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SILENCING TORY BOWEN: THE LEGAL IMPLICATIONS OF WORD BANS IN RAPE TRIALS

RANDAH ATASSI*

I. INTRODUCTION

Imagine surviving a rape. Imagine that you are courageous enough to testify and confront your assailant.¹ Then imagine being told by a judge that you can only use clinical terms like “sex” and “intercourse” to describe your experience, being forced to describe the attack with words usually reserved for a nonviolent consensual act. This is exactly what happened to Tory Bowen.² Her experience has created a stir in feminist and free speech circles and caused many to question: what rights do rape victims have?

In the United States, a woman is sexually assaulted every two minutes.³ Yet, only 6% of rapists will ever spend time in jail.⁴ One of the many reasons for this discrepancy is that only 60% of rapes are reported, making it among the most underreported

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1. See SUSAN ESTRICH, *REAL RAPE* 15 (Harvard University Press 1987) (explaining that many rape victims never report being raped).

2. See generally Nicole Wiesensee Egan, *She Couldn’t Call It ‘Rape’* PEOPLE, Oct. 10, 2008, available at 2008 WLNR 19702211 (recounting the rape of Tory Bowen).

3. Rape, Abuse & Incest National Network, How Often Does the Sexual Assault Occur?, <http://www.rainn.org/get-information/statistics/frequency-of-sexual-assault> (last visited Apr. 11, 2009) (citing Department of Justice 2006 Crime Victimization Survey).

4. Rape, Abuse & Incest National Network, Reporting Rates, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Apr. 11, 2009) [hereinafter Reporting Rates] (factoring the rate of unreported rapes/sexual assaults).

crimes.⁵ Many have attributed the underreporting of sexual assault offenses to the treatment rape victims receive from the criminal justice system.⁶ Frequently, victims do not come forward out of fear of being blamed for their attacks, as they often blame themselves.⁷

Rape is treated uniquely in the justice system, unlike any other field of criminal law; it is the only crime where the victim can effectively be put on trial.⁸ Rape's "uniqueness" concept is magnified in the courtroom, where rape victims come face to face with their attackers, relive their story, and are subjected to cross-examination.⁹ No one is more aware of this struggle than Tory Bowen, who was told not to use the word "rape" to testify about being raped.¹⁰

This Comment explores the implications of word bans on rape trials as well as their impact on rape victims. Part II of this Comment describes the experience of Tory Bowen. It also looks at

5. *Id.* See John Dwight Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 13 (1993) (asserting that one of the reasons of the low rate of rape prosecution is the difficulty in successfully prosecuting the offender and that most rape victims never report their rapes); Morrison Torrey, *When Will We Be Believe? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991) (citing the rate of false reporting to be 2%, making it comparable to the false reporting rates of other crimes, and explaining that there is no factual data to support the myth that rape is often falsely reported).

6. See GREGORY M. MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* 14 (The University of Chicago Press 1993) (arguing that there are those who believe that sexual violence is institutionalized in this country and legitimized by the U.S. legal system).

7. See *id.* at 34 (stating that "[r]ape 'is a fear much worse than fear of other crimes because women know that they are held responsible for avoiding rape, and should they be victimized they know they are likely to be blamed.'" (quoting MARGARET GORDON AND STEPHANIE RIGER, *THE FEMALE FEAR* 2 (University of Illinois Press 1989))).

8. See Torrey, *supra* note 5, at 1058 (claiming that rape is the only crime, in which the victim is put on trial and the defendant is treated as if a victim).

9. See AMANDA KONRADI, *TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS* 177 (Praeger Publishers 2007) (arguing that the reason many rape victims do not report their assaults is the fear of being "reassaulted" by defense attorneys and prosecutors and the small chance of success at trial).

10. For discussions of Tory Bowen's case, see generally Josh Funk, *Sex-Assault Case Dropped, Judge Banned Words*, ORLANDO SENTINEL, Jan. 5, 2008, available at 2008 WLNR 277526; Paul Hammel, *No New Trial in 'Rape' Ban Case*, OMAHA WORLD HERALD, Jan. 4, 2008, available at 2008 WLNR 210453; Clarence Mabin, *Banned Words Spark Debate in Sexual Assault Case*, LINCOLN JOURNAL STAR, June 17, 2007, available at 2007 WLNR 11560417 [hereinafter *Banned Words*]; Clarence Mabin, *Judge: Use of Term 'Rape' Could Unfairly Bias Jury*, LINCOLN J. STAR, Oct. 3, 2007, available at 2007 WLNR 19550282 [hereinafter *Judge*]; *Judge Sued After Limiting Language in Trial 'Rape' Was Among Words He Barred, Accuser Says that Violated Her Rights*, SEATTLE TIMES, Sept. 9, 2007, available at 2007 WLNR 17618043.

the historical treatment of word bans generally as well as more specifically in regard to the word “rape.” This section also explains the various myths and stereotypes associated with rape and rape victims. Finally, it examines the legislative remedies implemented to deal with these stereotypes.

Part III analyzes the legal impact of word bans on defendants’ and victims’ rights. It also shows that these word bans have little impact on defendants’ rights and could not justify the harm to victims. Part III argues that these word bans are part of an institutionalized bias in the legal system against rape victims that stems from, what many legal and feminist scholars have called, “rape culture.”¹¹

Finally, Part IV will propose that these word bans be prohibited in order to encourage victims to testify and increase the rates of reporting and conviction for rape and other sex crimes. Currently, rape shield laws have been enacted in most states and codified in the Federal Rules of Evidence¹² in order to protect victims from having their sexual history brought up at trial.¹³ Amending existing rape shield laws and taking measures to ensure that those laws do more to protect victims’ rights can accomplish the goal of encouraging victims to testify without infringing on defendants’ rights.

II. BACKGROUND

A. *Tory Bowen’s Story*

In October 2004 following a Halloween party,¹⁴ Tory Bowen left a downtown Lincoln, Nebraska, bar with Pamir Safi—who later allegedly sexually assaulted her.¹⁵ Bowen has no memory of leaving the bar,¹⁶ and the next thing she remembers is regaining consciousness with Safi already on top of her.¹⁷

11. See generally ANDREA DWORKIN ET AL., *TRANSFORMING A RAPE CULTURE* (Emilie Buchwald, Pamela Fletcher & Martha Roth eds., Milkweed Editions 2005) (1995) (referring to sexual inequities in rape prosecutions as a “rape culture”).

12. FED. R. EVID. 412. Rule 412 is titled “Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition.” *Id.* It operates by first generally excluding evidence about a victim’s sexual history. FED. R. EVID. 412(a). Secondly, the following subdivisions provide exceptions to that general rule. FED. R. EVID. 412(b)-(c).

13. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 56 (2002) (stating that rape shield laws were enacted to protect victims from being forced to publicly disclose their private sexual history).

14. Hammel, *supra* note 10.

15. *Id.*

16. *Id.*

17. *Id.*

Safi was charged with first-degree sexual assault,¹⁸ and the case went to trial.¹⁹ Following a motion by defense counsel, Judge Jeffrey Chevront entered an order to exclude the use of such words as “rape” and “victim” but allowed Bowen to use words like “sex” or “intercourse,” despite the prosecution’s attempt to get those words banned as well.²⁰ The judge later modified the ruling to allow the use of “sexual assault.”²¹ Bowen said being forced to use the word “sex” to describe her experience was like being assaulted all over again.²² The first case ended in a mistrial because the jury could not reach a unanimous verdict.²³

Following the trial, free speech and feminist activists took up Bowen’s cause.²⁴ The second trial ended with Judge Chevront declaring a mistrial because protesters had interfered with jury selection,²⁵ and the case was not pursued a third time.²⁶ Bowen

18. The statutory definition of first degree sexual assault in Nebraska is: (1) Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.

