

TO CATCH A SEX THIEF: THE BURDEN OF PERFORMANCE IN RAPE AND SEXUAL ASSAULT TRIALS

COREY RAYBURN*

*All the world's a stage,
And the men and women merely players:
They have their exits and their entrances;
And one [wo]man in [her] time plays many parts.¹*

Jacques' observation in Shakespeare's *As You Like It* describes the typical rape and sexual assault trial in the United States. The complainant² plays many different characters throughout the course of the trial. Pre-written cultural scripts dictate her³ lines. The setting is both the courtroom

* J.D., University of Virginia School of Law; B.A., University of Iowa. I would like to thank Anne Coughlin, Robin West, Susan Ehrlich, Trevor Foster, Anna Nelson, John Nelson, and Andrew Peterson for their comments and suggestions. I also want to thank the editors of the *Columbia Journal of Gender and Law* for their assistance.

¹ WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7.

² This Article uses the terms "accuser" and "complainant" to signify the person who has allegedly been raped, and "accused" and "defendant" to signify the alleged rapist. At a rape trial, the person who was raped is not so much a "victim" as she is an "accuser." Her role, as will be demonstrated in this Article, is not perceived as a passive one. Instead, the fact that she is the primary actor, from the jury's perspective, is very important for understanding the linguistic power plays that occur during the rape trial. Likewise, the alleged rapist is constructed as a passive agent who must be on the defensive because of the charges against him. This Article uses the terms "accuser," "complainant," "accused," and "defendant" to highlight the reversal in controlling dynamics from the rape event itself: the passive "victim" becomes the active "accuser," and the active "rapist" becomes the passive "defendant."

³ This Article focuses on male-to-female rape and sexual assault, but this is not meant to define the extent of either crime in America. Male-to-male rape is a well-documented and prevalent problem in the United States. See Rape Crisis Center of Catawba County, *Male Rape*, 1996, http://www.rapecrisiscenter.com/education_articles_007.htm. A less documented issue is female-to-male rape. See *id.* Another underreported phenomenon, female-to-female rape, has received recent attention. See generally LORI B. GIRSHICK, WOMAN-TO-WOMAN SEXUAL VIOLENCE (2002). Nonetheless, the statistical reality in America is that sexual assault is directed towards females ten times more than males. Men Against Sexual Assault, *Sexual Assault Statistics*, Feb. 20, 2003, <http://sa.rochester.edu/masa/stats.php> [hereinafter MASA].

and the scene of the alleged rape as imagined by the jury. Unique to a rape “play,” however, an accuser cannot be sure which role the jury will assign to her by the time it begins its deliberations. Is she to be cast as a whore?⁴ A vengeful liar? A tease? Mentally unstable? If she has the “proper” background and the defendant is a stranger, can she play the role of an innocent Madonna whose perceived purity may result in the rarest of events: a guilty verdict?

While every trial has elements of theater,⁵ rape and sexual assault cases are unique because they emphasize the gender performances of the accuser and the accused. Complainants who testify are not just recounting the events of the alleged rape. They are also defining the essential parts of their gender roles for the jury. Every statement, mannerism, action, and emotion of the accuser on the witness stand relays information about her gender to the jury. If the jurors deem a performance too emotional, they may assume the accuser is stereotypically hysterical and unreliable. If, however, she appears cold and calculating, the jury may believe she is a “gold-digger” using the criminal trial as a prequel to a lucrative civil suit. If she shows too much anger (as though it were possible for someone who has been raped to be “too angry”), the jury may see vengeance as her motive for “crying rape.” Which predefined gender roles the jury assigns the accuser and accused during the trial are important in determining whose story the jury will ultimately believe.

At its core, a criminal rape trial taps into the linguistically and culturally founded beliefs of the jury in order to reach a desired outcome. In most cases of “simple rape,”⁶ as Susan Estrich has labeled acquaintance rape, the defense attempts to access certain meta-narratives about sex and rape to convince the jury that the alleged rape event was really consensual sex. These rape myths and the rhetoric of rape and sex, not statutory rules and procedures, are the critical pivot points for shaping the jury’s decision.⁷ The trial itself is like a play where the actors and their agents fight to define the roles and script utilizing these meta-narratives. As Stephen Schulhofer has written, “[s]ocial attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed [rape law]

⁴ These different roles will be described in greater detail later in this Article. They are primarily derived from the scholarship of Kimberlé Crenshaw concerning rape trials and storytelling. See Kimberlé Crenshaw, *Whose Story is it Anyway?*, in RACE-ING JUSTICE AND EN-GENDERING POWER 402, 409 (Toni Morrison ed., 1992).

⁵ Bernard J. Hibbits, *De-scribing Law: Performance in the Constitution of Legality*, Mar. 1996, <http://www.law.pitt.edu/hibbits/describ.htm>; Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 651-54 (2001).

⁶ SUSAN ESTRICH, REAL RAPE 4 (1987).

⁷ ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 58 (1999).

reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.”⁸

The William Kennedy Smith, Jr., Big Dan’s Tavern, Central Park “wilding,” and Mike Tyson trials, as well as the failed trial of Kobe Bryant, illustrate an important concept of law in America: the roles assigned by the media and jurors to the accuser and accused are fundamental to the outcomes of rape trials. When the defense attorneys for Kennedy Smith, Jr. successfully painted him as a respectable doctor from a good family and his accuser as an unstable money-grubber, the jury found him not guilty.⁹ Kobe Bryant’s defense team successfully deployed a similar strategy and his case did not even go to trial.¹⁰ In the Big Dan’s Tavern trials, the defendants were portrayed as wild Portuguese immigrants who represented a culture built on misogyny.¹¹ Similarly, the Central Park “wilding” cases were framed less as traditional rape cases than as general acts of violence by Black and Hispanic hordes against innocent, civilized New Yorkers who needed protection.¹² Mike Tyson was the embodiment of the wild man who could not be controlled by society’s rules and the prosecution exploited that perception.¹³ In each of these cases, and in most other rape trials in

⁸ STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17 (1998).

⁹ Jody Freeman, *The Disciplinary Function of Rape’s Representation: Lessons from the Kennedy Smith and Tyson Trials*, 18 LAW & SOC. INQUIRY 517, 530-33 (1993). In December 1991, William Kennedy Smith, Jr. became one of the first celebrities to have his criminal trial broadcast nationally on Court TV. Valerie Block, *Court TV on Trial: Struggling Network Heals Ownership Rift; New Chief Works on Programming, Ad Sales*, CRAIN’S N.Y. BUS., Nov. 2, 1998, at 3. The trial captured the public’s attention because Smith was John F. Kennedy’s nephew. Smith was charged with rape, but was found not guilty. Freeman, *supra* at 530-33.

¹⁰ Adrienne T. Washington, *Bryant’s Accuser Unfairly Portrayed as False by Public*, WASH. TIMES, Jul. 22, 2003, at B2. Kobe Bryant, a professional basketball player, was charged with rape for an incident at a Colorado resort. The charges against Bryant were dropped on the eve of trial and a settlement with his accuser was reached.

¹¹ LISA M. CUKLANZ, RAPE ON TRIAL: HOW THE MASS MEDIA CONSTRUCT LEGAL REFORM AND SOCIAL CHANGE 69-72 (1996). The Big Dan’s Tavern trials concerned a gang rape in a bar in New Bedford, Massachusetts in March 1983. Those responsible for the crime were part of the Portuguese immigrant community. The trials were televised in 1984 on CNN and the defendants were ultimately found guilty. *Id.* at 9-10.

¹² *Id.* at 8. The “wilding” incidents concerned groups of teenagers who molested and assaulted victims in Central Park. Though it was not an actual rape case, the sexual nature of the crimes garnered national attention. The cases were portrayed in the media as savage minority children preying on the civilized denizens of New York City. *Id.*

¹³ Freeman, *supra* note 9, at 527-30. Mike Tyson, a professional boxer, was convicted of raping a beauty contestant in a hotel room. In the trial, the prosecution was able to capitalize on Tyson’s aggressive behavior and wild reputation to obtain a conviction. *Id.*

America, the outcomes have been determined not so much by specific evidentiary decisions and legal rules, but by utilizing the narrative structure most appealing to the jury.¹⁴

While feminist jurisprudential critiques and efforts at reforming rape law have focused on procedural and substantive defects of statutes and judicial decisions,¹⁵ there is a more significant factor that determines rape trial outcomes: what this Article terms the “burden of performance.” This burden, which will be described in depth below, is in addition to the burden of proof and persuasion already upon the prosecution. When complainants testify, they assume roles that put their gender identity into question. How they perform in these roles is fundamental to the jury’s decision-making process. Defense attorneys use the predefined roles and certain rhetorical techniques to compare a particular complainant’s experience with those in society’s collective consciousness.¹⁶ Specifically, the defense takes advantage of a jury’s exposure to rape and pornography images and anecdotes. When a complainant is telling her story, she must impress a jury that has been inculcated with a lifetime of rape imagery and accounts, making the burden of performance a substantial impediment. Accusers must convince a jury, jaded by rape stories and pictures, that her story is “special” enough to warrant a guilty verdict. The end result is that prosecutions are doomed to fail in most situations.¹⁷

To understand rape law reform and its failure, it is absolutely essential to comprehend the unique performative problems that stifle efforts to reduce the occurrence of rape. Existing legal scholarship has ignored important developments in communication theory and has omitted significant considerations, contributing to the failure of reform efforts. As a result, existing feminist and mainstream proposals to improve American rape law are inherently suspect. To address this existing shortcoming, this Article offers new theories for analyzing rape trials and rape law derived from the burden of performance.

This Article argues that rape law reform must be fundamentally reoriented to address the problematics of performance and language that determine the outcomes of rape and sexual assault trials. Part I gives a brief account of the modern history of rape law reform and critique in the United States. Part II outlines the existing limited scholarship on representational and performative critiques of rape law. In Part III, the Article turns to a thought experiment derived from the scholarship of Jean Baudrillard that illustrates the unique nature of performances in rape trials as compared to

¹⁴ TAsLITZ, *supra* note 7, at 7-8.

¹⁵ See *infra* notes 37-41 and accompanying text.

¹⁶ TAsLITZ, *supra* note 7, at 15-57.

¹⁷ See *infra* notes 26-31 and accompanying text.

other crimes. Part IV uses the hypothetical example in Part III to articulate and explore the concept of the burden of performance. In Part V, the Article focuses on the overriding factors that ensure the burden of performance will be insurmountable for most accusers. These impediments are derived from the scholarship on disaster pornography, sexual pornography, and the effect of the media's construction of rape, sex imagery, and myths. Finally, this Article offers some conclusions about how the burden of performance fundamentally alters the discussion of American rape law reform.

I. A BRIEF HISTORY OF RAPE LAW REFORM IN AMERICA

The history and details of America's attempts to reform rape law have been written about many times before,¹⁸ so this section is brief. A popular notion in the mainstream American press is that rape law has gone too far, that the pendulum has swung from failing to protect rape victims¹⁹

¹⁸ For a comprehensive history of rape law reform and proposed reforms, see David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317 (2000).

¹⁹ As this Article is significantly focused on the rhetoric surrounding rape, it is important to consider the labels used to identify those who have been raped. The central conflict concerning the naming issue surrounds the transition from using the term "rape victim" to using "rape survivor." See David Mills, *Semantics of Rape Language vs. What's "Politically Correct,"* WASH. POST, Nov. 22, 1991, at B5. This linguistic transition has been largely driven by those who believe that the "victim" rhetoric is disempowering. See Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1311 n.115 (1992); Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1916 n.11 (1996); Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 164 n.5 (1997); International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89, 110 (1994); Metin Basoğlu, *Prevention of Torture and Care of Survivors*, 270 J. AM. MED. ASS'N 606, 606 (1993); EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 17-18 (1988). Some writers have gone as far as saying the "victim" label is abusive. See Julie Hosking, *When it Comes to Rape, Victim is a Dirty Word*, SUNDAY TELEGRAPH (Sydney, Australia), Mar. 24, 2002, at 20. "Survivor" became a preferred term because it was used as part of a process to move past the trauma of a sexual assault. See Rhona Dowdeswell, *Why I Must Forgive to Get Over My Rape; Analysis*, WESTERN DAILY PRESS, Jan. 25, 2002, at 8. Despite this movement among rape scholars to use "survivor" rhetoric, Andrea Dworkin presented the following argument for using "victim":

It's a true word. If you were raped, you were victimized. You damned well were. You were a victim. It doesn't mean you are a victim in the metaphysical sense, in your state of being, as an intrinsic part of your essence and existence. It means somebody hurt you. They injured you And if it happens to you systematically because you are born a woman, it means that you live in a political system that uses pain and humiliation to control and to hurt you.

Andrea Dworkin, *Woman-Hating Right and Left*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 28, 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). There are also numerous people who have been raped who prefer to be called "victims." See Kate E. Bloch, *A Rape Law Pedagogy*, 7 YALE J.L. & FEMINISM 307, 308 n.6 (1995). There

to targeting innocent men.²⁰ This viewpoint has been inspired by a backlash against political correctness and sexual harassment laws, as well as a general social move away from feminism.²¹ Opponents of rape law reform have had incredible success in convincing America that rape law has drastically changed in the last thirty years so that it now covers conduct that should not be criminal.²² The Dotson case, where the victim recanted her rape story years later, further fed the media's portrayal of the feminist agenda gone too far.²³

Quite simply, the idea that rape law reform has overreached is a myth without any basis in fact.²⁴ While there may be successful prosecutions of innocent men, that would make rape law no different than any other area of criminal law.²⁵ To single out rape law as having gone too far, given its incredibly low prosecution and conviction rates, is a specious argument. In any given year in the United States, 250,000²⁶ to nearly 900,000²⁷ attempted or completed rapes occur. It is estimated that only

is no easy answer to the dilemma of rape identity rhetoric. *See* SABINE SIELKE, *READING RAPE: THE RHETORIC OF SEXUAL VIOLENCE IN AMERICAN LITERATURE AND CULTURE 1790-1990*, at 12-14 (2002). Further, there is an oversimplified belief among some who argue that a positive sounding word like "survivor" creates a positive effect. *See id.* at 13. This Article uses the term "victim" because of the persuasive arguments for its use and its appropriateness in describing the courtroom setting. Further, in rape trials, the person attacked is regularly called the "victim," rendering the word even more appropriate for purposes of this Article.