NEB. REV. STAT. § 28-319(1) (2007). In Nebraska, “the victim’s lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct.” *State v. Rossbach*, 650 N.W.2d 242, 250 (2002).

19. See Clarence Mabin, *Woman Sues Judge in Sex Assault Case*, LINCOLN JOURNAL STAR, Sept. 8, 2007, available at 2007 WLNR 17739377 (stating that Safi was charged with sexual assault and tried by a jury).

20. See *Banned Words*, *supra* note 10 (explaining that Judge Chevront denied the state’s motion because he felt that if he granted it, there would be no words left to describe the act).

21. See Hammel, *supra* note 10 (noting that the judge allowed the “equally descriptive term” of “sexual assault”).

22. Dahlia Lithwick, *Gag Order: A Nebraska Judge Bans the Word Rape from His Courtroom*, SLATE, June 20, 2007, at 1, available at <http://www.slate.com/id/2168758/>. This article explains that Bowen felt that being forced to use the word ‘sex’ to describe her experience was like an assault in itself. *Id.* See Paul Hammel, *Lawsuit on “Rape” Ban Is Defended*, OMAHA WORLD-HERALD, Sept. 19, 2007, available at 2007 WLNR 18323315 (citing Bowen’s attorney who argued that forcing Bowen to use ‘clinical language’ was confusing and misleading to jurors and impacted Bowen’s credibility); *Judge*, *supra* note 10 (quoting Bowen that being forced to use clinical terms felt unnatural and contrived).

23. See Mabin, *supra* note 19 (stating that a mistrial was declared in the first case when jury was deadlocked seven to five).

24. See Kelly Bramlet, *Protest Here Decries Judge’s Ban on ‘Rape,’ ‘Victim’ in Rape Case*, SPRINGFIELD STATE JOURNAL-REGISTER, July 18, 2007, available at 2007 WLNR 13765698 (describing how Promoting Awareness, Victim Empowerment (“PAVE”), a Chicago-based nonprofit group, organized the first set of protests that were held in Nebraska).

25. See Mabin, *supra* note 19 (stating that Chevront declared a mistrial

filed a lawsuit in federal court, which was dismissed,²⁷ challenging Chevront's actions on the grounds that they violated her constitutional rights.²⁸ She said she would appeal the decision to the Supreme Court if necessary,²⁹ and she did just that, but the Supreme Court denied certiorari.³⁰

The reasoning behind the judge's decision to allow the word ban was that the word "rape" in a victim's testimony might be unfairly prejudicial to the defendant, who is presumed innocent until proven guilty.³¹ Another justification was that use of the word "rape" would allow the witness to testify to a legal conclusion.³² Judge Chevront cited a state law that allowed him to ban words that might be unfairly prejudicial to the defendant.³³

B. I Can't Say What?

Historically, cases have held that the use of the word "rape" is permissible.³⁴ In *State v. Goss*, over defense counsel's objection, the judge allowed the victim to testify that the defendant was "raping" her, finding that her use of the term rape was her way of describing her experience in lay terms.³⁵ That case reaffirmed the

during jury selection because of intense media coverage and protests).

26. Hammel, *supra* note 10.

27. See Clarence Mabin, *Lawyer to Appeal Dismissal of Bowen Lawsuit*, LINCOLN JOURNAL STAR, Oct. 17, 2007, available at 2007 WLNR 20455708 (explaining that U.S. District Judge Richard Kopf dismissed the suit because of Supreme Court holdings that prohibit federal courts from getting involved in cases pending in state court).

28. *Bowen v. Chevront*, No. 4:07CV3221, 2007 WL 2668905, at *1 (D. Neb. Sept. 10, 2007); Margery A. Gibbs, *Appeals Court Upholds Court's Word Ban*, USA TODAY, Apr. 3, 2008, available at http://www.usatoday.com/news/nation/2008-04-03-2867930717_x.htm?loc=interstitialskip. The case was dismissed on procedural grounds citing a lack of jurisdiction. *Id.*

29. Tony Rizzo, *In Some Trials, Accusers Must Watch What They Say*, FORT WORTH STAR-TELEGRAM, June 9, 2008, available at 2008 WLNR 10850172.

30. *Bowen v. Chevront*, 129 S. Ct. 460 (2008).

31. See Hammel, *supra* note 10 (stating that the terms were banned to protect defendant's right to be presumed innocent until proven guilty).

32. See *Banned Words*, *supra* note 10 (citing statement by one of Safi's attorney's Clarence Mock, who said that the ruling was to keep the trial fair and to prevent a witness from reaching a legal conclusion). The Federal Rules of Evidence, however, provide that: (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. FED. R. EVID. 704.

33. Hammel, *supra* note 10. The Nebraska statute states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." NEB. REV. STAT. § 27-403 (2007).

34. See cases cited *infra* notes 35-37.

35. 235 S.E.2d 844, 849 (N.C. 1977). The Supreme Court of North Carolina

prior ruling of the Supreme Court of North Carolina in *State v. Vinson*, holding that a police officer testifying to the victim's use of the word "rape" during his investigation was not an opinion on a question of law.³⁶ In *State v. Sneedon*, a judge held that a woman saying she was "raped" was admissible and found it was not a conclusion on a matter of law.³⁷ All of these cases from North Carolina stand for the proposition that a witness may describe her experience of being "raped" without permitting the victim to come to a legal conclusion and unfairly prejudicing the defendant.³⁸

In 1992, the Ninth Circuit Court of Appeals handed down a decision in *Zal v. Steppe*, in which they ruled that *in limine* word bans on attorneys were not violations of free speech.³⁹ In *Zal*, the court examined a contempt sanction against a defense attorney for violating the word ban.⁴⁰ The court upheld the word ban and found that no constitutional violation took place.⁴¹ The defendants in that case were abortion protesters who were on trial for criminal trespass.⁴² The Ninth Circuit in *Zal* upheld the word bans without providing guidance to lower court judges; this effectively gave district judges unlimited discretion to censor attorneys.⁴³ The holding in the *Zal* case was directed at prior restraint of free speech for attorneys.

In *United States v. Rosenberg*,⁴⁴ the government filed a motion *in limine* to preclude the use of thirty-six different words at trial.⁴⁵ The defense characterized the government's motion as a

held, "Her use of the term 'rape' was clearly a convenient shorthand term, amply defined by the balance of her testimony." *Id.*

36. *State v. Vinson*, 215 S.E.2d 60, 70 (N.C. 1975) (holding that the victim's use of the word 'rape' during her testimony did not constitute an opinion on a question of law and that the trial court did not err in admitting the testimony).

37. *See State v. Sneedon*, 164 S.E.2d 190, 193 (N.C. 1968). The Court went on to say that "it is inconceivable that the jury could have construed it otherwise, and its admission was not error." *Id.*

38. *Goss*, 235 S.E.2d at 850; *Sneedon*, 164 S.E.2d at 193; *Vinson*, 215 S.E.2d at 70; *see also* 725 ILL. COMP. STAT. 5/115-11.1 (West 2008) (stating that in Illinois, the word "rape" when used by a witness, prosecutor, or defense attorney is admissible).

39. *Zal v. Steppe*, 968 F.2d 924, 927-28 (9th Cir. 1992).

40. *Id.* at 925.

41. *Id.* at 929.

42. *Id.* at 925.

43. Kathleen K. McGinn, *Zal v. Steppe: Ninth Circuit Approval of an In Limine Word Ban of Specific Words* 23 GOLDEN GATE U. L. REV. 35, 36 (1993).

44. 806 F.2d 1169 (3d Cir. 1986).

45. *See* Douglas L. Colbert, *The Motion In Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1307-09 (1987) (discussing the way in which the government in *United States v. Rosenberg* filed "its most far-reaching motion *in limine*" to exclude the use of certain inflammatory words by defendants while testifying). *Id.* The government cited Federal Rule of Evidence 402 in support of their motion, which states, "Evidence which is not relevant is not admissible." FED. R. EVID. 402.

'gag order,'⁴⁶ but that motion was eventually denied.⁴⁷ Both *Zal* and *Rosenberg* were cases that involved highly charged political issues.⁴⁸

C. *The Accuser Becomes the Accused*

In banning the word "rape," Judge Cheuvront brought the word ban issue, itself a complicated issue, into the complex territory of balancing the rights of rape victims against the rights of defendants.⁴⁹ On the one hand, a defendant is entitled to a fair trial⁵⁰ and to confront the witnesses against him.⁵¹ On the other hand, rape victims experience an extreme amount of trauma testifying in court,⁵² and the law has recognized their entitlement to protection.⁵³

The legal system has had difficulty in the past dealing with rape cases because of the immense impact that stereotypes and myths about rape have on their prosecution.⁵⁴ First of all, people generally think of rape as an attack by a stranger in a dark alley

46. Colbert, *supra* note 45, at 1309.

47. *Id.*

48. *See id.* at 1307-09 (stating that the defendants in *Rosenberg* were part of a black liberation group and were being charged with criminal trespass); McGinn, *supra* note 43, at 35 (stating that the defendants in *Zal* were abortion protesters being charged with criminal trespass).

49. *See* Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 206 (1997) (explaining that "[t]his struggle between women's rights and defendant's rights has been highlighted in the ongoing debate over rape legislation.").

50. *See* *Turner v. State*, 379 U.S. 466, 471-72 (1965) ("The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.").

51. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

52. *See* Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 CATH. U. L. REV. 297, 308-09 (2004) (discussing the way in which cross-examination can feel like a "second rape" for rape victims).

53. *See id.* at 298 (explaining that rape shield laws were the state and federal legislatures' response to rape victims' fear of not receiving a fair trial).

54. *See* KONRADI, *supra* note 9, at 5 ("Cultural stereotypes about rape victimization and rape victims shape how rape survivors enact the victim-witness role, all the way through the process.").

using force or aggression.⁵⁵ This is, in fact, one of the least common forms of sexual assault.⁵⁶ However, these cases often have more success in getting to trial and obtaining a conviction.⁵⁷

In the nineteenth century, women were not seen as having a distinct legal identity from their husbands or fathers.⁵⁸ Rape was not seen as crime perpetrated by a man who had legal ownership over his wife and daughters.⁵⁹ Despite the fact that women's status has changed dramatically since that time, many of the underlying stereotypes about women have persisted.⁶⁰ It was only well into the twentieth century that marital rape was even acknowledged as a crime.⁶¹ In 1984, a New York judge struck down the state's marital exemption.⁶² Many other states took a long time to follow suit.⁶³ In 1997, some states continued to keep

55. See Daphne Edwards, *Acquaintance Rape & the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 271 (1996) (stating that courts often would require a "force" element, which is consistent with the myth that rapes are often committed by "violent strangers").

56. MATOESIAN, *supra* note 6, at 7 (explaining that "rape is not, for the most part, committed by strangers . . ." and stating that 84% of victims knew their assailant); the incidence of rapes committed by strangers on the street is a small percentage. *Id.* at 16. Patriarchal myths inhibit reporting of sexual assault by blaming the victim and limiting reception of rapes to only 'real' rapes, which are based on cultural stereotypes of strangers jumping out from behind the bushes and attacking the victim. *Id.* at 13.

57. Matoesian writes:

The legal system is more likely to prosecute and juries are more likely to convict in rape cases with the following characteristics: when the perpetrator and the victim are strangers, and some type of extrinsic force is used; when consent and intimacy, and prior sexual history are not introduced as issues in the case; and when the victim is a 'nice girl' or a virgin, and has not been drinking, using drugs, 'partying,' or otherwise violating traditional female gender role behavior.

Id. at 15; see CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 19 (Springer 1992) (arguing that "[r]ape cases involving strangers are taken more seriously than rapes involving acquaintances.").

58. See Ingram, *supra* note 5, at 23 (describing how a woman's legal entity united with her husband's at marriage).

59. See *id.* (explaining that the historical reasoning behind the marital exemption was that women were property of their husbands and subject to his control); Reidy, *supra* note 52, at 305 (noting that rape used to be considered a property offense committed not against the woman herself, but rather her father or husband).

60. See Reidy, *supra* note 52, at 306 (claiming that despite modern shifts in thought about rape, much of the burden is still placed on the actions of women as opposed to the crime itself, which takes away focus from the alleged criminal act of the defendant).

61. See KONRADI, *supra* note 9, at 9 (explaining that "[w]omen who were married had no prospect of securing legal action against husbands who raped them, no matter how brutally.").

62. Gruber, *supra* note 49, at 216.

63. See *id.* (citing to the Model Penal Code that specifically rejected the marital exemption). The removal of the marital exemption was a progression

marital exemptions on the books, prescribing lesser penalties for husbands who sexually assault their wives.⁶⁴

Rape trials have often been plagued with victim blaming that made justice for the victim, in many cases, nearly impossible.⁶⁵ In 1989, a Florida jury acquitted a defendant for abducting a woman at knifepoint and repeatedly raping her based on the fact that she was wearing a lace miniskirt without underwear.⁶⁶ There have been other similar cases,⁶⁷ which show that the practice of victim blaming is still commonplace in our legal system.⁶⁸ The view that rape victims have somehow contributed to their victimization is unique to the crime of rape⁶⁹ and is symptomatic of a larger bias

over time. *Id.*

64. As of 1997, several states such as Alabama, Illinois, and South Dakota still incorporated some form of marital exemption into their rape statutes. *Id.*

65. See Edwards, *supra* note 55, at 271 (arguing that the purpose behind the modern rape law reform was to shift the scrutiny away from victim's behavior).

66. Gruber, *supra* note 49, at 219. The jury foreman said they acquitted the defendant because they felt like the victim asked for it based on the way she was dressed. *Id.*

67. See *id.* at 220-21 (describing one case in which a jury acquitted three men despite kidnapping a woman and brutally raping her because during trial the jury learned she was unmarried, had two illegitimate children, and was possibly a prostitute, making her somehow responsible for her own rape); see also Leslie Griffy & Mary Anne Ostrom, *State Backs DA in De Anza Case, Attorney General Finds Evidence Insufficient*, SAN JOSE MERCURY NEWS, May 3, 2008, available at 2008 WLNR 8442140 (describing a case in which a young college student was brutally raped and the District Attorney refused to prosecute the case despite the fact that there were witnesses to the attack because the girl was intoxicated at the time and could not remember the attack).

68. See Ingram, *supra* note 5, at 7 (arguing that the history of bias against rape victims has caused the legal system to scrutinize the victim's behavior, looking for fault on her part).

69. See *id.* (arguing that society's attitude towards rape victims is "in sharp contrast" to the attitudes of victims of other crimes); see also ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 153 (New York University Press 1999) (providing an example of a robbery cross-examination employing the same tactics used against rape victims). Taslitz writes:

[Q:] Mr. Smith you were held up at gunpoint at the corner of First and Main?

[A:] Yes.

[Q:] Did you struggle?

[A:] No.

[Q:] Why not?

[A:] He was armed.

[Q:] Then you made a conscious decision to comply with his demands rather than resist?

[A:] Yes.

[Q:] Did you scream? Cry out?

[A:] No, I was afraid.

[Q:] I see, have you ever *given* money away?