²⁰ SCHULHOFER, *supra* note 8, at 10.

²¹ *Id.*

²² *Id.*

²³ CUKLANZ, *supra* note 11, at 74. In April 1985, Cathleen Crowell Webb recanted her claims that led to the conviction of Gary Dotson for rape in 1979. Although Dotson was not initially released, he eventually had his time commuted and was pardoned. Dotson and Webb received significant media attention, went on numerous talk shows together, and Webb published a book about the story. *Id.* at 10-11.

²⁴ SCHULHOFER, *supra* note 8, at 10.

²⁵ The false conviction rates for rape are two to three percent, which is not different from other crimes. *See* MASA, *supra* note 3.

²⁶ *See* GREENFELD, *supra* note 3, at v. It is difficult to determine the exact number of attempted or completed rapes because of the very low rate of reporting by victims. CALLIE RENNISON, U.S. DEP'T OF JUST., *CRIMINAL VICTIMIZATION 2001: CHANGES 2000-01 WITH TRENDS 1993-2001*, at 10 (2002), available at <http://www.ojp.gov/bjs/pub/pdf/cv01.pdf>. As a result, a wide range of estimates for the number of rapes and sexual assaults have been given by various researchers.

²⁷ Phyllis Chesler, *Book Review*, 220 N.Y.L.J. 2, 2 (1998) (reviewing STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998)).

sixteen percent of rapes and sexual assaults are reported to police.²⁸ According to a 1993 report, of the total number of reported rapes, only two percent resulted in conviction and incarceration.²⁹ Little has been altered in the substance and procedures of rape law in the last thirty years to justify the popular belief of radical change.³⁰ Rape conviction and plea bargaining rates have not substantially increased and most victories for reformers have been “symbolic.”³¹

This is not to deny that rape law in America has gone through numerous evidentiary and substantive changes over a longer time frame. The traditional elements of the crime of rape throughout most of the twentieth century were (1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or threat of severe bodily harm; and (4) without her consent.³² The force requirement was a derivative of the older, and difficult to overcome, “utmost resistance requirement.”³³ Even in the face of specific violent threats, consent could be given through “voluntary” submission to the rapist.³⁴ Thus, if a victim eventually gave up resisting, courts interpreted this as consent.³⁵ Even as late as 1973, a New York appellate court held that the utmost resistance requirement meant that the jury’s vote to convict was improper.³⁶

Feminists such as Susan Brownmiller and Catharine MacKinnon attacked these outcomes and helped lead an effort to reform rape laws nationwide.³⁷ In 1975, Michigan became the first state to adopt some of the policy changes suggested by feminists.³⁸ Feminists achieved victories by getting policymakers to eliminate: the requirement that an accuser have a witness to corroborate the rape, the instruction to jurors to treat the

²⁸ MASA, *supra* note 3.

²⁹ Deborah Fineblum Raub, *Sure, People are Aware of Rape, Especially Now. But . . .*, ROCHESTER DEMOCRAT & CHRON., Apr. 15, 1999, at 1C. *See also* GREGORY M. MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* 8-9 (1993).

³⁰ MATOESIAN, *supra* note 29, at 3.

³¹ *Id.* at 17.

³² Bryden, *supra* note 18, at 320-21.

³³ SCHULHOFER, *supra* note 8, at 19.

³⁴ *Id.*

³⁵ *Id.* at 19-20.

³⁶ *People v. Hughes*, 343 N.Y.S.2d 240, 242 (App. Div. 1973).

³⁷ SCHULHOFER, *supra* note 8, at 25.

³⁸ *Id.* at 29.

complainant with skepticism, and the admission of evidence of a victim's sexual history.³⁹ Other changes to the traditional definition included making the crime of rape gender-neutral, criminalizing all types of sexual penetration, and making rape within marriage illegal.⁴⁰ More recently, some jurisdictions have begun to eliminate the force requirement in response to feminist criticisms of rape law.⁴¹

However, as legislatures have broadened the definitions of rape, courts have continued to define rape narrowly.⁴² Despite decades of advocacy efforts and awareness campaigns, juries continue to be skeptical of claims of rape and hold accusers to a higher standard than they do for other crimes.⁴³ Reforms have had no effect in some jurisdictions, while others have shown only modest progress.⁴⁴ What little success has occurred is largely attributable to increased cultural awareness of acquaintance rape rather than legal change.⁴⁵ In many states, a strict requirement that the accuser show the defendant used actual force to threaten her effectively blocks convictions even in extreme cases.⁴⁶ Most states do not recognize a verbal "no" by a complainant as determinative of non-consent.⁴⁷ Other states have maintained a variation of the resistance requirement that is often applied in the same way as its more stringent predecessor.⁴⁸ Consequently, while a formal "utmost resistance requirement" has been removed, it is de facto enforced by jurors and judges in rape trials across the country.

While the shortcomings of reform are significant, the problems of enforcement and application of the law stem from a different source. Specifically, the cultural, rhetorical, and performative issues in rape law continue to undermine efforts to deter and prevent rape. An important, but

³⁹ TASLITZ, *supra* note 7, at 7. See SCHULHOFER, *supra* note 8, at 30; Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 12 (1998).

⁴⁰ Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1783 (1992) [hereinafter *Beyond Rape*].

⁴¹ SCHULHOFER, *supra* note 8, at 32-33.

⁴² Bryden, *supra* note 18, at 321-22.

⁴³ TASLITZ, *supra* note 7, at 6.

⁴⁴ *Id.* at 7.

⁴⁵ Bryden, *supra* note 18, at 319.

⁴⁶ SCHULHOFER, *supra* note 8, at 6.

⁴⁷ *Id.* at 9-10.

⁴⁸ *Id.* at 127.

small contingent of legal and feminist scholars has explored these concerns in detail.

II. RHETORICAL AND PERFORMANCE CRITIQUES OF RAPE LAW

Traditional feminist jurisprudential critiques of rape law underestimate the role of language.⁴⁹ Instead, emphasis is placed upon the inherent patriarchal structures at play and the sexist statutes used to determine the guilt of the defendant.⁵⁰ In this way, critiques of rape trials are not substantially different than non-feminist critiques of other criminal trials. The focus is almost entirely on the “rules of the game” and the application of those rules, as opposed to the rhetoric and images integral to the outcome of the trial.⁵¹ Under such a view, rape victims do not achieve justice because the laws, fact-finders, and procedures control and determine the outcome of rape trials. This is not to say that feminists fail to address underlying problems of patriarchal culture and the attitudes of judges and jurors.⁵² However, those criticisms are usually limited to describing how culture shapes the law and decision-making of various actors in the rape trial.⁵³ This is quite different than criticizing the rhetoric, representations, and performances of the actors in the trial and those used by the media. As a result, the efforts to reform rape law described in the previous section have not focused on the linguistic elements shaping rape trial outcomes.⁵⁴

Even when reform efforts have been designed to limit certain narrative strategies by the defense, as in the case of rape shield laws, attorneys have been able to accomplish the same goals through non-controversial lines of inquiry.⁵⁵ Instead of explicitly exploring an accuser’s sexual history, a lawyer could re-victimize the complainant through subtle, but still dehumanizing, cross-examinations.⁵⁶ Most often, this process occurs through the defense using physical evidence like clothing and appearance to state what could not be expressed through direct argument.

⁴⁹ TASLITZ, *supra* note 7, at 10.

⁵⁰ MATOESIAN, *supra* note 29, at 18.

⁵¹ *Id.* at 20.

⁵² CUKLANZ, *supra* note 11, at 15.

⁵³ *Id.*

⁵⁴ TASLITZ, *supra* note 7, at 10.

⁵⁵ JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 137 (1998).

⁵⁶ *Id.*

Showing the accuser's provocative lingerie can serve the same function as branding her a "slut." Talking about her actions leading up to the rape can serve to show that she was "asking for it," even without a thorough investigation of her sexual history. Though some reform has targeted rhetorical change, it has failed to address the problems in a systematic fashion.

Andrew Taslitz has identified "storytelling theory" as a method for better understanding what occurs at a rape trial.⁵⁷ However, his ideas on the communicative aspects of rape trials have been virtually ignored by the legal community.⁵⁸ Under Taslitz's theory, "the story of a case must be told in a way as to satisfy a jury's needs for narrative coherence and fidelity."⁵⁹ Coherence is the internal consistency of a story so that it is logical.⁶⁰ Fidelity is determined by how well the story appeals to a juror's sense of reality.⁶¹ Storytelling theory requires that changes in underlying meta-narratives be incremental because the new stories must replace the old while still maintaining a connection to the previous stories.⁶² This means that feminist stories of rape can only be added piecemeal and cannot be presumed to win over jurors by force of argument alone. While I adopt a slightly different theory than Taslitz, his description of rape trials provides an excellent starting point for understanding how rhetoric determines jury decisions.

Taslitz identifies four underlying rape story narratives that dominate trials: silenced voices, bullying, black beasts, and a little more persuading.⁶³ The "silenced voices" narrative holds that rape victims' voices are effectively neutralized in the rape trial process.⁶⁴ The result is that victims' stories are lost in the procedure and arguments of the trial structure. Primarily, rape victims are unable to have their complex and nuanced tales heard in a meaningful sense by the jury. Instead, their stories are reduced to the basic cultural scripts of how the jurors believe rape

⁵⁷ TASLITZ, *supra* note 7, at 15.

⁵⁸ As of October 28, 2005, a search on the LEXIS database under U.S. Law Reviews and Journals shows Taslitz's book on the subject has been almost exclusively cited by Taslitz himself and a few brief mentions by other authors. No recent reviews of rape law by other major scholars have significantly engaged Taslitz's work.

⁵⁹ TASLITZ, *supra* note 7, at 15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 17.

⁶³ *Id.* at 19-36.

⁶⁴ *Id.* at 19.

occurs. This process extends from the trial to include media coverage of rape as well.⁶⁵ Complainant narratives are often reduced to sound bites and defense counsel tales are often prominent in news stories.⁶⁶

The “bullying” narrative is an extension of America’s culture of masculinity.⁶⁷ Taslitz argues that because male aggression is encouraged and rewarded by mainstream society, there is an acceptance of similar behavior in sexual conquests.⁶⁸ Occasionally, however, the bullying narrative can be used by the prosecution to effectively paint the defendant as the aggressor. The Central Park “wilding” story represents one such example where the media portrayed minority teenagers as bullies that needed to be controlled and punished.⁶⁹

Taslitz’s third narrative, “black beasts,” is the one story that works exclusively for the prosecution. The concept of black beasts is derived from historical notions that Black men are walking phallic symbols who are dangerous to the community at large.⁷⁰ The black beasts narrative is best typified by the famous Scottsboro trials in the 1930s, where Black teenagers in the South were convicted for rape and sentenced to death.⁷¹ Because they had allegedly attacked Whites, they were prime targets for the black beasts myth. After numerous appeals and three decisions by the United States Supreme Court,⁷² the defendants were freed, but they had served between six and nineteen years in prison.⁷³ The Central Park “wilding” stories were also indicative of the black beasts narrative, and the case demonstrates the way bullying and black beasts stories can intersect and reinforce each other.⁷⁴ The corollary to the black beast narrative is that Black complainants are viewed as effectively “nonrapable” and even less likely to be believed than their White counterparts.⁷⁵

⁶⁵ *Id.* at 23.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25.

⁶⁸ *Id.* at 25-26.

⁶⁹ *Id.* at 28.

⁷⁰ *Id.* at 28-29.

⁷¹ *Id.* at 29-30.

⁷² *Powell v. Alabama*, 287 U.S. 45 (1932); *Patterson v. Alabama*, 294 U.S. 600 (1935); *Norris v. Alabama*, 294 U.S. 587 (1935).

⁷³ TASLITZ, *supra* note 7, at 30.

⁷⁴ *Id.*

⁷⁵ *Id.* at 32-33.

The fourth and final theme is “a little more persuading.” This perspective equates rape with seduction.⁷⁶ The idea of “a little more persuading” can be found prominently in Sigmund Freud’s belief, at least according to some scholars, that the unconscious causes an accuser to surrender to rape.⁷⁷ Under this view, Freud believed that if someone really wanted to resist a rape, she would, and the failure to do so was consent by the unconscious mind.⁷⁸ This narrative significantly contributes to putting the burden on complainants to show that they took every conceivable action to prevent being raped even when utmost resistance is no longer required by law. Men are protected under such a narrative because they are justified in exercising a little more persuasion in light of clear resistance and a firm “no.”

Susan Ehrlich’s scholarship supplements Taslitz’s storytelling analysis through an understanding of “talk” about rape.⁷⁹ Ehrlich is not an American legal scholar, and her scholarship has been overlooked by legal scholars.⁸⁰ Ehrlich argues that “language is the primary vehicle through which cultural and institutional ideologies are transmitted in legal settings.”⁸¹ The statements and “talk” of witnesses are mediated and filtered through the legal, cultural, and institutional norms of the courtroom.⁸² Because these underlying ideologies are heavily gendered, the “talk” of the courtroom reinforces and replicates the more systemic dialogue of patriarchy.⁸³ Under this view, language is not neutral and not all speakers are served equally in any given discourse.⁸⁴

⁷⁶ *Id.* at 33.

⁷⁷ *Id.* at 33-34.

⁷⁸ *Id.*

⁷⁹ SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT 4 (2001).

⁸⁰ As of November 24, 2005, a search in the LEXIS database under U.S. Law Reviews and Journals shows almost no mention of Ehrlich’s academic writing, except in one book review.