[A:] Yes, of course.

against rape victims that are based on various gender stereotypes.⁷⁰

These stereotypes date as far back as seventeenth century England.⁷¹ English jurist Sir Matthew Hale has said that “rape is an accusation easily to be made and hard to be proven and harder to be defended by the party accused, tho never so innocent.”⁷² This infamous quotation is an excellent example of our society’s distrust of rape victims. It also demonstrates how, historically, rape victims have been held to different standards than victims of other crimes.⁷³

Rape shield statutes have been enacted in many states to protect rape victims’ sexual history from being used against them; however, they are not always effective. The Illinois Appellate Court for the Second District has held that the rape shield statute⁷⁴ was “not designed to preclude the admission of all

[Q:] And you did so willingly?

[A:] What are you getting at?

[Q:] Well, let’s put it like this, Mr. Smith. You’ve given money away in the past. In fact, you’ve got quite a reputation for philanthropy. How can we be sure that you weren’t *contriving* to have your money taken from you by force?

Id. at 153 (emphasis in original).

70. See KONRADI, *supra* note 9, at 12 (claiming that rape stereotypes are a unique form of gender stereotypes that stem from the belief that (1) rape occurs because women give in to men’s natural desires and/or fail to protect themselves and (2) rape is unwanted sex and not violence).

71. *Id.* at 8.

72. See *id.* (explaining that Hale’s caution is corroborated by three stereotypes about women: (1) they are vindictive, deceitful and use rape accusations as a tool to gain power over men; (2) they ask to be raped by the way they dress which is a manifestation of their subconscious desire to have sex with their attackers; and (3) they enjoy being forced to have sex).

73. See *id.* at 7 (“Historically, laws hampered the prosecution of rape by delineating a narrow band of behaviors as criminal holding victims/survivors of rape to different and higher standards of conduct than victims of other crimes.”).

74. The Illinois Rape Shield statute states:

In prosecutions for predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV; and in prosecutions for battery and aggravated battery, when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 12-12 of the Criminal Code of 1961; and with the trial or retrial of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, and aggravated indecent liberties with a child, the prior sexual activity or the reputation of the alleged victim or corroborating witness under Section 115-7.3 of this Code is inadmissible *except (1) as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of this Code with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness under Section 115-7.3 of this Code consented to the sexual*

evidence relating to sex.”⁷⁵ Attorneys have used these loopholes to underhandedly attack witness credibility, and, for the most part, judges have allowed it.⁷⁶

III. ANALYSIS

A. *Victims' and Defendants' Rights*

1. *Words and Prejudice*

Word bans are a relatively new development in criminal trials, which have been implemented to protect the defendant from unfair prejudice. There is considerable difference, however, between the usual exclusion of prejudicial “subject matter” and the exclusion of specific words used to describe perfectly permissible subject matter. There have been occasions in which courts have

conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.

725 ILL. COMP. STAT. 5/115-7(a) (West 2008) (emphasis added). The statute implies that prior consent to sexual conduct with the defendant is relevant to whether or not the victim consented in the instant case. Federal Rule of Evidence 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. A victim’s prior consent to sex with the defendant, on a different occasion, does not prove that his or her complaint is untrue. If this were the case, then an individual who is married or in a committed relationship and is a victim of intimate partner violence would be in danger of having the entire sexual history of the relationship brought out in court and used against him or her.

75. *People v. Grano*, 676 N.E.2d 248, 257 (Ill. App. Ct. 1997). The trial court held that the portion of the Illinois Rape Shield Statute that made inadmissible evidence of “sexual activity or reputation” applied to prior accusations of sexual assault. *Id.* at 288. The appellate court found that the defendant could introduce evidence that the 14-year-old victim had made prior accusations of sexual assault, despite the fact that there was no proof that the allegations were false, merely that they were never successfully prosecuted. *Id.* This also feeds into the stereotype that “if a woman says ‘yes’ there is no reason to believe her ‘no’ the second time . . .” Torrey, *supra* note 5, at 1014.

76. *See Commonwealth v. Harris*, 825 N.E.2d 58, 64 (Mass. 2005) (arguing that a defendant may introduce evidence as to victim’s bias or motive to lie and evidence of victim’s prior sexual conduct with the defendant). A judge is granted broad discretion to decide if the prejudicial effect of the evidence outweighs the probative value, and the judge is charged with exercising this discretion wisely, keeping in mind the reasoning behind rape shield statutes. *Id.*; *see Torrey, supra* note 5, at 1014 (arguing that despite reforms for rape prosecutions, there are still various obstacles to a successful rape prosecution); *see Anderson, supra* note 13, at 94 (“Since their passage, federal and state rape shield laws have repeatedly failed to deflect the strictures of the chastity requirement in real cases.”); *ESTRICH, supra* note 1, at 88 (stating that in Michigan, after rape shield laws were passed, defense attorneys admitted to still delving into a victim’s prior sexual history to discredit his or her testimony).

balanced the admissibility of certain words with the possible prejudice against the defendant.

In *State v. Cortes*,⁷⁷ the Connecticut Supreme Court reversed an assault conviction because probative evidence was improperly excluded.⁷⁸ It also analyzed the possible prejudice of overuse of the word “victim.”⁷⁹ It concluded that the use of the word over seventy-six times did unfairly prejudice the defendant.⁸⁰ The court’s reasoning was that the use of the word “victim” implied that a crime had taken place and deprived the defendant of the right to an impartial trial.⁸¹ Even in that case, the court’s holding turned on the fact that the trial court refused to provide a curative instruction to the jury.⁸²

In Nebraska, where Ms. Bowen was raped, a word like “victim” was not always viewed as prejudicial.⁸³ In 1998, the Court of Appeals of Nebraska ruled in a sexual assault case that use of the word “victim” in a jury instruction was permissible because it defined the victim as someone *alleging* to have been sexually assaulted.⁸⁴ The court found that this clarification prevented any unfair prejudice.⁸⁵ There have been few, if any, cases of prior restraint of a *witness’s* testimony.⁸⁶

77. 851 A.2d 1230 (Conn. 2004).

78. *Id.* at 1239.

79. *Id.* at 1240.

80. Timothy H. Everett, *Developments in Connecticut Criminal Law: 2005*, 80 CONN. B.J. 185, 205 (2006).

81. The court in *Cortes* stated:

In cases in which the fact that a crime has been committed is contested, and where the court’s use of the term “victim” has been the subject of an objection and has not been the subject of a subsequent curative instruction, a court’s use of the term may constitute reversible error. The danger in the latter type of case is that the court, having used the term without specifically instructing the jury as to its intention in using the term, might convey to the jury, to whatever slight degree, its belief that a crime has been committed against the complainant.

Cortes, 851 A.2d at 1241.

82. *Id.*

83. See generally *State v. Malcom*, 583 N.W.2d 45, 50 (Neb. 1998) (noting that use of the word “victim” was not prejudicial to the defendant).

84. The Court of Appeals of Nebraska said:

The instructions which Malcom complains of on appeal are phrased essentially in the language of §§ 28-318 and 28-319. In addition, the definition of “victim” as provided in instruction No. 3 clearly indicates to the jury that “victim” is a person alleging to have been sexually assaulted. Finally, the remainder of instruction No. 3 makes it clear to the jury that the State must prove every element, including that penetration occurred, beyond a reasonable doubt. We do not find any error in these instructions, and this assigned error is without merit.

Id. at 50.

85. *Id.*

86. See Lithwick, *supra* note 22, at 2 (citing Wendy Murphy, New England School of Law Professor and Bowen’s attorney, in saying that word bans have

2. *Juries and Witnesses*

In jury trials, a witnesses' credibility is of the utmost importance. Appellate courts routinely refuse to reverse a jury's findings of fact because it has the firsthand knowledge of a witness's testimony and can observe their demeanor on the witness stand.⁸⁷ Juries can determine if a witness is being forthright not only by the answers they give, but in the manner that the answers are given. When a witness is forced to contemplate every answer before it is given for fear of being in contempt, it undoubtedly affects her credibility.