⁸¹ EHRLICH, *supra* note 79, at 4.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 12. It should be noted that Ehrlich does not rely on the much maligned and controversial Sapir-Whorf hypothesis to reach this conclusion. According to Ehrlich, the “Sapir-Whorf hypothesis holds that the grammatical and lexical structure of a given language has a powerful mediating influence on the ways that speakers of that language come to view the world.” *Id.* at 12. Instead, she uses Deborah Cameron’s work to support her argument. *Id.* at 12-13.

Ehrlich adopts a conception of the relationship between gender and language known as critical theory.⁸⁵ Primarily, she relies on the work of Deborah Cameron, who argues that linguistic practices inform and create social identities.⁸⁶ Using Cameron's theories, Ehrlich argues that gender identities are performative and that gender is not something people simply *have*, but rather something they constantly *do* by making linguistic moves.⁸⁷ Styles of communication, mannerisms, and ways of holding oneself all convey and form a gender identity. Within the legal sphere, the heavily coercive and rigid structures of law constrain these linguistic choices.⁸⁸ Accordingly, the law "has the capacity to impose and affirm culturally powerful definitions of social reality."⁸⁹

Ehrlich cites the William Kennedy Smith, Jr. rape trial as one example of the principle that rhetoric and culture, not law, often change not just the result, but also the way procedures and practices are followed in a rape trial.⁹⁰ Specifically, the judge permitted the jurors to assess the accuser's clothing under the auspices of looking for stains or damage.⁹¹ In contrast, the prosecution was not permitted to admit evidence that the defendant had been accused of sexually assaulting three other people in the previous ten years.⁹² The judge, in making these rulings, adopted patriarchal conceptions of gender identity that were not so much the letter of the law, but rather his own predilections about gender and rape.⁹³ Ehrlich believes these practices and "meanings and interpretations" of laws are at least as important as the supposed substance of the law in understanding rape trials.⁹⁴

This example by Ehrlich is consistent with most feminist critiques of rape law. However, the problems do not end at the point of shaping procedural outcomes. There is a larger battle taking place at a rape trial

⁸⁵ *Id.* at 5. "Critical theory" in the context of feminist literature, as used by Ehrlich, rejects static notions of gender in favor of constructivist and dynamic meanings of gender identity. *Id.*

⁸⁶ DEBORAH CAMERON, VERBAL HYGIENE 15-16 (1995).

⁸⁷ EHRLICH, *supra* note 79, at 5.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.* at 18.

⁹⁰ *Id.* at 26.

⁹¹ *Id.* at 26-27.

⁹² *Id.* at 27.

⁹³ *Id.*

⁹⁴ *Id.* at 28.

whereby the accuser must assume a performative role to garner credibility with the jury. In the years before Jody Freeman became a prominent environmental law professor, she made this observation about the Kennedy Smith, Jr. trial:

Implicit in any seemingly neutral portrayal of how men and women “are” is an argument about how they “should” be The power of representation reaches its height somewhere in this vicious circle of consciousness control, where social construction is mistaken for nature and interpretation masquerades as truth.⁹⁵

Ultimately, the Kennedy Smith, Jr. trial demonstrated that although accusers can try to occupy a safe space in their representations, they cannot control the way audiences, and specifically juries, perceive them.⁹⁶ There is no neutral role to assume for someone alleging rape. There are only different, culturally-defined, normalized roles that will be developed further by prosecutors and defense lawyers.

Kimberlé Crenshaw has argued that accusers inevitably become pigeonholed into a limited number of categorical stereotypes including “the whore, the tease, the vengeful liar, the mentally or emotionally unstable, or, in a few instances, the madonna.”⁹⁷ Once the accusers become part of those cultural identities, it is extremely difficult for them to escape these roles in the eyes of the jury. A whore is still a whore even if she takes off the makeup and becomes an upstanding citizen. A vengeful liar will always have motives for what she is saying and the jury will always doubt her words. The unstable accuser is unreliable in her recounting of events because her narrative is constructed through a mentally ill framework. Because gender identity is performative, the jury holds the perceived past performances of an accuser’s identity against her.

The roles assigned by the defense fit into scripts that determine legal outcomes in rape trials.⁹⁸ The Madonna role is usually reserved for victims of rape by a stranger, or what Estrich calls “real rape.”⁹⁹ The Madonna role is essentially that of the pure, innocent victim¹⁰⁰ who has neither sexual desire nor history. However, Taslitz has prosecuted a case where the defense was able to use a victim’s sexual innocence against her in

⁹⁵ Freeman, *supra* note 9, at 538-39.

⁹⁶ *Id.* at 539.

⁹⁷ Crenshaw, *supra* note 4, at 409.

⁹⁸ Freeman, *supra* note 9, at 539.

⁹⁹ ESTRICH, *supra* note 6, at 3-4.

¹⁰⁰ Crenshaw, *supra* note 4, at 430.

order to attain a verdict of not guilty.¹⁰¹ In that case, the defense effectively argued that the victim's naïveté was indicative of shame following an act of consensual sex. She was lying in an attempt to regain her chastity. Therefore, no role is safe for a complainant, and she has little choice as to which role she will play. The adversarial system ensures the defense will explore whatever role is beneficial to its side and may even ascribe several roles to one accuser.

This Article further explores the performative critique offered by Taslitz, Ehrlich, and Crenshaw and supplements the arguments they have made about rape trials. While their general criticisms are helpful, they do not address the degree to which representation and performance alter the outcomes in rape trials. This Article seeks to push legal scholarship further by arguing that performance, and not rule-making, should be the focus of future rape law reform and critique. To do otherwise virtually assures that progress in the fight against rape will be as slow as it has been during the last thirty years.

III. SIMULATED CRIMES AND JEAN BAUDRILLARD'S THOUGHT EXPERIMENT

Comparing rape law to other areas of criminal law illuminates why rape law reform has failed. While several scholars have noted the similarities between theft and rape, none have compared the two crimes from a rhetorical and performative perspective. Richard Posner, in *Sex and Reason*, termed an average forcible rapist as a "sex thief" and outlined many similarities between the two crimes.¹⁰² Consistent with this label, Posner argued that sex should be treated as a commodity and rape should be viewed as theft of that commodity. Donald Dripps offered a similar, yet

¹⁰¹ TASLITZ, *supra* note 7, at 3.

¹⁰² RICHARD A. POSNER, *SEX AND REASON* 182 (1992). Posner's perspective offers numerous benefits to the feminist analysis of rape when compared to the traditional definitions adopted by courts and legislatures. Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 *GEO. L.J.* 2413, 2430-31 (1993) [hereinafter *Taste for the Absurd*]. It eliminates the "utmost resistance standard" and its watered-down variants. Further, Posner's commodity theory puts emphasis on autonomy and choice, two values that would normally be embraced by feminists in a rape law discussion. *Id.* at 2431. However, Robin West has outlined some of the problems with Posner's particular comparisons between rape and theft law in her review of *Sex and Reason*. *Id.* West argued that Posner's commodity theory of rape fell prey to the problem of legitimation. *Id.* Because Posner takes a strong view of autonomy, he is unwilling to support any attempt to criminalize rape by fraud or coercion. West was concerned that the failure to criminalize coercive sex meant that those acts became legitimated by their legality. *Id.* at 2431-32. The end result of Posner's silence concerning other crimes is that society would remain blind to coercive sex acts even when there were "grossly unequal distributions of sexual power." *Id.* at 2431 (emphasis added).

distinct, commodity theory of rape and sexual assault.¹⁰³ Susan Estrich, representing a potentially feminist perspective, has also proposed a rape law that uses a similar commodity analysis.¹⁰⁴ While there are certainly differences between rape and robbery in these commodity theories,¹⁰⁵ there

¹⁰³ *Beyond Rape*, *supra* note 40, at 1780. Dripps, like Posner, believes rape should be viewed from the perspective of preserving sexual autonomy and uses a commodity perspective to support his argument. *Id.* at 1786-87. However, Dripps' specific theory has advantages over Posner's, in that it does more to remove the force requirement and squarely puts the emphasis on consent. Robin West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1447 (1993) [hereinafter *Legitimizing the Illegitimate*]. Further, Dripps' particular theory of consent does not allow a defendant to achieve consent through threats of force. *Id.* at 1447-48. However, as with Posner's theory, West identified several important shortcomings. The problem of legitimation persists because Dripps seeks to protect sexual acts that are coerced in many instances. *Id.* at 1452. Further, West makes an argument that would apply to both theories: treating sex as a commodity has historically been a disservice to feminism and fails to describe the experience of rape. *Id.* at 1449-51. Dripps' theory is also problematic because it includes an intent standard that creates an exception that may swallow the rule. In his model statute for sexually motivated assault and sexual expropriation, Dripps includes the relatively standard phrase of "purposely or knowingly." *Beyond Rape*, *supra* note 40, at 1807. The problem with Dripps' statute is that the intent standard allows the same type of defense arguments as the force and consent standards he is critiquing. The emphasis on the defendant's knowledge allows defenses to incorporate rape myths because they are likely to be part of the defendant's state of mind. If the defendant believed that the accuser wanted "rough sex," then the rape would not constitute criminal conduct under the model statute.

¹⁰⁴ ESTRICH, *supra* note 6, at 102-03. Specifically, she argues that the rules that govern the exchange of property should be used in rape cases. *Id.* Unlike Posner's and Dripps' proposal, Estrich's proposal seeks to criminalize coercive sex situations. *Id.* Unfortunately, unlike Dripps, Estrich never details how her proposal could be implemented into law. SCHULHOFER, *supra* note 8, at 84. While avoiding the problem of legitimation, Estrich does not offer a developed statute that can be examined for other policy shortcomings.

¹⁰⁵ A major problem with these commodity theories relates to the assumptions they make about sex and rape. While West was very critical of the notion of commodifying sex, she did not fully explore the notions of restitution and fungibility as they relate to sex. *Legitimizing the Illegitimate*, *supra* note 103, at 1449-51; Panel Discussion, *Men, Women, and Rape*, 63 FORDHAM L. REV. 125, 154 (1994). While Dripps is careful not to adopt a commodity theory that would "smuggle in a normative term," he cannot avoid certain inherent assumptions about the nature of commodities. *Beyond Rape*, *supra* note 40, at 1787. In the case of robbery, restitution is normally possible. Whatever goods are stolen can be returned. There may be instances where the goods stolen have been damaged or destroyed, but the principle that they can be replaced generally applies. Even in the case of objects with high sentimental value, there is no theft of a person's identity in robbery so there is some measure of fungibility. Dripps seemingly recognizes this shortcoming of the analogy and thus moves from an analogy of jewelry theft to a theft of personal services. *Id.* at 1801-02. Under this perspective, however, the comparison is still problematic. Unlike most theft of services cases, rape is taken without any illusion of fair compensation. Theft of services is more analogous to an incident where a prostitute does not receive payment. To equate such an event to a rape is a strained metaphor. Rape is unique precisely because compensation is impossible. There can be no way to make someone whole again. Even the unpaid prostitute can receive restitution, but a rape victim cannot. While Dripps' caveat that his claim is not

are also important distinctions in performance aspects. To accomplish a performative comparison of rape and robbery, this Article uses a hypothetical example from Jean Baudrillard. To fully understand the thought experiment, it is first necessary to be familiar with Baudrillard's worldview.

A. Jean Baudrillard

Jean Baudrillard has been called everything from the "pop-star"¹⁰⁶ to the "pimp"¹⁰⁷ of the postmodern age.¹⁰⁸ The easiest access point to understand Baudrillard's unique writing is to explore the concept of hyperreality, a term that Baudrillard coined.¹⁰⁹ The hyperreal world is composed of a simulation and can be viewed as a society based entirely on

normative addresses this concern to a degree, the inherent problem with a commodity view of rape is that it applies the analogous square peg to a round hole. Even if some contract and theft law is helpful for understanding rape, that connection does not mean a commodity theory is a desirable method for understanding and constructing rape law. To do so will always leave some dangerous assumptions built into statutes and in the rhetoric surrounding the issue.

¹⁰⁶ Postmodernism: Baudrillard, <http://www.cultsock.ndirect.co.uk/MUHome/cshtml/general/pomodot.html#Baudrillard> (last modified June 21, 2003). Baudrillard's mainstream notoriety is probably due mostly to his connection to the Matrix movies by the Wachowski brothers. The brothers drew inspiration from Baudrillard's scholarship and even featured one of his books in the first movie in the trilogy. See Richard G. Smith, *Lights, Camera, Action: Baudrillard and the Performance of Representations*, 2 INT'L J. OF BAUDRILLARD STUDIES (2005), available at http://www.ubishops.ca/baudrillardstudies/vol2_1/smith.htm.

¹⁰⁷ Suzanne Moore, *Getting a Bit of the Other: The Pimps of Postmodernism*, in MALE ORDER: UNWRAPPING MASCULINITY 165, 180 (Rowena Chapman & Jonathan Rutherford eds., 1988).

¹⁰⁸ Baudrillard has been identified as "the male French theorist who most explicitly and most frontally adopts an adversarial relation to feminism." Jane Gallop, *French Theory and the Seduction of Feminism*, in MEN IN FEMINISM 111, 113 (Alice Jardine ed., 1987). This rather harsh criticism by Gallop concerning Baudrillard's work has largely been responsible for his almost total irrelevance to feminist literature. Baudrillard says many provocative, arguably misogynist things in his various works and he has rarely been identified as a friend to feminism. This is significant to this Article as Baudrillard's writings figure prominently in what is, at its core, a feminist critique of rape law. For a full defense of Baudrillard in regard to his statements about feminism, see VICTORIA GRACE, BAUDRILLARD'S CHALLENGE: A FEMINIST READING (2000). Grace's excellent work handles the various objections and arguments made by Gallop and others about Baudrillard's relationship to feminism and eventually concludes that feminism has much to gain from examining and utilizing Baudrillard's scholarship.

¹⁰⁹ GRACE, *supra* note 108, at 25.

performance.¹¹⁰ Hence, it has significant relevance to the larger themes of this Article.

Baudrillard suggests that there are three levels of simulation.¹¹¹ The first level of simulation is one where there is a copy of an original.¹¹² The copy is not detailed or sophisticated enough to be mistaken for the original.¹¹³ Paintings and maps can be examples of this first level.¹¹⁴ No one would mistake a road map for the actual reality of the world, but it is, nonetheless, a representation that can be used to understand the layout of the real world.

The second level of simulation is where the simulation becomes so perfect that it is indistinguishable from the real world.¹¹⁵ Baudrillard uses the analogy of a Borges fable about a world map to help the reader understand this second level.¹¹⁶ In this case, the map is life-sized and so perfect that it looks like a duplicate of the real world. It is an identical copy such that you could traverse the map just as you would travel in the real world. While no such map has ever existed, it is a metaphor for understanding the second level of simulation.

The third level of simulation is one where there is a copy, but no original.¹¹⁷ This world is what Baudrillard terms the hyperreal world in which we live.¹¹⁸ Perhaps the easiest, but not most complete, analogy for this third level is found in online virtual worlds.¹¹⁹ People play games in fantastic worlds that lack any current or historical connection to reality, but are nonetheless “real.” Virtual people have virtual possessions, travel through virtual worlds, and have virtual experiences. In the third order of simulation, the model precedes the real because there is no referent for the

¹¹⁰ *Id.*

¹¹¹ RICHARD J. LANE, JEAN BAUDRILLARD 30 (2000); Brian F. Fitzgerald, *Software as Discourse: The Power of Intellectual Property in Digital Architecture*, 18 CARDOZO ARTS & ENT. L.J. 337, 357 (2000).

¹¹² LANE, *supra* note 111, at 30.

¹¹³ JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 86 (Sheila Faria Glasner trans. 1994) (1981) [hereinafter SIMULACRA].

¹¹⁴ LANE, *supra* note 111, at 86.

¹¹⁵ *Id.* at 30.

¹¹⁶ SIMULACRA, *supra* note 113, at 1-3.

¹¹⁷ LANE, *supra* note 111, at 86-87.

¹¹⁸ SIMULACRA, *supra* note 113, at 12.

¹¹⁹ LANE, *supra* note 111, at 30.

real.¹²⁰ Baudrillard finds little difference between the virtual worlds created in the computer realm and the real world in which we live. The representations and models that construct our understanding of the world, largely through mass media, are really just simulations without an original.¹²¹ The difference between virtual and “real” is more slight than most would expect. Given the various cultural filters through which information is interpreted in modern America, the ability to know what is “real” is often quite difficult. For Baudrillard, the various obstacles to accessing the “real” render it a simulated world of the third order.

To the lay Baudrillard reader encountering such ideas for the first time, these concepts probably seem a bit unusual. Some of this is surely due to the condensed nature of these explanations, in addition to the varying analyses of Baudrillard’s work. Baudrillard’s writing vacillates between the literal and performatively provocative.¹²² As a result, there are often concepts that appear to be more extreme and less serious than many readers take them to be.¹²³ This has resulted in numerous misinterpretations and misreadings of his scholarship,¹²⁴ even by people known as Baudrillard scholars.¹²⁵

For now, this Article seeks to take Baudrillard on his own terms so as to use his tools to explore concepts of representation.¹²⁶ Engaging in a

¹²⁰ Maria Grahn-Farley, *The Law Room: Hyperrealist Jurisprudence & Postmodern Politics*, 36 NEW ENG. L. REV. 29, 45-46 (2001).

¹²¹ Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 668 (2004); Heather Lauren Hughes, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237, 239 (1998).

¹²² LANE, *supra* note 111, at 97.

¹²³ *Id.*

¹²⁴ GRACE, *supra* note 108, at 31.

¹²⁵ Douglas Kellner fits within this category. While recognized as a Baudrillard scholar, he spends most of his time attacking Baudrillard’s work based on his rather peculiar, science-fiction type reading of Baudrillard. His attacks have probably unfairly discredited Baudrillard, but are nonetheless taken as credible because he is viewed as an authority on Baudrillard. *See id.* at 33-34.

¹²⁶ It is also important to realize that Baudrillard’s ideas about simulation are ethically neutral. That is, for Baudrillard, hyperreality is becoming the natural order of things in American society, but that transformation is not a “good” or “evil” process. LANE, *supra* note 111, at 100. This is in contrast to similar theories, like Guy Debord’s conception of the spectacle being the defining event for a modern world. For Debord, spectacles are something to be challenged and resisted. *Id.* For Baudrillard, simulation just is—there is no way to go back to what was before, so it is foolish to try. *Id.* Further, the statement that we cannot access the real does not negate the existence of “real” suffering and “real” horror. Nicholas Spencer, *The “Law” of Simulated War in Gravity’s Rainbow*, 24 OKLA. CITY U. L. REV. 681, 695 (1999).

thought experiment of Baudrillard's design can help to highlight the quandaries and paradoxes of rape law. By adopting Baudrillard's perspective for at least a little while, we can see how performance substantially interacts with criminal law.

B. Baudrillard's Thought Experiment

In *Simulacra and Simulations*, Jean Baudrillard offers a story and a strategy to reveal that law and order are just systems of third order simulation.¹²⁷ Baudrillard has identified a resistance strategy of hyper-simulation.¹²⁸ By following the simulation to its logical endpoint, the hyper-simulator demonstrates a fatal flaw in the design of the larger simulation structure.¹²⁹ In this instance, Baudrillard uses the example of an armed robbery to expose the illusory nature of law's grip on reality.¹³⁰ He argues that a hyper-simulated robbery, where all the events appear to be real, but are only simulated, can challenge the simulation of law in modern societies.¹³¹ Below is the thought experiment from Baudrillard. Baudrillard is not a lawyer and does not have any legal training, but he does offer a fairly accurate assessment of how most Western legal systems would react to an attempt to simulate an armed robbery. Without understanding concepts like "intent" and "mens rea," Baudrillard is nevertheless able to give a plausible narrative about how a simulated robbery would be received by a criminal justice system.

This Article attempts to replicate the example by applying the story to a fact pattern of a hypothetical rape. The stories are rather long, so they are side-by-side below to make the narratives easier to compare. In the left column is Baudrillard's original story of a simulated armed robbery. In the right column is my version of a simulated rape.

For example: it would be interesting to see whether the repressive apparatus would not react more violently to a simulated holdup than to a real holdup. Because the latter does nothing but disturb the order of things, the right of property,

For example: it would be interesting to see whether the repressive apparatus would not react more violently to a simulated rape than a real rape. Because the latter does nothing but disturb the order of things, the right of sexual consent,

¹²⁷ SIMULACRA, *supra* note 113, at 20.

¹²⁸ *Id.* at 19-27.

¹²⁹ *Id.*

¹³⁰ *Id.* at 20-21.

¹³¹ *Id.* at 19-27.

whereas the former attacks the reality principle itself. Transgression and violence are less serious because they only contest the distribution of the real. Simulation is infinitely more dangerous because it always leaves open to supposition that, above and beyond its object, law and order themselves might be nothing more than simulation.

But the difficulty is proportional to the danger. How to feign a violation and put it to the test? Simulate a robbery in a large store; how to persuade security that it is a simulated robbery? There is no “objective” difference: the gestures, the signs are the same as for the real robbery, the signs do not lean to one side or another. To the established order they are always of the order of the real.

Organize a fake holdup. Verify that your weapons are harmless, and take the most trustworthy hostage, so that no human life will be in danger (or one lapses into the criminal). Demand a ransom, and make it so that the operation creates as much commotion as possible—in short, remain close to the “truth,” in order to test the reaction of the apparatus to a perfect simulacrum. You won’t be able to do it: the network of artificial signs will become inextricably mixed up with real elements (a policeman will really fire on sight; a client of the bank will faint and die of a

whereas the former attacks the reality principle itself. Transgression and violence are less serious because they only contest the distribution of the real. Simulation is infinitely more dangerous because it always leaves open to supposition that, above and beyond its object, law and order themselves might be nothing more than simulation.

But the difficulty is proportional to the danger. How to feign a violation and put it to the test? Simulate a rape in a private, but visible location; how to persuade the police that it is a simulated rape? There is no “objective” difference: the gestures, the signs are the same as for the real rape, the signs do not lean to one side or another. To the established order they are always of the order of the real.

Organize a fake rape. Verify that your weapon is harmless, use a willing partner as the simulated victim, so that consent is not an issue (or one lapses into the criminal). Demand every perversion your partner wants, and make it so the operation creates as much commotion as possible—in short, remain close to the “truth,” in order to test the reaction of the apparatus to a perfect simulacrum. You won’t be able to do it: a network of artificial signs will become inextricably mixed up with real elements (the police will really threaten you with their

¹³² SIMULACRA, *supra* note 113, at 20-21.

heart attack; one will actually pay you the phony ransom), in short you will immediately find yourself once again, without wishing it, in the real, one of whose functions is precisely to devour any attempt at simulation, to reduce everything to the real—that is, to the established order itself, well before institutions and justice come into play.

It is necessary to see in this impossibility of isolating the process of simulation the weight of an order that cannot see and conceive of anything but the real, because it cannot function anywhere else. The simulation of an offense, if it is established as such, will either be less severely punished (because it has no “consequences”) or punished as an offense against the judicial system (for example if one sets in motion a police operation “for nothing”)—but *never as a simulation* since it is precisely as such that no equivalence with the real is possible and hence no repression either.¹³²

weapons; a witness may tackle and attack you; your partner will actually stop struggling because of your threatening demands), in short you will immediately find yourself once again, without wishing it, in the real, one of whose functions is precisely to devour any attempt at simulation, to reduce everything to the real—that is, to the established order itself, well before institutions and justice come into play.

It is necessary to see in this impossibility of isolating the process of simulation the weight of an order that cannot see and conceive of anything but the real, because it cannot function anywhere else. The simulation of a rape, if it is established as such, will not be punished because, as a simulation, it is welcomed and encouraged by the real. The very essence of a defense strategy is just to argue that the rape was not “real,” but was just a simulation of rape. Thus, the system of simulation cannot be resisted through a hyper-simulation approach.

The critical difference between Baudrillard’s example and the rape narrative is in the way each crime is treated by the criminal justice system. A simulated robbery, though not appearing objectively different from the real robbery, may still contain “artificial signs.” The hypothetical defendants in such a case raise a jury question that is not easily handled by modern justice systems: what happens if the defendants were just faking it? If they can actually show everyone was “in” on the robbery, then what crime has taken place? Under American law, the defendants in a simulated armed robbery would lack the necessary *mens rea* for a crime of armed robbery. Hyper-simulation of robbery, within Baudrillard’s paradigm, is an oppositional, resistance strategy because it can expose law’s limited ability to access the real intent of the parties. According to Baudrillard, though a

hyper-simulated robbery may “be punished for either falling short of success or being too successful,” it will not be punished for “being a simulation itself.”¹³³ There is no crime for simulating a robbery and if the crime was truly simulated, the defendants would have no intent to commit robbery. Hyper-simulation of a crime “leaves open the supposition that, above and beyond its object, *law and order themselves might be nothing but simulation.*”¹³⁴

Whereas a simulated robbery may be distinguished from a real robbery, the simulated rape story is indistinguishable from the average simple rape as presented to a jury. That is, the defense strategy in most rape cases is to argue that the rape was simulated. Defense attorneys do not use the term “simulated,” but when they say “it was just rough sex” or “bruises are normal,” they are saying the rape was only an illusion, a facsimile, a copy, a *simulation*. While a defense lawyer may never have heard of Jean Baudrillard, he or she is effectively engaging in a strategy identified by Baudrillard: hyper-simulation. Hyper-simulation is commonplace in simple rape trials. Hyper-simulation cannot offer a method for exposing fallacies of rape law, because it is already part of the process. Understanding why rape and robbery are different in this regard is crucial to understanding some of the unique representational problems in rape law.

Simulated crimes are rare, or nonexistent, but the possibility of a simulated crime gives us a window into understanding how intent standards are problematic in Western law systems. Reading someone’s mind, as intent rules attempt to do, is often a difficult undertaking for fact-finders. When the accused tries to problematize the very concept of intent (as in the simulated armed robbery case), there is a troubling epistemological gap for a fact-finder to overcome. While such cases of simulation do not really exist, the problem at the margins of a defendant who does not easily fit into the categories of “intended to do it” and “did not intend to do it” is illustrative of deeper problems of criminal law.

IV. THE BURDEN OF PERFORMANCE

Many scholars have characterized a rape trial as a trial of the accuser¹³⁵ to emphasize the ordeal the complainant must survive before, during, and after a trial. The label of “trying the victim” is also meant to emphasize the ways in which an accuser has her sexual history brought before the jury, even when rape shield laws are in place, while the defendant does not have to go through a similar ordeal.¹³⁶ There is,

¹³³ LANE, *supra* note 111, at 123.

¹³⁴ SIMULACRA, *supra* note 113, at 20.

¹³⁵ See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094 (1986).

¹³⁶ CONLEY & O’BARR, *supra* note 55, at 17.

however, an important way in which complainants are tried in rape cases, beyond the usual methods described. Accusers carry an extra burden above and beyond most victims of crime: the burden of performance.

The burden of performance is the difficulty witnesses have in persuading a jury by the force of their testimony. The persuasion that takes place is not based on logic or reason. Rather, it depends on the ability of the witness to define her character role and provide a cogent story with fidelity to the jury.¹³⁷ To successfully overcome the burden of performance the narrative must fit within the script of the trial and the larger rape meta-narratives.¹³⁸

In the normal and simulated robbery trials, the burden of proof is on the prosecutor. In the simulated robbery trial, a burden of performance also lies on the defendant. The defendant must persuade a skeptical jury that he or she was actually simulating an armed robbery despite the large array of physical evidence linking him or her to the crime. However, the robber will be able to point to other evidence to corroborate his or her defense. Evidence of planning the simulation, guns without ammunition, and testimony from the simulated hostage all serve to corroborate the defendant's unusual tale. The defendant must persuade the jury that the crime was not "real," but only a simulation. The burden of performance is squarely upon the simulated robber as his or her story is likely to be against the accepted tales of how robberies occur in the real world.