Words and language in general are crucial in jury trials. A jury's perception of witnesses affects how they eventually render their verdict, and language affects how juries view witnesses. Language is the foundation of storytelling not only in life, but also in the courtroom.⁸⁸ This concept is exemplified by the dynamic of the rape trial.

Perhaps, more so than any other crime, the crime of rape heavily depends on the narrative that takes place in the courtroom.⁸⁹ Often, sexual assaults are committed by acquaintances where the main issue is the victim's consent—making the victim's credibility crucial; however, testifying in court can be an intense and emotional experience for rape victims.⁹⁰ The words that a victim uses can impact the way in which the law addresses her experience.⁹¹ In *State v. Rusk*, a Maryland Court of

been a growing trend nationally since the Kobe Bryant trial and that there has been a shift from limiting attorney speech to witness speech as well). Prior to the start of trial, Bryant's attorney successfully won a motion to preclude the use of the word "victim" during the trial. Kirk Johnson, *Judge Rules Bryant Accuser May Not Be Called 'Victim,'* N.Y. TIMES, June 2, 2004, available at <http://www.nytimes.com/2004/06/02/us/judge-rules-bryant-accuser-may-not-be-called-victim.html>.

87. See, e.g., *Dixie Serv., L.L.C. v. R & B Falcon Drilling USA, Inc.*, 955 So.2d 214, 220 (La. Ct. App. 2007) ("When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error.").

88. See TASLITZ, *supra* note 69, at 63 (describing the way in which storytelling at trials "limits and shapes" our perceptions of what took place and how storytelling is influenced by the way in which we use language).

89. See MATOESIAN, *supra* note 6, at 19 (discussing how language in the courtroom documents the manner in which rape is legitimized as a social norm). "If rape is routinely and systematically transformed into consensual sex, then courtroom talk represents an excellent site for examining how the victim's experience of violence (nonconsent) is delegitimized and decriminalized in real live performance." *Id.*

90. See KONRADI, *supra* note 9, at 99 (stating that three-fourths of rape victims surveyed said that testifying in court was an "intensely emotional experience.").

91. See generally *State v. Rusk*, 424 A.2d 720 (1981) (discussing the effects

Appeals case, the court's determination of whether there was sufficient evidence at trial to sustain a conviction for second-degree rape turned on the court's interpretation of the witnesses description of being "lightly choked."⁹² The Court of Appeals of Maryland upheld the defendant's conviction on the grounds that the Court of Special Appeals had substituted the jury's finding of fact for its own.⁹³ In that case, a witness's description of the attack could have made the difference between a conviction and an acquittal.

B. The Relevance of "Rape"

Banning the use of the word "rape" has been viewed as a strange legal decision for various reasons. First of all, a jury is unlikely to be influenced by the use of words like "rape" or "sexual assault."⁹⁴ If this were true, there would be an extremely high incidence of rape convictions, but in fact, the exact opposite is true.⁹⁵ Furthermore, the word ban was not in response to any sort of legal issue that needed a remedy. Despite dismissing Bowen's case, the Federal Judge Richard Kopf said, "For the life of me, I do not understand why a judge would tell an alleged rape victim that she cannot say she was 'raped' when she testifies in a trial about rape."⁹⁶ Unfair prejudice is not the only rationale behind word bans.

Another reason behind the word ban is that it prevents a witness from testifying to an "ultimate conclusion." This may seem a legitimate justification, but it ultimately fails as there were no similar word bans in other criminal cases. There are no cases

of a victim's chosen words).

92. See *id.* at 728 (describing the facts from which a jury could reasonably conclude that the victim did not resist because of threatening acts by the defendant, among them a light choke). The dissenting opinion came to the opposite conclusion after discussing those same facts. *Id.* at 734-35. The dissent analyzed the victim's testimony noting that she testified

that she started to cry and [the defendant] "started lightly to choke" her, whatever that means. Obviously, the choking was not of any persuasive significance. During this "choking" she was able to talk. She said "If I do what you want will you let me go?" It was at this point that the defendant said yes. I find it incredible for the majority to conclude that on these facts, without more, a woman was forced to commit oral sex upon the defendant and then to engage in vaginal intercourse.

Id. at 734.

93. *Id.* at 727.

94. See KONRADI, *supra* note 9, at 61 ("Unfair prejudice against the defendant is far less likely than would be true for nonsexual crimes precisely because it is so difficult, given existing patriarchal themes, to convince jurors of defendant bullying, yet so easy to convince them of victim seduction.").

95. See Reporting Rates, *supra* note 4 (citing statistic that when rape cases are actually prosecuted, only 58% of them are successful).

96. Bowen v. Chevront, 516 F. Supp. 2d 1021, 1029 (D. Neb. 2007).

in which a witness was told not to say “robbed,” “mugged,” “murdered,” or “embezzled.” Other cases involving word bans usually involved politically charged issues. In cases like *Zal* and *Rosenberg*, the words being banned arguably served no probative purpose and were only going to be used to incite emotion in the jury. Rape is one of the few crimes that is treated in this way.⁹⁷

One explanation for this “special” treatment is that American culture perpetuates myths and stereotypes about gender and rape, which infiltrate our legal system.⁹⁸ These stereotypes impact the way society thinks about the word “rape” and its various meanings. There has been a long-standing effort to reform rape laws to redefine the legal definition of force by recognizing not only physical force, but coercive force as well.⁹⁹ The reasoning behind this is that rape is more often committed using coercive force, yet many courts still require proof of physical force.¹⁰⁰

Pervasive stereotypes have affected the way men and women generally think about words like rape and force.¹⁰¹ At first glance, this argument weighs in favor of banning the use of the word “rape” altogether. However, the confusion surrounding the use of these words can also work against the victim if she is not permitted to speak freely.¹⁰² In Bowen’s case, for example, she alleges that Safi raped her while she was passed out.¹⁰³ Assuming that the use of “rape” would prejudice the defendant, the same argument could be made if the victim were only permitted to use such as “sex” or “intercourse.”¹⁰⁴ Robert Weisberg, a Stanford law

97. Common sense would tell you that a similar word ban on words such as robbed, burglarized, or murdered would not withstand judicial scrutiny. See *Banned Words*, *supra* note 10 (citing statement by Bowen’s attorney saying the ruling was absurd because it was “like saying to a robbery victim, ‘you can’t say you were robbed, because that’s a legal judgment. You can only say you gave your stuff to the defendant.’”).

98. See TASLITZ, *supra* note 69, at 19 (defining “cultural rape narratives” as the stories based on widely held beliefs about gender roles which affect the way narratives are interpreted in the courtroom).

99. See Edwards, *supra* note 55, at 258 (explaining that laws that prohibit rape without a showing of force conform with feminist reforms).

100. *Id.* at 269-70 (citing study that shows that assailants more often use coercive force than physical force). “In keeping with the ‘violent stranger’ rape myth, courts often require the assailant to use overt physical violence and the victim to resist to establish rape.” *Id.* at 271.

101. See TASLITZ, *supra* note 69, at 76 (noting that “[t]he words ‘rape’ and ‘force’ simply mean different things to men and women.”).

102. See *Banned Words*, *supra* note 10 (citing Wendy Murphy, Bowen’s attorney in saying that word bans on witnesses affect their credibility with juries).

103. Hammel, *supra* note 10 (stating that Bowen awoke to find Safi having sex with her).

104. See Lithwick, *supra* note 22, at 1 (arguing that use of the word “sex” is another legal conclusion, that the sex was consensual); see also MATOESIAN, *supra* note 6, at 17 (“Rape and intercourse are not separated by any difference

professor, argues that in cases where courts replace the word "victim" with the less loaded "complainant" there is no possibility of prejudice to defendants because the same message is being conveyed.¹⁰⁵ He states that in the case of rape, there is no "value-neutral word" for unwanted sex.¹⁰⁶

Jurors expect accusations to be made at a trial.¹⁰⁷ They expect the person who is alleging to be a victim of a crime to make that allegation on the stand. A witness telling a jury that she was raped would not be unfairly prejudicial because it would merely tell the jury what they already know, that the victim *believes* that they were raped.¹⁰⁸

In a recent case, the Appellate Court of Connecticut held that the reasoning in *Cortes*¹⁰⁹ did not always apply. In *State v. Rodriguez*,¹¹⁰ the court held that limited use of the word "victim" combined with a curative instruction and the defendant's presumption of innocence prevents any impermissible prejudice.¹¹¹ In that case, the judge was able to ensure that the trial ran smoothly, that all parties were fairly treated, and that the jury was properly instructed on the law.¹¹² The holding of *Rodriguez* shows that a judge can control a trial without infringing on either party's rights.¹¹³

The same logic used in *Rodriguez* could also be used for the

between physical acts or amount of force involved but only legally by a standard centered on man's definition of the encounter.").

105. See Lithwick, *supra* note 22, at 2.

106. *Id.* (citing Professor Weisberg in saying that the word "intercourse" is insufficient to describe rape, that a "blanket ban" on the word is not the answer, and that it is a judge's responsibility to keep the trial fair by gently admonishing the witness if they get out of hand or merely instructing the jury).

107. See Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219, 242 (1992) (stating that juries expect victims to fit certain stereotypes, and victims that deviate from the stereotypes are distrusted).

108. Furthermore, because the issue of consent is a crucial one, in the absence of any force, in the form of physical aggression or use of a violent weapon, a jury will need to find evidence of lack of consent elsewhere. If the jury was merely to hear the defendant and the victim had sexual intercourse without the use of the word "rape" to explain that the defendant never obtained the victim's consent, they will be more inclined to find that the sex was consensual.

109. *Cortes*, 851 A.2d at 1230.

110. 946 A.2d. 294 (Conn. App. Ct. 2008), *cert. denied*, 953 A.2d 650 (Conn. 2008).

111. *Id.* at 305-06. The court reasoned that when the trial court used the word "victim" only five times, the presumption of innocence instruction mitigated any negative effect that the word may have had. *Id.*

112. See *id.* at 303 (stating that a judge's role in a criminal trial is that of a moderator).

113. *Id.*

word “rape.”¹¹⁴ If merely hearing a witness use the word “rape” makes a jury presume that a crime occurred, then clearly that jury has not been properly instructed on the law. For example, in an embezzlement case, it would be difficult, if not impossible, for a complaining witness to describe their belief that the defendant embezzled money from them without using that word or other similar words with similar meanings. It remains to be seen why rape garners special treatment in the eyes of the law, and why complaining witnesses in rape cases are treated so harshly.¹¹⁵

C. Rape is Different

As discussed earlier, there is a longstanding history of mistreatment of rape victims who come forth and testify against their assailants.¹¹⁶ This issue has gained attention in recent years because of the media’s increased involvement in high profile rape cases. The Kobe Bryant case is a prime example of this trend.¹¹⁷ The negative media attention that the victim received in that case made it even less likely that sexual assault survivors would come forward.¹¹⁸ After the state of Colorado dropped the case against Bryant, the number of reported rapes dropped 10% from the previous year.¹¹⁹ The way rape victims are treated in the media impacts the way they are treated in the courtroom, because jurors take their personal experiences and perceptions with them when they come into court to decide a case.¹²⁰

It is a commonly held belief that men are, all too often, the

114. The logic used in *Rodriguez*, that the judge may cure possible prejudice by a curative instruction, may be used in the case of rape. A judge may instruct the jury that the witness’s use of the term is not meant to imply to a legal certainty that she was raped and that the defendant is innocent until proven guilty.

115. See Matthew R. Lyon, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 291 (2004) (stating that, as of the article’s publication, the common-law majority rule was that women could not withdraw consent for sex after penetration took place).

116. See *supra* note 64 and accompanying text (discussing the law’s history of mistreatment of rape victims); *supra* note 69 and accompanying text (explaining the way in which rape victims are held to different standards than victims of other violent crimes).

117. See Aaron J. Lopez, *Expert: Victims’ Path Rockier than Celebrities’*, ROCKY MOUNTAIN NEWS, Mar. 15, 2007, available at 2007 WLNR 4883689 (discussing the Kobe Bryant rape case).

118. See *id.* (quoting Dr. Janine D’Anniballe, executive director of the organization Moving to End Sexual Assault, in saying that the negative treatment of the complaining witness combined with eventual dismissal of the case have deterred others from coming forward).

119. *Id.*

120. See HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE 119 (LexingtonBooks 1980) (explaining the way in which jurors’ decisions are influenced by their biases).

victims of false accusations and that rape prosecutions are easily won.¹²¹ The Duke Lacrosse case exemplifies the way in which people misunderstand rape trials. The prosecuting attorney in that case came under fire after he mishandled the Duke Lacrosse players' prosecution by withholding exculpatory evidence, among other things.¹²² Edmund Davis, a Texas criminal defense attorney, believes that this case has finally "leveled the playing field."¹²³ He was quoted as saying that in the past, "[prosecutors] used to be able to trot out any old mule and call it a racehorse."¹²⁴ Regardless of the mistakes made in the Duke case, it is hard to dispute the difficulty of obtaining a conviction in a rape case.¹²⁵ Nonetheless, comments like the one made by Davis are common.

Rape's "different" treatment in the eyes of the law¹²⁶ carries over into the word ban issue. Pamir Safi's defense attorney argued that the word itself is so highly inflammatory that its

121. See TASLITZ, *supra* note 69, at 38-39 (citing a 1991 study of university students that found that a quarter of students surveyed believed that women frequently cried rape, frequently provoked the attack, and could prevent rape if they really wanted to). The study also found that a third of those surveyed believed that women sometimes enjoy being raped and when they say "no" they really mean "yes." *Id.* Taslitz argues that this number underestimates how widely held these beliefs are because university students are more likely to have progressive opinions about rape. *Id.*

122. Benjamin Niolet, *Lacrosse Case Leaving Mark in Courts Nationwide*, THE NEWS & OBSERVER, May 27, 2007, available at 2007 WLNR 9954835 (stating that Mike Nifong, the prosecuting attorney, denounced the defendants to the media while building a case on contradictory evidence and withholding exonerating DNA evidence). Ultimately, Nifong was disbarred. The N.C. State Bar v. Michael B. Nifong, 06 DHC 35, at *16 (June 16, 2007), available at <http://www.ncbar.com/Nifong%20Findings.pdf>.

123. Niolet, *supra* note 122.

124. See *id.* (quoting Davis in saying that in the past, rape prosecutions were won on little or unreliable evidence).

125. See *supra* notes 67-68 and accompanying text (arguing that society's bias against rape victims has caused the legal system to scrutinize their behavior more harshly); *supra* note 70 and accompanying text (discussing the stereotypes about women that are the basis for stereotypes about rape); *supra* note 72 and accompanying text (quoting Matthew Hale in discussing his beliefs about women that may impugn rape victim's credibility); *supra* note 73 and accompanying text (discussing the way in which rape victims are held to higher standards than victims of other crimes); *supra* note 94 and accompanying text (discussing how it is less likely for there to be prejudice against a defendant in the case of sex crimes because of people's biases against rape victims).