In a trial for a simulated rape, the burdens are a bit different. The burden of proof is still, as always, on the prosecution. However, in the average simple rape trial, the burden of performance is on the accuser and the prosecution.¹³⁹ The accuser must prove that the rape was "real" and that there was no consensual sex or simulated rape. With only two witnesses to the alleged crime, the accused and the accuser, the accuser must establish what can rarely be proven beyond a reasonable doubt. The trial usually revolves around a single event of which there is almost never any visual or audio record. Physical evidence is often limited to issues of whether there was an exchange of bodily fluids and does not usually weigh on the issue of consent.¹⁴⁰ In cases where the complainant ultimately submitted to avoid further harm, there is unlikely to be any corroborating bruises or injury. If there is evidence of physical harm from a rape kit, it may not fully counter a defense strategy describing the alleged rape event as "rough," but ultimately, consensual sex. The defense can always argue that the rape was

¹³⁷ TASLITZ, *supra* note 7, at 15.

¹³⁸ *Id.* at 7-8.

¹³⁹ There are exceptions, as noted earlier, when a bullying and/or black beasts narrative is utilized by the prosecution.

¹⁴⁰ SCHULHOFER, *supra* note 8, at 25-27.

simulated in that the accuser either wanted or did not object to manhandling and the use of some force. The evidence can color the jury's assessment of the competing narratives about the alleged rape event, but a credibility determination is an essential part of almost every rape trial jury verdict.¹⁴¹ As a result, oral testimony is the lens through which jurors attempt to access and comprehend the happenings of an alleged rape event.

As explained earlier, the performance is also gender-based. The accuser must perform within a limited selection of roles and according to the scripts defined by culture. When someone is painted into a defined position, and the number of "good" alternatives is limited, escape from the larger narrative is difficult. Accusers remain "vengeful" or "whores" no matter what the prosecutors do in an effort to rehabilitate credibility. The different roles often create a double bind for complainants. If they cannot justify their reactions in a cold, logical manner, they are seen as flighty or unstable, and thus, unreliable.¹⁴² If, however, they appear too confident and aware, they may be seen as gold-digging, hoping to seek damages in a subsequent civil suit, especially if the defendant is wealthy.¹⁴³ Only in those instances when the prosecution can utilize other rape myths like black beasts can she fit a role amenable to a conviction. Consequently, the accuser is forced to overcome a very high threshold to prove that the defendant raped her and that the sex was not consensual. Even though the defendant is the one arguing that the rape was simulated, the jury is more likely to believe the story of simulation than in the robbery case.

The accuser's performance is complicated by the differences between "real" rape and "simple" rape. Real rapes entail a higher burden in proving the alleged rape event was consensual, because there is a less developed rape myth structure about an accuser's willingness to have sex with a stranger. In such cases, many strangers deny the encounter even occurred, causing physical evidence to play a greater role. Although real rape garners the most media attention, simple rape is far more common.¹⁴⁴ In fact, the myth that real rape is the norm actually increases jury skepticism of accusers who allege simple rape.¹⁴⁵ For the overwhelming majority of cases, especially those that culminate in a trial, consent is the focal point for the defense strategy. Proving a reasonable doubt as to the accuser's non-consent is a much easier burden to meet than denying that penetration actually occurred. The result is that the accuser bears the entire burden of performance in a rape trial and must do everything in her power to

¹⁴¹ *Id.* at 10.

¹⁴² CONLEY & O'BARR, *supra* note 55, at 32.

¹⁴³ *Id.*

¹⁴⁴ MATOESIAN, *supra* note 29, at 7-8.

¹⁴⁵ *Id.* at 13.

overcome the idea of simulation, gender stereotypes, roles, and scripts being deployed by the defense.

The burden of performance is made even more difficult by certain linguistic defense strategies. There are no neutral language choices that can be made by the complainants during a rape trial.¹⁴⁶ Even the statement of “no” in opposition to a would-be rapist is filtered through cultural and linguistic assumptions that render it indeterminate in meaning.¹⁴⁷ Not only do accusers face the well-known bromide that “no sometimes means yes,” they must also confront more subtle dismissals of “no” meaning no.¹⁴⁸ Empirical evidence shows that unless the “no” is repeated and accompanied by physical resistance, it is unlikely to be believed.¹⁴⁹ Further, depending on what non-neutral meaning jurors ascribe to “normal sex,” they will reach very different interpretations of what rape is.¹⁵⁰ Because a common cultural belief holds that “playing hard to get” is “normal sex,” any of the jurors may refuse to vote to convict because of a strong belief in forceful seduction.¹⁵¹ There are also significant gender gaps in determining what constitutes a threat of force.¹⁵² Deciding what constitutes force and what force is sufficient to make someone fearful enough to acquiesce is a problem of language, and how jurors interpret those concepts is important to the final verdict. Interpreting communication at the time of rape is even more problematic when viewed from a performative perspective.

Because of the heavy dependence on oral testimony in a rape trial, language shapes and determines how jurors visualize and interpret the alleged rape event.¹⁵³ Defendants in rape cases often deploy language to create narratives that paint them as victims of sexual aggression. Susan Ehrlich calls this rhetorical move the “grammar of non-agency.”¹⁵⁴ When the accused adopts this linguistic strategy, he engages in passive voice retellings in order to attribute greater responsibility to the accuser.¹⁵⁵ The

¹⁴⁶ MATOESIAN, *supra* note 29, at 1-2.

¹⁴⁷ EHRlich, *supra* note 79, at 29.

¹⁴⁸ *Id.*

¹⁴⁹ George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About “No,”* 61 U. PITT. L. REV. 579 (2000).

¹⁵⁰ EHRlich, *supra* note 79, at 29.

¹⁵¹ *Id.*

¹⁵² SCHULHOFER, *supra* note 8, at 78-79.

¹⁵³ EHRlich, *supra* note 79, at 37.

¹⁵⁴ *Id.* at 38.

¹⁵⁵ *Id.* at 40.

accused is portrayed as being attacked by someone with an agenda, be it money, sex, or whatever post hoc rationalization fits the facts of the case. The accused is often said to just lay prone to the accuser initiating sex.

Defense lawyers facilitate the process by framing questions to allow the defendant to talk about his experience in non-agency terms. The goal is to make the accused appear as a passive object rather than a “strategic and active” subject.¹⁵⁶ This framing process fits neatly with the defense attorney’s attempts to revive notions of the utmost resistance standard.¹⁵⁷ When a defendant is portrayed as a simple object in the recounting of the alleged rape event, the role of the active subject falls to the accuser. Thus, the failure of the accuser to actively resist during the rape event becomes a serious liability in the eyes of jurors. She is portrayed as the agent in control of the alleged rape event. Her failure to fight back with utmost resistance becomes a linguistic reality even when it is not a legal one.

The door to further questioning of the accuser also opens once she is the linguistic subject in the narrative of the rape event.¹⁵⁸ Why didn’t she yell out for help? Why didn’t she run away when she had the chance? Why did she go up to his apartment? Why did she kiss him if she did not mean it as an overture for sex? Why did she wait to report the crime?¹⁵⁹ The questions become endless and eventually present an insurmountable burden when the agency of the parties is switched by the defense strategy. Any potential misstep by the subject/accuser is portrayed as a fault that exonerates the object/accused. The passive accused is little more than a prop in the story conveyed to the jury. In contrast, the active role assumed by the accuser creates an image of a person with a wide array of options that she failed to explore. At least one study has shown that retellings of sexual violence stories with passive language ascribed to the attacker make the audience less likely to ascribe fault to the attacker and more to the accuser.¹⁶⁰

The accusers become agents in the defense narrative, but more importantly they are portrayed as “ineffective agents” who must be blamed for their failings.¹⁶¹ This final move, where the accuser is denied justice and is blamed for her own suffering, completes the patriarchal deterrence strategy. Rape victims are not only told that they are not due any recourse

¹⁵⁶ *Id.* at 63.

¹⁵⁷ *Id.* at 65-66.

¹⁵⁸ *Id.* at 79.

¹⁵⁹ CONLEY & O’BARR, *supra* note 55, at 17.

¹⁶⁰ EHRlich, *supra* note 79, at 40.

¹⁶¹ *Id.* at 95.

through the criminal justice system, but also that they are getting their “just desserts” for failing to be the ideal active subjects. In such a world, it should not be surprising to find that most rapes go unreported.

Even when defendants are unable to adopt a purely passive role because of other evidence, they can use a variation on the theme to accomplish the same goal. Defendants can utilize the myth that men are controlled by their sexual urges and that the defendant was unable to control his biological impulses.¹⁶² This type of argument fits very well with the assertion that the accuser was a “tease” who should have known not to prey on the defendant’s urges. This pattern of shifting responsibility from the defendant to the complainant is accomplished even without an explicit passive/active role reversal.

Again, the contrast with the robbery trial is remarkable. An attempt to portray the defendant as a passive object is unlikely to accomplish anything in front of the jury. The defendant’s performance in a robbery trial is unrelated to gender and probably only bears on issues of truthfulness. Claims that a bank left itself open to be robbed by maintaining limited security will not persuade a jury that the defendant is not culpable. That the bank could have taken numerous precautions or stored less money on-site is irrelevant as a matter of law. The victims of robbery do not have to show that they tried their hardest to resist the efforts to steal money. In fact, a bank may well be praised for turning over its assets without resistance in order to protect the lives of customers and employees.

Of course, the purpose of the American system of adversarial justice is such that truth is found between competing narratives of the alleged rape event described to the jury. This idyllic formulation of the means by which criminal trials operate requires a prosecutor to combat the narrative constructed by the defense. Under most areas of law, this position seems defensible. In the context of rape trials, however, certain linguistic and legal obstacles heavily privilege the defense’s narrative strategy and ensure that juries overwhelmingly adopt the defendants’ versions of the alleged rape event. The utmost resistance standard historically allowed judges to admit evidence and arguments that permitted juries to insert their own prejudices and conceptions of gender identity. No matter which of the current or proposed frameworks our justice system adopts for adjudicating rape trials, the result is the same: accusers become social constructions of the jury. In such a world, the prosecutors have little room to push juries toward more progressive and feminist notions of gender. The defense strategy is one that fits neatly with most traditional, patriarchal perspectives on rape law that are found within the jury.

The end product of the burden of performance is not unlike that of the “*CSI* effect” that some have argued has raised juror’s expectations in

¹⁶² *Id.* at 57.

many cases.¹⁶³ Because of television shows like *CSI*,¹⁶⁴ some scholars believe that jurors have come to expect significant forensic evidence that most lawyers are unable to deliver.¹⁶⁵ Jurors expect definitive answers on many basic questions at a trial.¹⁶⁶ The fact that *CSI* and other shows are entirely fictional has not discouraged jurors from applying expectations based upon their television viewing onto real-life trials.¹⁶⁷ In a system of justice that uses a standard of guilt of beyond a reasonable doubt, such barriers all but assure an incredibly low percentage of rape reports actually result in rape convictions or pleas.

Whatever the source of these myths and narratives, their effect is real in creating a heavy burden of performance on the accuser in rape trials. To assess the impact of the burden of performance can be a difficult endeavor for a jury. Nonetheless, some measure of performance is essential for understanding the problems of performance at a rape trial.

V. MEASURING THE BURDEN OF PERFORMANCE

Assessing performances in a non-legal environment is inherently problematic. Taste and perspective render almost any attempt to objectively evaluate the quality of a performance an extremely difficult task. In a courtroom environment, however, the value of a performance is assessed by one simple factor: the verdict. While the jury's decision is not an objective criterion, it is the only one that matters when evaluating courtroom performances.

The concept of gender in performance creates an array of difficulties in the mediation of messages to the jury. The accuser must compete with preexisting notions of gender roles and of sexual violence.¹⁶⁸ The accused may sometimes utilize the strategic advantage of rape myths found in mainstream society.¹⁶⁹ Reality in a rape trial is an event mediated through language such that witness testimony, arguments by lawyers, and decisions by judges and juries cannot be understood without an appreciation

¹⁶³ Janine Robben, *The 'CSI' Effect: Popular Culture Finds the Justice System*, 66 OR. ST. B. BULL. 8, 9 (2005).

¹⁶⁴ *CSI* (CBS).

¹⁶⁵ Robben, *supra* note 163.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 11. See also Richard Willig, 'CSI Effect' Has Juries Wanting More Evidence, USA TODAY, Aug. 5, 2004, at A1.

¹⁶⁸ See *supra* notes 63-101 and accompanying text.

¹⁶⁹ TASLITZ, *supra* note 7, at 44-57.

of rhetoric and performance.¹⁷⁰ As Brenda Danet has explained, “[w]hen the meaning of an act is ambiguous, the words we choose to talk about it become critical.”¹⁷¹

This Article isolates two important areas of measuring performance. First, because of the sheer volume of rape narratives, stories, and imagery present in American culture, desensitization among the public and psychological dissociation between the complainant and jurors are legitimate sources of concern. Second, the defendant’s performance is often able to access the myth of rape as pornography in order to appeal to the jury’s prurient interest. These concepts represent measures of performance because of media saturation of rape and pornography stories and images. Each of these phenomena is discussed *infra*.

A. Desensitization and Dissociation

When a concept is over-signified in society, its impact on the listener continually decreases.¹⁷² The problem for rape advocacy groups and prosecutors is no longer that rape is invisible to the public at large. Rather, rape is visible all too often in the news, in fictional stories, in real crime stories, in movies, and on television. Rape trials themselves are important media events that disseminate a wide array of fact patterns to the American public.¹⁷³ The problem of underrepresentation in the 1960s and 1970s¹⁷⁴ has slowly been replaced with overrepresentation. In a world where rape and violence are constantly represented and re-represented, there can be no blank slate from which to educate a juror about sexual violence.¹⁷⁵ While there was certainly never a juror who was an empty vessel, the degree to which Americans have been constructed concerning rape is astounding.