126. See SPOHN & HORNEY, *supra* note 57, at 23-24 (explaining that feminist and legal scholars criticized the treatment of rape cases because they demand that the rape victim demonstrate a level of resistance that was not required by other victims of violence). Common law previously held that rape should be treated differently because of the likelihood that vindictive and mentally disturbed women would make false allegations against a defendant. *Id.* at 24. Despite the fact that these claims never had any empirical support, juries were often given an instruction similar to Lord Hale's warning. *Id.*

utterance in the courtroom is extremely prejudicial to the defendant.¹²⁷ But even if the word “rape” did incite emotion in a jury, most jurors have preconceived notions about rape victims in their minds before the trial even begins.¹²⁸ Also, courts have regularly held that rape shield laws, used to prevent bias against the victims, do not violate a defendant’s Sixth Amendment confrontation right.¹²⁹

Since rape victims have historically received negative treatment in the legal system,¹³⁰ measures should be taken to counteract these biases.¹³¹ It seems that the same logic used to

127. Meg Massey, *Putting the Term Rape on Trial*, TIME, July 23, 2007, available at <http://www.time.com/time/nation/article/0,8599,1646133,00.html?cnn=yes> (citing Mock, Safi’s attorney, in saying that “rape seethes with enough emotion to prejudice a jury and is itself a legal conclusion. Once that word is uttered, Mock says, ‘the skunk is in the jury box and it’s hard to get the smell out’”).

128. See FIELD & BIENEN, *supra* note 120, at 119 (stating that the law as it relates to rape is mostly concerned with the notion of consent). Jurors will often

use broad definitions of consent to determine some degree of willingness on the part of the woman to have had intercourse with the defendant. When the jurors perceive that the woman has precipitated or encouraged the assault by her appearance or behavior, they are likely to apply the “assumption of risk” criterion. Under these conditions, the jurors are likely to be lenient with the defendant.

Id.

129. See Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant’s Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 497-98 (1997) (stating that courts have repeatedly upheld rape shield statutes despite criticism that they deny defendants their right to cross-examine and confront the witness against them); *State v. Cassidy*, 489 A.2d 386, 389 (Conn. App. Ct. 1985) (discussing the policy concerns behind rape shield laws). These policy concerns include:

[P]rotecting the victim’s sexual privacy and shielding her from undue harassment, encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment. . . . Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and waste of time on collateral matters.

Id.

130. See *supra* note 67 and accompanying text (providing examples of historical mistreatment of rape victims in rape cases).

131. See Wallach, *supra* note 129, at 485-86 (arguing that rape is different than other crimes because of the historical treatment of rape victims and the added element of the consent). Rape shield laws have been enacted in almost all fifty states to protect rape victims from disclosing their sexual history at trial. *Id.* at 486. The state of Nebraska, where Tory Bowen’s cases was tried, has even acknowledged this fact. The Nebraska Legislature said in enacting their sexual assault statute:

It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will *protect the dignity of the victim at all stages of judicial process*, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law

exclude evidence of a victim's sexual history¹³² could be used to permit use of the word "rape." Considering the overwhelming hurdle rape victims face¹³³ in successfully prosecuting their claims, an argument that the word "rape" is unduly prejudicial holds no weight. Although the word "rape" serves little probative value in terms of proving an element of the crime, its absence can impact the jury's perception of what took place between the victim and defendant and make the witness seem evasive and untruthful. Like all other motions *in limine*,¹³⁴ the jury is never informed about the motion. A juror is likely to question why, in a rape case, no one ever talks about rape.

IV. PROPOSAL

Considering the overwhelming evidence to the contrary, it

procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of this state as such system is employed in the area of criminal sexual offenses.

NEB. REV. STAT. § 28-317 (2007) (emphasis added). Nebraska's rape shield statute states:

Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Id. § 28-321(2).

132. The reasoning is that its prejudicial effect outweighs its probative value.

133. See FIELD & BIENEN, *supra* note 120, at 47 (stating that because juries are often comprised of ordinary people who buy into stereotypes about women and rape, jurors may judge the victim based on these stereotypes influencing the ultimate outcome of the trial). A victim's physical appearance can impact a jury's decision because juries will either think that the defendant was overcome with passion if the victim was attractive, or if she was not, that no one would rape an unattractive woman. *Id.*; See also Robert Stansfield, *Gang Rape Girl Was Glad of Attention; Lawyer's Shock Claim to Court*, THE MIRROR, May 18, 2007, at 25, available at <http://www.mirror.co.uk/news/top-stories/2007/05/18/gang-rape-girl-was-glad-of-attention-115875-19122896/> (discussing a sexual assault case in the United Kingdom against three young boys accused of gang raping a teenage girl where their attorney argued that the girl must have consented to the sex to gain attention because she was overweight and unattractive).

134. A motion *in limine* is defined as "a pretrial request that certain inadmissible evidence not be referred to or offered at trial." BLACK'S LAW DICTIONARY 1038 (8th ed. 2004).

would be difficult to argue that defendants accused of rape face extreme prejudice.¹³⁵ This fact has led legislatures to enact rape shield laws to prevent exacerbating a victim's trauma of testifying against her accuser by protecting a victim from having to recount her sexual history and having it used against her.¹³⁶ Word bans can have the same traumatic impact on victims as testifying about their prior sexual history.¹³⁷ These word bans serve no value in the courtroom—they only serve to silence the witness and undermine her credibility in front of the jury,¹³⁸ which is just another example of how the system distrusts rape victims. To allow a victim of theft or burglary to testify using those words, but not afford the same rights to rape victims is a clear double standard. The word rape is no more inflammatory than words like “force” or “penetration,” which are necessary to develop the witness's testimony.

Despite the fact that rape is not a legal term in most states, it can serve a function for victims while testifying. In *Goss*, the victim used rape as a shorthand term when testifying to her experience.¹³⁹ A witness should be allowed to use whatever words he or she pleases to describe their experience; issues of honesty and credibility should be left to the jury. Jurors use biases when they make their decisions, and any negative impact from word bans, however minimal, can affect their verdict.¹⁴⁰

Rape shield laws have been enacted because lawmakers acknowledge that criminal defendants' rights are not absolute and that there are certain issues that serve no purpose but to waste

135. See *supra* notes 59-60 and accompanying text (discussing the legal system's bias against rape victims); see also Torrey, *supra* note 5, at 1015 (discussing how myths about rape and rape victims, dispute being untrue, impact the way judges and jurors perceive testimony in rape trials).

136. See *supra* notes 12-13 and accompanying text (discussing the purpose of rape shield laws and quoting the federal statute); see also Reidy, *supra* note 52, at 299-300 (discussing that introducing a rape victim's prior sexual history at trial is like putting the victim herself on trial and because of this heightened burden, that is not present in other criminal trials, rape victims need additional protection).

137. See Clarence Mabin, *Controversial Sex Assault Trial Starts Monday*, LINCOLN JOURNAL STAR, July 8, 2007, available at 2007 WLNR 13055368 (citing PAVE founder Angela Rose stating that Judge Chevront's ruling was related to the problem of re-victimizing sexual assault victims).

138. See *Banned Words*, *supra* note 10 (quoting Wendy Murphy, law professor and Bowen's attorney, in saying that word bans impugn a witness's candor and credibility).

139. See *supra* note 35 and accompanying text (quoting *Goss* where rape victim was allowed to testify that she was 'raped' as a shorthand version for saying that the defendant had sexual intercourse with her without her consent).

140. See Torrey, *supra* note 5, at 1050 (explaining that jurors use their own prejudices and biases when interpreting the facts of a case).

the courts' time.¹⁴¹ Primarily, rape shield statutes are there to protect victims' rights and prevent a victim from being exposed to further trauma on the witness stand.¹⁴² Protecting rape victims from word bans also serves this same goal.

One of the main problems with rape shield statutes, in their current incarnation, is that they contain exceptions that allow for relaxed enforcement to the detriment of rape victims.¹⁴³ One of the first tasks would be to clarify or remove these exceptions. The existence of loopholes or exceptions in the current laws¹⁴⁴ makes it too easy for lawyers to get around the rules. These exceptions need to be narrowly tailored to deal with the necessary confrontation issues.¹⁴⁵ If this revision is insufficient, then these exceptions should be removed. The sexual history that is admissible under these provisions serves no probative purpose. It merely offers one way in which a victim's sexual history can be used against her.