¹⁷⁰ EHRlich, *supra* note 79, at 36. While the critique in this Article is performative and rhetorical in nature, it does not mean that there are no policy ramifications to these arguments. Unlike some radical scholarship, including Baudrillard’s, this is not meant to argue that reality does not exist independent of language, nor does it support the belief that reality is inaccessible.

¹⁷¹ Brenda Danet, ‘Baby’ or ‘Fetus’?: *Language and the Construction of Reality in a Manslaughter Trial*, 32 SEMIOTICA 187, 189 (1980).

¹⁷² Jean Baudrillard, *The Violence of the Image*, <http://www.egs.edu/faculty/baudrillard/baudrillard-the-violence-of-the-image.html> (last modified July 10, 2005) [hereinafter *Violence of the Image*].

¹⁷³ CUKLANZ, *supra* note 11, at 48.

¹⁷⁴ See SCHULHOFER, *supra* note 8, at 2.

¹⁷⁵ *Violence of the Image*, *supra* note 172.

Even when the messages are transmitted as fiction, their effects are significant in forming social attitudes about rape.¹⁷⁶ In fact, fictionalized stories often personalize and dramatize the issues surrounding rape as to render them more powerful in shaping societal attitudes.¹⁷⁷ The characters can be portrayed in paper-thin stereotypical fashion to fit whatever passions the story creators wish. The result is a story thoroughly disconnected from “real” rape events, but with emotional potency that can engender a strong emotional response in the audience.

The endless saturation of messages and images creates an inherent ambiguity and indeterminacy of meaning such that ideology guides the audience to choose what it wants to hear.¹⁷⁸ Each juror in a rape trial has substantial life experience watching fictionalized rape and consensual sex through every form of media. However, mainstream media has barely noticed alternative perspectives and voices regarding sexual violence.¹⁷⁹ When they do appear, they are constrained by the dominant narratives surrounding rape and sexual assault.¹⁸⁰ Jurors must mediate performances on the witness stand through media depictions regarding rape. If any member of the jury has seen the extremely graphic rape of Monica Belluci’s character, Alex, in *Irreversible*,¹⁸¹ that will shape the juror’s assessment of what rape looks like. If they watch *Law & Order*,¹⁸² *CSI*, or any of the numerous crime and lawyer programs that pepper the airwaves, a jury’s understanding of rape and its treatment in the criminal justice system will have been affected. Any juror would surely have read newspaper and magazine accounts of any number of actual rape stories. They may well know of lurid tales of false allegations of rape. Perhaps they know the story of the rape in Big Dan’s Tavern through news accounts or the Jodie Foster movie, *The Accused*,¹⁸³ that was inspired by the story.¹⁸⁴ Moreover, television movies-of-the-week have dramatized rapes and rape trials in a way that has further blurred the distinction between fact and fiction.¹⁸⁵

¹⁷⁶ TASLITZ, *supra* note 7, at 8.

¹⁷⁷ CUKLANZ, *supra* note 11, at 85.

¹⁷⁸ SIMULACRA, *supra* note 113, at 17.

¹⁷⁹ EHRLICH, *supra* note 79, at 119.

¹⁸⁰ *Id.*

¹⁸¹ IRREVERSIBLE (Lions Gate Films 2002).

¹⁸² *Law & Order* (NBC).

¹⁸³ THE ACCUSED (Paramount Pictures 1988).

¹⁸⁴ CUKLANZ, *supra* note 11, at 10.

¹⁸⁵ *Id.* at 85.

There are also significant historical tales of rape that shape public attitudes. The biblical tale of Potiphar's wife, who falsely claimed Joseph raped her as revenge for his rejecting her, demonstrates that rape myth stories have a long history in Western culture.¹⁸⁶ As Taslitz has observed, the negative portrayals of women that give rise to rape myths can even be found in children's stories such as *Peter Pan*.¹⁸⁷ In the well-known story, Tinkerbell's (sexual) jealousy drives the fairy to lie in an attempt to kill Peter's girlfriend Wendy.¹⁸⁸ This sexual jealousy myth appears in many defense strategies that portray an accuser as manufacturing a false complaint.

Unfortunately, mainstream media has not balanced rape myth stories with feminist arguments. There has been very little effort to integrate rape reform arguments into the dominant discourse.¹⁸⁹ The focus on stories about individuals, as opposed to complex systems and institutions, all but assures that feminist notions of rape are not broadcast to the public.¹⁹⁰ Reformer narratives cannot be easily distilled into forms ready made for television, movies, and other mainstream media. As a result, the emphasis in media has been on real rape and the subtleties of feminist ideas have not been disseminated sufficiently to the mass audience.

The net effect of this saturation of rape imagery is not positive for victims. The results of the over-signification of rape images and stories are similar to the effects that have been observed in media portrayals of disaster and relief aid, as the next section will discuss. Rape reformers can gain important insights by examining the communication dynamics at play in these areas.

1. Disaster Pornography

Disaster pornography is the manner in which media portrays famine, disease, war, and other natural disasters. The primary critique of disaster images is that they sensationalize victims of disaster in ways that are similar to pornography's exaggeration of sex.¹⁹¹ When a child suffering from starvation in Africa is photographed crouched on the ground, covered in flies, and with a large swollen belly, a particular series of messages is

¹⁸⁶ TASLITZ, *supra* note 7, at 8.

¹⁸⁷ *Id.* at 8; J.M. BARRIE, *PETER PAN* (1911).

¹⁸⁸ TASLITZ, *supra* note 7, at 8.

¹⁸⁹ CUKLANZ, *supra* note 11, at 32.

¹⁹⁰ *Id.* at 50.

¹⁹¹ SUSAN D. MOELLER, *COMPASSION FATIGUE: HOW THE MEDIA SELL DISEASE, FAMINE, WAR AND DEATH* 35-36 (1999).

conveyed to the audience.¹⁹² When images of the starving child are played and replayed, a construction of famine is transmitted to the West. This conception has certain hyperreal elements that make the suffering of the children “more real than the real.”¹⁹³ The media’s use of the iconic starving child lacks nuance and understanding of famine, but it creates a conception of “famine” that has all the trappings of the real event.

Although there are no images of local warlords blocking food distribution, explanations of how broken economies undermine crop development efforts, videos of localized efforts to restore agricultural production to the area, or an understanding of any of the factors that created the famine, there is a clear and powerful image of what famine means. The lack of detail, meaning, or any “real” understanding is unimportant because the images often accomplish exactly what they are intended to do: they sell newspapers, they result in increased donations, and they shock the audience. Two human rights workers offered this account of the media’s creation of disaster pornography:

Somali doctors and nurses have expressed shock at the conduct of film crews in hospitals. They rush through crowded corridors, leaping over stretchers, dashing to film the agony before it passes. They hold bedside vigils to record the moment of death. When the Italian actress Sophia Loren visited Somalia, the paparazzi trampled on children as they scrambled to film her feeding a little girl—three times. This is disaster pornography.

Reduced to nameless extras in the shadows behind Western aid workers or disaster tourists, the grieving, hurting and humiliated human beings are not asked if they want to be portrayed in this degrading way.¹⁹⁴

While disaster pornography has been identified in the context of starvation and famine, any disaster may suffice for media manipulation. The 2004 tsunami affecting Asia revived the notion of disaster pornography as the West was constantly barraged with images depicting the destruction and suffering caused by tidal waves.¹⁹⁵ Similarly, Hurricane Katrina created an

¹⁹² *Id.* at 35.

¹⁹³ JEAN BAUDRILLARD, *SEDUCTION* 29 (Brian Singer trans., New World Perspectives ed., 1990) (1979) [hereinafter *SEDUCTION*].

¹⁹⁴ Rakiya Omaar & Alex de Waal, *Disaster Pornography from Somalia*, 61 *MEDIA & VALUES* (1993), available at http://www.medialit.org/reading_room/article105.html.

¹⁹⁵ Miles Kemp, *Refugee Question Won't Go Away*, *ADVERTISER*, Jan. 10, 2005, at 18.

onslaught of media coverage that sensationalized the horror and resulted in more disaster porn for America to view.¹⁹⁶ In the end, the signs that compose disaster pornography are simulations of Baudrillard's third order—they are copies with no originals. While they are “real” disasters, the images and ideas propagated by the media are something else. Snippets are carefully connected, orchestrated into a larger package, and played and replayed in order to construct a social understanding of disasters.

The effects of disaster pornography are twofold. First, compassion fatigue becomes prominent in the audience because of repeated viewings of disaster pornography.¹⁹⁷ A more common term for this phenomenon is “overexposure.” When the public becomes tired of seeing the most graphic and horrifying images, it often exhibits desensitization whereby future images of suffering do not hold the same resonance as the first, carefully selected, shocking images. In international fundraising efforts, this means support for various crises eventually dwindles.¹⁹⁸ When the next great disaster comes, it has to surpass the previous disaster or hold some other unique property to avoid being just another disaster. An average hurricane or tornado hardly registers in the American public's consciousness because it has been overdone. After Katrina, hurricane Rita was an unimpressive sequel.¹⁹⁹ Unless there are record winds, unusual threats to celebrities, or especially unique images, the story will not be widely distributed because it lacks the same effect as the last time it was reported.²⁰⁰

It is important to distinguish this theory from the commonly debated notions of desensitization in areas like television violence. Unlike arguments that television violence desensitizes children so they are more apt to engage in acts like those depicted on the screen,²⁰¹ the theory of disaster pornography is subtler. Rather than trying to replicate the acts on the screen, the viewer of disaster pornography becomes numb to suffering.²⁰² This theory of numbing as a result of exposure to horrific imagery examines a weaker effect than that proposed by television studies, which aims to show total desensitization. As will be discussed below, there

¹⁹⁶ Duncan Black, *How High's the Water, Papa?*, HOTLINE, Aug. 31, 2005.

¹⁹⁷ MOELLER, *supra* note 191, at 37.

¹⁹⁸ *Id.*

¹⁹⁹ *Showbiz Tonight: Is it too Soon to Joke about Katrina?*, (CNN television broadcast Sept. 28, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/28/sbt.01.html>.

²⁰⁰ MOELLER, *supra* note 191, at 37-38.

²⁰¹ See generally Stephen J. Kim, “Viewer Discretion is Advised”: A Structural Approach to the Issue of Television Violence, 142 U. PA. L. REV. 1383 (1994).

²⁰² MOELLER, *supra* note 191, at 35-37.

is substantial psychological evidence to show this that the numbing theory is typified in disaster pornography.

A second related concern with disaster pornography is that the shocking images create a dissociative effect between the audience and those suffering.²⁰³ This disconnect occurs in part because of mass media's one-way style of communication. Viewing a television or reading a magazine does not afford a viewer or reader the chance to interact with those suffering, or even those who have reported the disaster. This media distancing is not unlike that experienced by an audience watching a movie or a play.²⁰⁴ The viewer may yell at the actress to turn around before the monster attacks her, but no one is listening to the plea from the audience. In disaster pornography the media selects images that create a complex relationship between the victim and the viewer. The starving child is often picked to look with sad eyes directly into the camera, and as a result, at the viewer. Whereas watching a murder on television removes our subjectivity by rendering us passive in changing the outcome, disaster pornography simultaneously places the audience as an object viewing the horror and a subject capable of changing the outcome. This complex relationship, according to Slavoj Žižek, causes the audience to distance itself from the disaster pornography in the same way that it removes itself from the events in a fictional story.²⁰⁵ Seeing the suffering child in Africa staring through the television creates a psychological need in the audience to pretend that the event is not really happening as a means to cure the guilt and confusion from the symbolic relationship with the disaster victim.²⁰⁶

2. Rape as Disaster Pornography

While it may not be wholly apparent, there are several important similarities between the constructions of disasters and rape. Rape trials are an important communication event where rape stories are shaped by the media's construction of the concepts of gender and sexual violence. Like a disaster, rape is an event that jurors often have learned about through one-way media, fictional stories, and images created for dramatic effect. Because of such similarities, it is not hard to see how compassion fatigue or dissociation can occur and increase the burden of performance on the accuser.

²⁰³ *Id.* at 38-39.

²⁰⁴ JENNY EDKINS, WHOSE HUNGER?: CONCEPTS OF FAMINE, PRACTICES OF AID 113 (2000).

²⁰⁵ *Id.* at 114-15.

²⁰⁶ *Id.*

A person who is on the witness stand telling her story of rape does not just have to convince the jury that she is telling the truth. Instead, because of the desensitization effect, she has to compete with every movie, television program, book, magazine, newspaper, and website depicting rape or consensual sex that any of the twelve jurors has ever seen. If her story does not measure up to the jury's high standards as constructed by years of mass media inculcation of rape imagery, then the defendant will walk free. Each fictionalized account of rape normalizes and naturalizes rape in a way that makes potential jurors numb from the repetitive experiences.²⁰⁷

Traditional feminist critiques of media depictions of rape have focused on cases where the media message is patriarchal.²⁰⁸ Usually this occurs where the person raped is portrayed as being a guilty party or when rape is romanticized as what a "woman wants."²⁰⁹ The disaster pornography and desensitization argument is concerned with the flipside of the existing critique—repeated viewing of graphic rape images, even those with limited patriarchal connotations, can create the same pernicious effects as disaster pornography.

The images of the especially graphic and shocking rapes in mass media create a standard that is too high for most accusers to meet in front of a jury already confronted with conflicting accounts of an alleged rape event. A jury who hears about a run-of-the-mill simple rape where the accuser was intoxicated is likely to shrug at the details of the complainant's story. The jurors have heard it all before, but with more shocking details, more horrifying tidbits, and, if through movie or television, with an accompanying audio/video record. The accuser cannot inject extra details like the movie-of-the-week screenwriter. She cannot ask the makeup artist to paint on extra bruises before her big entrance. And she certainly cannot ask the director to have the defendant portrayed in an uglier light to highlight his evil nature. Rather, the accuser's story is limited by what she remembers and what she told the police when she first reported her rape. Any variation from that story will hurt her credibility and will likely ruin a chance for conviction.²¹⁰ And yet, with her heavy burden of performance, if she does not improve her story, a conviction is unlikely because of the jury's desensitization to her rather mundane rape narrative.

Just as the call of the starving African child eventually goes unanswered, the accuser's statements on the stand can fail to impress a

²⁰⁷ CUKLANZ, *supra* note 11, at 87.

²⁰⁸ *Id.* at 3-4.

²⁰⁹ Valerie J. Phillips, *Loud Fight Curbs Rape, Study Says*, CHI. TRIB., Mar. 31, 1986, at 7.

²¹⁰ Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 85 (1987).

jaded jury. When a rape is recounted through oral testimony, with limited physical evidence, it is likely to underwhelm a jury that has heard much better stories and seen more convincing accounts of rape. The fact that television or movie rapes may have been fictional does not mean a jury's conception of rape is not actively shaped by them. As discussed earlier, fictional accounts can be more powerful because they are dramatized and sensationalized. Furthermore, the fictional accounts often lack the uncertainty and nuance that jurors often confront in rape trials.

The defense can also take advantage of the intersection of the desensitization of rape and the roles ascribed to the accuser. A story that portrays the accuser as a money-grubber becomes more potent if the victim's injuries are minor and her tale not particularly lurid. The jury can be convinced that the accuser has simply decided to take financial advantage of unpleasant sex or that she is using the rape complaint out of regret for having sex with the defendant. If the details of the alleged rape are not shocking, the defense can easily dovetail the regret story with the facts of the case. As the defense capitalizes on the intersections of these narratives, the accuser's burden of performance becomes heavier.

The dissociation effect is also readily transferable to the rape trial context. An accuser on the witness stand is not unlike the starving child or numerous other repeated images found in disaster pornography. When jurors hear an account of the alleged rape event, they are placed in the same unusual position of the disaster porn viewer. Jurors play the role of the object by passively hearing the story of rape. They are unable to change what transpired or even inquire further about the story being told. If they are confused by details, they are restrained by legal procedure from asking the witness to clarify. However, the jury also plays the role of the subject during the trial. As fact-finders, jurors ultimately determine the outcome of the trial. They interact with and attempt to persuade each other of their beliefs concerning a defendant's guilt or innocence. These facts, however, are not unique to rape trials—jurors play this role in every criminal case.

What distinguishes the rape juror from other criminal case jurors, or specifically those in the bank robbery example, are numerous factors relating to gender and the inability to comprehend the concept of rape independent of mass media constructions. Gender is a performative concept, and in a rape trial, a jury is constantly judging an accuser's gender. In a non-rape criminal trial, the concept of gender is rarely introduced. As a result, the constant judging of past and present performances is not something for the jury to consider. This is illustrated in the two thought experiments that began this discussion. A jury hearing a robbery case is unlikely to consider whether the accuser was a charitable person prone to giving money away. They are not going to question whether the accuser looks like the type to give money to someone and then lie to the police about it. While the jurors do make the normal credibility assessments based on the witness' performance in the courtroom, that is a relatively small-

scale analysis compared to injecting numerous loaded assessments of gender performativity. Jurors may find a complainant not credible on issues of performance, such as being a drug addict or habitual liar, but those evaluations do not compare well to those made about gender. When jurors attempt to assess a gender performance, they must not only draw from their own gender identity, but also the incredible array of materials about gender in the mass media. Trying to pigeonhole an accuser into one of the categories described by Crenshaw is only part of their mission. Because of social constructions of what can constitute rape, a juror is often faced with determining whether one of Crenshaw's types can even be raped. In this way, jurors in rape trials become subjects of a higher order than those commonly found in most criminal cases.

Unlike robbery or simple assault trials, the gulf of misunderstanding between a juror who has not been raped and the accuser can be enormous. A study of jury reform in Tennessee showed that a juror who has been raped is very unlikely to survive the voir dire process.²¹¹ While most jurors can comprehend various crimes that go to physical injury or monetary loss, a rape case has unique gender and power issues. Even in a murder trial, where jurors are unlikely to have had a personal frame of reference, jurors have a greater ability to comprehend the crime. With murder, the jury can more easily determine whether the event was murder or suicide (the simulation of murder) because the physical evidence is different in these two circumstances. In a rape trial, however, jurors are usually left to analyze the difference between consensual sex, something they probably have substantial knowledge about, and rape, something they have to rely on mass media to understand, using physical evidence that supports both claims.

This inability to understand rape creates the same confusion in a juror as it does in the disaster porn viewer—the juror cannot look away, yet has little to gain by looking deeper at the situation. Jurors can make the same dissociative move as the person viewing disaster pornography. Ultimately, this disconnect cannot help the accuser gain credibility in front of a jury. Instead, the jurors want to look away and pretend the events are just unfolding on the stage before them.

Victoria Grace offers an example of a documentary in New Zealand that is helpful for understanding the difficulties in one-way communication about sexual assault.²¹² In the documentary, *Girl Talk*, the camera crew was charged with being the “fly-on-the-wall” to observe personal conversations. The conversations were not scripted and wide ranges of people were filmed. In one particular segment, a middle-aged woman offered her feelings about

²¹¹ Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1, 18 (2003).

²¹² GRACE, *supra* note 108, at 109-10.

sex.²¹³ She explained that she did not enjoy sex very much because she found it painful. Her first experience with penetration had been when she was raped at a young age. For Grace, the broadcast was significant because there was no opportunity for “reciprocal exchange for that woman.”²¹⁴ When the mass media sent the video to households around New Zealand, something very personal and intimate was made very public. The person in the segment had no opportunity for mutual exchange; she was only a sender in the situation and had no means to engage her audience.

While a rape trial is not broadcast by technology to the jury, the same model of one-way communication is at play. The accuser on the witness stand can only tell her story. She has no ability to interact meaningfully with the jury. The jury cannot question the complainant, the victim cannot question the jury, and the trial setting offers no other possibility of dialogue. The dissociative effect is caused not by technological replication, but by the rules and procedures of the American criminal courtroom. The ability to empathize with or otherwise engage a person recounting her rape is totally eviscerated by the distance between the jurors and the witness stand. When twelve jurors hear the intimate story of rape, it is almost indistinguishable from hearing it through television or in a movie.

This dissociation effect magnifies the burden of performance because it increases the gulf between the accuser/sender and jury/receiver. A jury that has become dissociated from the particular story of the victim will be a tough crowd and not amenable to logical persuasion. When there is no intimacy in the victim’s story of rape, the jury’s detachment makes it hard to develop a rapport with the accuser. Just as the person filmed in *Girl Talk* did not achieve a meaningful connection to the mass audience, a rape victim on the stand will struggle to gain empathy from a jury. Without that connection, it becomes easier for a jury to apply negative labels like “unstable” to a person for whom they have little or no feeling. The burden of performance, through dissociation, eventually becomes a wall between victim and jury that further diminishes hope for conviction.

It may be argued that my account of rape trial jurors is too simplistic and underestimates a juror’s capacity to understand the gravity of a rape trial. However, the story that this Article tells is only possible in a world where images and stories of rape are ubiquitous. The jurors do not become dissociated from the accuser in the rape trial because they do not care. Rather, they become dissociated because that is what they have learned to do every time they have watched a rape on television, read about it in the newspaper, or gasped in horror as they viewed the R-rated scenes of rape on the big screen. To pretend that jurors can simply turn off such a

²¹³ *Id.*

²¹⁴ *Id.* at 110.

systemic learned response when the time comes for the real trial is to presume a concept of human nature without evidentiary support. Just as disaster relief agencies can point to the bottom line to show the diminishing returns from the use of disaster pornography, sex crime prosecutors can highlight the incredibly low number of reports that actually turn into convictions.²¹⁵ The jury in a rape trial has too many opportunities to buy into the defense story and avoid the thorny, disturbing questions surrounding issues of rape. A juror with a learned psychological response, loaded with a variety of explanations and justifications from a well-trained defense attorney, will not vote to convict except in the most unusual cases.

The perceived importance and objectivity of a courtroom can also fuel the biases of the jury. Susan Sontag observed that photography, by appearing to be an objective source of reality, creates an illusion of truth.²¹⁶ Photography, by being invasive and capturing moments of personal life, seemingly gives a true account of reality.²¹⁷ However, Sontag argues, photography is actually an incredible seducer that makes the viewer believe in a version of reality that has been reduced to singular images.²¹⁸ Photographs thus form an alternate reality or fantasy whereby viewers are fooled into believing they have a real understanding of what has been photographed.²¹⁹ In many ways, a rape trial operates in the same manner. The testimony is an invasive attempt to access the real events of the accuser's personal life. Because of the courtroom setting, the trial maintains the trappings of reality and truth. However, in reconstructing the happenings of the alleged rape event, the jurors can be seduced into believing they understand what really occurred. This attempt to be objective means that the juror is not on guard against his or her biases, and the seriousness of the situation actually lends itself to the injection of the juror's cultural belief. The juror can be seduced by the gravity of the situation to believe he or she is actually finding truth rather than interpreting various accounts of the same events.

There are certainly jurors who do not make the mistakes described above. There will be those who have not encountered many depictions of rape. Others may be well informed about the concept of rape and aware of the dangers of media depictions of rape. It is an open question whether members of this last group are likely to appear in the final jury pool. Nonetheless, there are people who would not exhibit the disaster

²¹⁵ See MASA, *supra* note 3.

²¹⁶ SUSAN SONTAG, ON PHOTOGRAPHY (1977).

²¹⁷ CARL ROLLYSON, READING SUSAN SONTAG 103 (2001).

²¹⁸ *Id.* at 103-04.

²¹⁹ *Id.* at 104.

pornography reactions. What is a fact, however, is that every potential juror could fall into the pattern described above, and in most cases, a single juror can prevent a conviction for rape. To assume that there are only perfect or exceptional jurors is to ignore the sad realities of most rape trials. A prosecution for rape is an appeal not to the perfect juror, but to every juror, including those jaded by stories of rape and those who dissociate rather than adjudicate.

B. The “Pornographic Vignette”

Catharine MacKinnon once observed that rape trials are pornographic²²⁰ in nature.²²¹ Nowhere else are such lurid details of an

²²⁰ This Article does not seek to define pornography, as that is a project that has eluded scholars, judges, and commentators for some time. However, it should be noted that, generally, this Article does not use the various definitions offered by feminist scholars, but instead uses the definitions and ideas of Baudrillard. This is not because the feminist definitions are lacking but because, in this Article, it is not important to define pornography's limits, but rather its essence. For Baudrillard, pornography is a replication of sex, but one that carries numerous, important differences. The close-up images of genitals, silicone-enhanced breasts, large penises, and collagen lips are supplemented with error-free, “perfect” intercourse. There is nothing hidden or left to the imagination in pornography. Every physical aspect of the human body is explored, every fetish displayed, and every desire satiated. In this way, pornography is “more real than the real.” *SEDUCTION*, *supra* note 193, at 28-29. Every image is designed to appeal to the viewer's prurient interest and arouse his or her sexual appetite. The use of zoomed imagery obviates the distance between the viewer and the physical features displayed so that there is no gap between sex and its representation. It is meant to exceed the real in every way so that viewers can live out their fantasies through pornography. The process that creates pornography is different from the process of hyper-simulation described in the hypothetical examples above. Pornography, by being “more real than the real” is not actually in conflict with the real in the same way hyper-simulation is meant to be. Instead, pornography is a banal attempt to create sex with no subtext, no seduction, and no subversive meaning. The very in-your-face nature of pornography provides no hidden concepts or ideas. It is only the extreme fantasy of the viewer played out through a series of images. Pornography “decomposes bodies into their slightest detail.” *Id.* at 28. In this way, pornography is actually distinguishable from obscenity. Obscenity still maintains a transgressive property, whereby social mores regarding perversity are challenged. In contrast, pornography is the embodiment of the social constructions of sex without any challenge to those norms. As a result, pornography cannot be an effective means of exposing simulations of sex, because it is itself the ultimate simulation of sex. Baudrillard uses the metaphor of quadrasonic sound to understand the nature of pornography. *Id.* at 30. The analogy is a little dated, but because he was writing in 1979, quadrasonics represented a major advance in home sound technology. With quadrasonic sound, one could hear music without error, in perfect sound. Every note and movement was reproduced in a manner that absorbed the listener and gave him or her a faithful reproduction of the musical piece. The irony, for Baudrillard, was that quadrasonic technology emitted sound in a way that had never been heard before. The so-called perfect reproduction was a copy with no original. Listening to a live performance in a concert hall does not create the surround sound experience, and there is a distance between the performer and audience in any live act. With quadrasonics, however, the listener was completely absorbed and the distance was eliminated. Baudrillard sees pornography as, in essence, quadrasonic sex; there is a representation of sex, but one with no original. Instead, the

individual's sexual life put so prominently before the public.²²² Carol Smart has even referred to an accuser's experience as reciting a "pornographic vignette" for the jury and audience.²²³ The emphasis of these arguments by Smart and MacKinnon has been to demonstrate the revictimization and deterrence effects of legal rules. The requirement that an accuser reveal so many personal details is often a painful process and deters would-be complainants from reporting the rape or testifying.²²⁴ However, this is only part of the picture concerning the pornographic nature of a rape trial. Also of importance is the pornographic effect of the testimony on the audience.

When examining the issues of rape and pornography, many scholars have attempted to find a causal connection showing that pornography leads to rape and sexual violence.²²⁵ Some research has tried to focus on especially violent pornography whereas other investigations have tried to connect non-pornographic, but still misogynistic, images with rape.²²⁶ While such lines of inquiry are partially relevant to this Article, this section is limited to focusing on very different connections between pornography and rape.