Second, rape shield statutes must be amended to allow a victim to testify freely about his or her experience. As has been shown, the danger of prejudice against the defendant is minimal. Also, courts have historically allowed victims to use their own words to describe their own experiences, even if they are coming to a conclusion about whether or not a crime has taken place.

The amended portion of the Federal Rules should include a provision that specifically deals with word bans.¹⁴⁶ The text should stress the importance of a rape victim's right to freely

141. See Gruber, *supra* note 49, at 225 (explaining how rape shield laws were enacted in order to counteract "social problems" that impacted the level of reporting, prosecution, and conviction).

142. See Torrey, *supra* note 5, at 1030 (explaining how testifying at trial can evoke similar emotions in a victim as when she was raped, which often discourages a victim from coming forward).

143. See Anderson, *supra* note 13, at 56 (discussing how the exception for prior sexual conduct with the defendant is ineffective because "men with whom the complainant has been previously intimate commit 26% of all rapes"). Anderson cites, as one of the main reasons for why rape shield statutes are generally insufficient, congressional floor debates that dealt more with the emotional trauma of testifying and not with the "unfairness of measuring rape complainants against a yardstick of sexual morality." *Id.*

144. See *supra* note 74 and accompanying text (discussing examples of loopholes in rape shield laws).

145. For example, courts should only allow cross-examination into topics that would typically be permissible in cross-examinations of victims of other crimes. A rape victim's sexual history with the defendant is as irrelevant as evidence that a victim of embezzlement had, at one time or another, lent money to a defendant.

146. For instance, under this amendment, a rape victim should be permitted to speak freely about his or her experience when testifying in front of jury. Any limitations of witness testimony should be made with the utmost judicial discretion and only in cases when it is absolutely necessary to preserve a fair trial for defendant as well as the victim.

testify without censorship, but there should be room for judges to exercise discretion in cases of blatant prejudice. However, judicial action should only be allowed in cases where the testimony is highly prejudicial and/or has no probative value.¹⁴⁷

One of the main problems with the word ban is that it is a prior restraint on the speech of the witness. Prior restraint is particularly problematic in a courtroom setting because a witness' credibility can be affected if they are concerned with complying with a word ban. This is why it would be more appropriate to allow a witness to testify and then deal with objectionable testimony later. In general, however, a rape victim's right to testify should be given considerable weight.

These aforementioned rules must be followed in state courts where the *vast* majority of rape cases are tried. The Federal Rules are not binding in state courts;¹⁴⁸ however, many states have adopted evidence codes that are similar or identical to the Federal Rules.¹⁴⁹ The amended portion of the Federal Rules should include a provision advising states to similarly amend their evidence codes to reflect the changes in the Federal Rules.

This proposal would not unfairly infringe on defendants' rights because it is in line with other provisions under the Federal Rules that allow for the rights of victims or witnesses to be taken into consideration. While a defendant is generally considered to have a right to a *fair* trial,¹⁵⁰ they do not have a constitutionally protected right to a *favorable* trial.¹⁵¹ Allowing a rule of evidence to acknowledge the inherent bias toward rape victims in the legal system would merely be guaranteeing a fair trial for everyone.¹⁵² Furthermore, as several cases have already outlined, a simple curative instruction would be sufficient to indicate to the jury that they are not to treat the use of the word "rape" as a legal

147. A limit on judicial discretion is necessary because judges are susceptible to myths and stereotypes just like jurors. Torrey, *supra* note 5, at 1055.

148. "These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101." FED. R. EVID. 101.

149. See Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 836 (2008) (stating that the Federal Rules of Evidence were "enacted in 1975 and thereafter adopted in whole or in substantial part by the vast majority of the states").

150. See *supra* notes 50-51 and accompanying text (describing defendants' rights in criminal trials).

151. See Gruber, *supra* note 49, at 211 (arguing that "[i]t is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf.>").

152. See *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (emphasizing that the right to an impartial trial involves not only eliminating bias against the defendant but also any bias against the prosecution).

conclusion.¹⁵³

There is no other parallel in criminal law to the crime of sexual assault.¹⁵⁴ All too often, the case comes down to the victim's testimony against the defendant's testimony. This makes credibility crucial in determining which side prevails. Rape victims, women in particular, face enormous obstacles when trying to convince juries of their credibility.

At the start of the trial the deck is stacked against them because of years of gender stereotyping that has led to pervasive myths about rape,¹⁵⁵ and when juries decide cases, they take these myths and stereotypes with them when they deliberate.¹⁵⁶ The law must recognize this fact and take steps to counteract these biases in order to balance the playing field so that both parties can be assured a fair trial.¹⁵⁷ While the victim has no constitutionally protected right to a fair trial, a fair and balanced trial is in the interest of justice and all parties involved.¹⁵⁸

CONCLUSION

Word bans in rape trials will have a detrimental effect on the progress that has been made in sexual assault reporting and

153. See *supra* notes 83-85 and accompanying text (citing the *Malcom* case's allowance of the word rape so long as a curative instruction was given to the jury).

154. See Gruber, *supra* note 49, at 205 (discussing how rape is one of the most brutal forms of criminal victimization and often leaves the victim suffering intense and prolonged trauma).

155. See *supra* note 72 and accompanying text (discussing the various stereotypes about women that impact people's perceptions about rape).

156. See Gruber, *supra* note 49, at 219 (discussing how judges and juries rely on tort-like defense like assumption of risk when placing blame on rape victims for their attack). Gruber goes on to say that this reliance impacts many judicial decisions ranging from admissibility of evidence to jury instructions. *Id.* See also *State v. Overman*, 153 S.E.2d 44, 58 (N.C. 1967) (holding that "[c]ontributory negligence by the victim is no bar to prosecution by the State for the crime of rape.").

157. *Contra* Jason Wool, *The Presumption of Innocence in Date Rape Trials Through the Use of Language Orders: State v. Safi and the Banning of the Word "Rape,"* 15 WM. & MARY J. WOMEN & L. 193, 224 ("The contrast between the female desire to 'have my day in court' with the defendants' rights advocates' desire to 'play by the rules' elucidates at least one possible conclusion about today's legal system: It cannot work for both men and women in the context of date rape trials." In his comment, Wool takes the position that word bans are necessary to preserve the defendants' right to be presumed innocent until proven guilty despite inherent bias against rape victims. *Id.* at 226. He does, however acknowledge that juries should, at the very least, be made aware of the word ban. *Id.* at 225. Specifically, Wool writes it's "only fair for the judge to instruct the jury that the order is in place, and that the complainant will not be able to use legally conclusive terms." *Id.*

158. See Torrey, *supra* note 5, at 1058 (discussing that rape victims are entitled to a fair trial because of the way in which they are put on trial, essentially placing them in the position of the defendant).

advocacy. Tory Bowen described how the word ban stifled her testimony and made her feel like she was perjuring herself by not speaking freely and truthfully.¹⁵⁹ Jurors, making findings of fact and determining issues of credibility, can sense doubt in a witness.

Rape victims already fear coming forward and facing their accusers. Censoring rape victims' testimony after they have finally found enough courage to come forward would only exacerbate that fear. The solution is to amend rape shield laws to include a provision protecting victims from word bans in order to preserve their right to testify truthfully. These changes are necessary to ensure that rape victims are protected against this unfair and unnecessary measure that only serves to further reduce their credibility in the eyes of the jury. In many rape cases, where the outcome of the trial comes down to the issue of consent, it is of the utmost importance that rape victims not be silenced and that they be allowed to give their testimony unhampered by unreasonable court orders.

159. See *Banned Words*, *supra* note 10 (stating that “[i]n Bowen’s opinion, Chevront’s ruling means she will have to lie on the witness stand.”).