Some commentators argue that the portrayal of rape fantasy scenarios make men²²⁷ more accepting of such possibilities in the real world.²²⁸ While the various studies often suffer from control problems and generally have not been able to show that the observed correlations actually entail causation,²²⁹ they are significant for some of their lesser-debated findings. What requires more attention is that several of these studies do show that rape imagery changes attitudes and that those attitudes change

senses are overwhelmed and the replication is enticing in many of the same ways as sex, but it is very different from sex itself.

²²¹ CATHARINE A. MACKINNON, *A Rally Against Rape*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LIFE* 81, 82 (1987).

²²² EHRlich, *supra* note 79, at 21.

²²³ CAROL SMART, *FEMINISM AND THE POWER OF LAW* 39 (1989).

²²⁴ *Id.* at 38.

²²⁵ Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201, 205 n.25 (1987) (reviewing *WOMEN AGAINST CENSORSHIP* (Varda Burstyn ed., 1985)).

²²⁶ *Id.*

²²⁷ While it is not explicitly mentioned in the text of this section, male perspectives are assumed to be those of either heterosexual or bisexual men.

²²⁸ Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"*, 53 OHIO ST. L.J. 1037, 1042 (1992).

²²⁹ Strossen, *supra* note 225.

behavior in a limited fashion. While no one has performed a study about the way jurors make decisions based upon prior viewing of rape imagery, the various lab setting studies that do exist suggest that rape media would have a significant effect on the attitudes of jurors.

An oft-cited study by Edward Donnerstein and Leonard Berkowitz demonstrated that in laboratory settings, males who were exposed to violent pornography were more likely to engage in hostile reactions to females.²³⁰ In the study, men were either angered or treated fairly by fellow study participants prior to what they believed was the experiment. Both groups of men were then shown films that depicted consensual sexual activity or rape scenes. The control group viewed a nonsexual, neutral film. The angered male subjects were then instructed to apply an electric shock to the fellow experiment participant that had angered them. The male subjects were to shock participant when they failed to perform certain tasks. None of the films increased shocks against males in the study. However, angered males who viewed rape scenes did increase shock intensity against females.²³¹ Men who were not previously angered also demonstrated increased aggression, but only when they viewed rape scenes where the person raped enjoyed being victimized.²³²

Another study by Dolf Zillman and Jennings Bryant showed that, when men viewed pornography depicting degradation of females who were nonetheless “eager to accommodate any and every imaginable sexual urge of every man in the vicinity,”²³³ they favored shorter prison sentences for rapists.²³⁴ A study by Neil M. Malamuth showed that men who viewed pornography that seemingly endorsed sexual violence were more likely to fantasize about rape.²³⁵

While these studies fall short of showing any definitive connection between viewing pornography and committing rape,²³⁶ they do demonstrate

²³⁰ Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOL. 710 (1981).

²³¹ *Id.* at 717.

²³² *Id.* at 720.

²³³ Dolf Zillman & Jennings Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32 J. COMM. 10, 12 (Autumn 1982).

²³⁴ *Id.* at 16-17.

²³⁵ Neil M. Malamuth, *Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli*, 10 ARCHIVES SEXUAL BEHAV. 33, 43 (1981).

²³⁶ Michelle Chernikoff Anderson, *Speaking Freely about Reducing Violence Against Women: A Harm Reduction Strategy from the Law and Social Science of Pornography*, 10 J. LAW & PUB. POL’Y 173, 189-90 (1998).

a strong connection between viewing pornography and the formation of certain attitudes about sex and rape. That these attitudes may cause a resultant behavior is beyond the scope of any of these experiments. However, one can conclude that men who view violent or even nonviolent pornography become more accepting of rape in some sense and may even fantasize about it. That they may actually prefer lower sentences for rapists has a direct bearing in the criminal justice context.

While it is dangerous to over-generalize from the studies above, it is still disconcerting to imagine the cumulative effect of regular viewing of pornography on prospective male jurors. When men internalize the depictions commonly found in pornographic materials, they become dangerous jurors for the prosecution of a rape trial. While there have been no direct studies in the jury setting, it is hard to imagine the results would be different from the controlled environment experiments. At a minimum, the existing social science research shows that men on rape trial juries are ideal candidates to believe defense narratives about how an alleged rape event occurred. There can be no doubt that defense lawyers, even when they do not understand these particular biases, will create stories and arguments to take advantage of them.

Substantial evidence also shows the prevalence of rape fantasies among men.²³⁷ These stories are often depicted in pornography and shown as positive, harmless events.²³⁸ When the same purveyor of pornography appears in a jury pool, the results can be significant. One major defense strategy in simple rape cases is to argue the harmless version of the rape fantasy—the reluctant female eventually gives in to male power and submits to his desire. The accuser's testimony about her fear and pain mirrors the acting of porn stars. The ability to differentiate the real crime of rape from the fictional rape stories is a difficult endeavor when the defense is actually acting to intrigue the juror. This is not simply a case of rape pornography making rape more acceptable. Rather, the trial itself is the pornography that reinforces the learned response from viewing other pornographic images. The defense's story creates reasonable doubt. However, unlike most criminal cases, this doubt is due to the juror's enjoyment of seeing his constructed fantasy acted out and described in a courtroom setting.

At first blush, the comparison between a rape trial and hard core pornography may seem extreme or even distasteful. After all, arguing that a proper legal proceeding with a strong air of authority is like a free-for-all orgy on television can seem to be a stretch. However, to underestimate the sexual nature of the proceeding for some jurors would be a serious mistake.

²³⁷ Peter Daskoch, *The Safest Sex: Sexual Fantasies*, PSYCH. TODAY, Sept. 1995, at 46, available at <http://www.psychologytoday.com/articles/pto-1268.html>.

²³⁸ *Id.*

Just as men in controlled experimental settings, not unlike the sterile environment of a courtroom, begin to fantasize about rape after viewing rape pornography, it is not unreasonable to assume some jurors do the same. The pornographic vignettes of the accuser are morphed by the defense to appeal to male juror fantasies. Jurors can play out fantasies of seduction in their mind in response to defense arguments.

One may argue that a trial setting has such gravity that no juror could seriously be excited by such an environment. However, rather than creating a greater sense of objectivity, a rape trial removes the cognitive distance between the juror and a rape. Normally, the male juror is confined to viewing a rape through pornography. Such a perspective is usually two-dimensional and the viewer has no role in the eventual outcome. During a trial, however, he actually gets to hear from a real live rape victim and decide whether the event was rape or sex. When the accuser is on the stand, the reality of the situation gives the male juror a connection to an event that can titillate and stimulate him. This can even be the case where the juror is consciously horrified by what he is hearing. The subtext of hearing the rape fantasy fulfilled is still omnipresent.

When the defense offers its theory of the crime, the juror is able to cleanse the negative aspects of the alleged rape event away so that he can enjoy the pure rough sex fantasy he has always wanted. This does not have to be the case with any more than one of twelve jurors for the defense to gain a meaningful advantage. The prurient interest and effects of the pornographic narrative can be used by defense counsel to create reasonable doubt. While the reasons for that doubt may be distasteful and ugly to consider, social science is suggestive enough to make us evaluate the exact role of defense narratives in achieving acquittals.

VI. CONCLUSION

The exclusive focus on statutory tinkering of rape law is doomed to fail. As requirements such as the utmost resistance standard have receded, they have been replaced with cultural norms that have the same effect.²³⁹ As long as jurors are free to inject their prejudices into rape trials, their attitudes will trump rulemaking. The jurors of today's rape trials have been molded and constructed by an array of rape stories and imagery in mainstream and pornographic media. These formative factors mean that there has been a shift from a problem of rape unawareness to rape over-awareness. Society has become saturated with rape narratives in all media forms, creating a substantial presumption against the stories of complainants. The over-signification of rape means rape myths have taken hold in virtually every prospective juror and any decent defense attorney

²³⁹ SCHULHOFER, *supra* note 8, at 127.

can take advantage of those hidden attitudes. As Susan Ehrlich noted, “interpretation of progressive statutory laws is impossible to separate from the cultural backdrop against which it is interpreted.”²⁴⁰

This inculcation of jurors places a burden of performance on the accuser. While the prosecution should certainly bear the burden of proof, a separate burden should not fall on those with the least advantage in a criminal trial, the complainants. Without legal representation, unless they pursue a separate civil suit, and without belief by society, accusers must put their very gender identity on trial. At the conclusion of the proceedings, the jury will not only render a verdict, they will decide if the accuser is a whore, a tease, mentally unstable, or one of the other socially-defined characters.

In a given trial, dissociation and desensitization will determine the extent to which the jury believes the complainant. Because the jury is composed of members who likely have been inundated with rape stories and imagery, there are substantial reasons to believe that jurors have become desensitized and dissociated from simple rape stories articulated during a trial. If any of the jurors is allured by the pornographic details of the alleged rape, the burden will almost certainly be insurmountable. An inculcated jury will pass judgment on the accuser while freeing the accused.

How then is it possible to inoculate a jury against the inculcation of rape media? The heart of the battle will surely be cultural.²⁴¹ As long as

²⁴⁰ EHRlich, *supra* note 79, at 25.

²⁴¹ While this Article offers a few policy proposals below, there is reason to believe the effort to decrease rape should be entirely cultural. Policymakers and legal scholars often loathe a problem with no legal solution. Since this Article does offer some solutions in the legal realm, this Article gives in to this impulse to a degree. However, such a policy move is not a necessity in legal scholarship. The retort most commonly attributed to Warren McCulloch is instructive: “[D]on’t bite my finger, look where I’m pointing.” GRACE, *supra* note 108, at 105. Criticism of this kind can be an end in itself when it identifies a major defect in existing law and scholarship. Using the scholarship of Jean Baudrillard, as this Article does, also makes any grand policy solution problematic. For Baudrillard, there is no meta-theory or unifying paradigm. LANE, *supra* note 111, at 13. Rather, Baudrillard is extremely suspicious of “totalizing systems of thought” and believes that critique is possible only at the margins; although it may serve to fracture the overall system, it cannot be concerned with replacing current myth structures with new grand narratives. Victoria Grace has offered a defense for Baudrillard’s style of critique that is applicable to this Article as well:

To ask if Baudrillard is really saying something about what is going on in the world is to understand the process of critique differently from the way intended here. Critique precisely reveals how the ‘what’s going on’ is constructed and the problematics of the attendant assumptions; this certainly tells us something about ‘what’s going on’ and indeed opens up a space for action and engagement that has no need of a positive ‘theory’ about any social reality conceptualised in static, ontic terms.

GRACE, *supra* note 108, at 1-2.

rape myths form the dominant meta-narrative, those attitudes will seep into the jury box. Swaying the minds and hearts of future rape trial jurors is not something that can reasonably be expected in the near term, but it is something that must occur over the long run for rape prosecutions to have real success.

Still, there are important practical lessons that should be derived from this Article. While the focus here is scholarly in nature, the emphasis on language and performance in understanding rape trials can also bridge the gap between the ivory tower of academia and the day-to-day realities of prosecuting sexual violence.²⁴² Rhetoric and performance are factors that should be important to both the practitioners who must make the linguistic choices and the academics who study rape law. Ignoring juror desensitization and dissociation, as well as the performative concerns of the pornographic vignette ensures the process of statutory change will continue to yield only modest gains.

Exploring the intersection of language, performance, and substantive rape law demonstrates that statutes and legal decision-making are still secondary means to effect change in the area of sexual violence.²⁴³ Recognizing the role of rhetoric and performance helps reorient the discussion of policy change to new alternatives while actually showing the potential for such reforms.²⁴⁴ Future reforms need to ensure limited flexibility in allowing language and culture to undermine enforcement.²⁴⁵ Efforts to change intent standards and definitions of consent are especially problematic because they fail to account for the slipperiness of language and the media conceptions of rape that have heavily constructed jurors. What is “consent” to a juror in modern America? The question can only be answered by examining how media has constructed consent in fictional rape stories and other media. Defining rape in an academic bubble will not affect a jury that already “knows” what consent means.

There are already some proposals that show the possibility of radical reform which take into account the performative problems of rape trials. The conclusion of Taslitz’s work described in this Article is that rules of evidence that are feminist in nature should be adopted.²⁴⁶ These new rules would include allowing uninterrupted narrative testimony by complainants on direct examination, using empathetic experts, and

²⁴² MATOESIAN, *supra* note 29, at 19.

²⁴³ EHRlich, *supra* note 79, at 152.

²⁴⁴ *Id.*

²⁴⁵ SCHULHOFER, *supra* note 8, at 90.

²⁴⁶ TASLITZ, *supra* note 7, at 101.

intermediaries to “translate” defense counsel questions.²⁴⁷ Other radical alternatives could include allowing interaction between the jury and accuser through written questioning, limiting the use of certain defense strategies based upon rape myths, and requiring a “rape-qualified” jury that would not be as susceptible to rape myth strategies. Each of these proposals raises constitutional questions in the area of due process and the right to confrontation that are beyond the scope of this Article.

Nonetheless, conventional structural reform must be replaced with policies, like those above, that incorporate new modes of communication and procedural rules that seek to bridge the gap between accuser and jury. In the meantime, what is needed is a fuller accounting of the rhetorical and performative issues at play in rape trials so that policies can be designed to address those concerns.

The past efforts at rape law reform have had very modest effects on reducing sexual violence. With an understanding of those partial successes and the shortcomings of the critiques, new policy alternatives can aid in efforts to prevent rapes and sexual assaults. By recognizing the insidious myths and messages that determine the outcomes of rape trials, we can begin to imagine a world where rape is the exception rather than the rule. To continue to view rape through the lens of rule-making is to pretend the jury is insulated from an American culture saturated with rape imagery and pornography. To make a meaningful reduction in sexual violence, academics, practitioners, judges, and activists must begin to recognize that the burden of performance is devastating to an accuser. Hopefully, with a fuller understanding of performance and representation during rape trials, complainants may actually receive justice in the American criminal justice system.

²⁴⁷ *Id.*