

A CLOSER LOOK AT THE RHETORIC OF  
RAPE

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## DEDICATION

### For Mother

April 19, 1941 to March 19, 2009

You said to	remember
So I ground-chipped-hammered	
a monument in stone	
to reveal the beautiful truth of	you.
You saw	
the deep lines around	your wise eyes
gnarled and swollen knuckles of	your tender hands
sagging breasts that fed	your children.
When every flaw	
real or imagined	
has been chiseled away	
I am left with dust	and my love of you.

**FAMILY** – Dad, Brian, Kyle, Heather, Brandi, Jay, and my beloved brother - John “MacDaddy” Ford - who lived his life and will always influence mine.

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## ABSTRACT

A CLOSER LOOK AT THE RHETORIC OF RAPE: HOW THE USE  
OF VERNACULAR EUPHEMISM IN U.S. COURTS  
EXACERBATES THE GROWING DIVISION BETWEEN LEGALITY  
AND JUSTICE.

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Based on the research of Lakoff and Turner, combined with studies in Burkean theory, and the representation of rape, this work presents the problematic use of metaphoric language in US Court rape trials. These are the cause of a growing trend in the public perception of a division between legality and justice in topic of sexual assault. Illustrating this claim is a case study of a rape trial.

## INTRODUCTION

June 2007. The entire class is a juxtaposition of oddities, brought together by the “Summer in H.E.L.”: a four week linguistics class covering the history of English language from pre-linguistic communication to modern prescriptive grammar. Despite my focus in rhetoric and composition, I find linguistic studies an invaluable supplement to my research and teaching. In fact, it was a line from our textbook in HEL, which triggered this project. Leslie Arnovick and Laurel Brinton state in The English Language: A linguistic History “A primitive attitude toward language seems to underlie euphemism, one that sees an essential link between the word and the thing denoted.”

In recognition of the power of words to signify the referent, they describe ways in which people have attempted to control the referent by using euphemisms. The authors state that euphemisms of all sorts serve to either strengthen or weaken a word, as is required by the current needs of the discourse. According to linguistic laws, most often strengthening or weakening a word then leads to the absolute replacement of the word by a euphemism or hyperbole. In the case of euphemisms, once the euphemism

displaces the original word, as completely as possible in an era of print language, the euphemism itself is then in “constant need of renewal” (Brinton & Arnovick 80-82).

The more I considered the rule about metaphor, the stronger I felt that it did not fit neatly into my experiences, as a previous student of cognitive psychology working in the specialized area of writing as trauma therapy. It has been my experience that euphemism and metaphor, as they operate in recovery from traumatic events, tend to wear out the referent; effectively opposing the linguistic law described by Brinton and Arnovick. For example, the word rape has long been subject to the use of euphemisms and metaphors, however, rather than the power of the euphemisms and metaphors getting worn down, it is the public reaction to the experience of rape that has historically shifted instead. This leaves the victims of the rape in a difficult situation when attempting to locate words to talk about their experience.

My sentiments are echoed in the work of Aldridge and Luchjenbroers’ work:

From the cognitive linguistics/cognitive semantics view of lexical meaning, meaning is ‘encyclopedic’ in nature: the sense



of a word is not divorced from its context of use. As such, linguistic meaning is encoded in memory as a type of cognitive routine that draws upon experiences in the world, and activation of particular concepts will trigger related concepts in memory. (Luchjenbroers & Aldridge 343)

There is nothing new in my reaction to the disjunction between the linguistic comprehension of metaphor, and the psychological understanding of the rhetorical work it does. In his article “Psychological Processes in the Comprehension of Metaphor” Paivio states,

We know even less about the psychology of semantic creativity than we do about syntactic creativity, and the former must be counted among the most challenging theoretical problems that confront those who are interested in a scientific understanding of language behavior (Ortony 150).

These words are as true today as they were when the article was written 20 years ago. There is still a substantial lack of research, in both the field of linguistics and the field of cognitive behaviorist psychology, addressing the juxtaposition of language and trauma.

I began looking into the question of why metaphor works differently in trauma discourse than Brinton and Arnovick propose it should. As is the danger in any rule of law that seeks to encompass all events in all circumstances, this linguistic declaration of metaphors' behavior is not wrong, but it fails to cover the specific rhetoric of trauma as the law is too generalized. The use of this type of generalization is not unusual in semiotic studies, according to Michiel Leezenburg:

(T)he bulk of present-day research on metaphor still appears to rely principally on metaphors of the simple categorical A is B type, and on sentences in isolation...By restricting ourselves to such oversimplified cases of isolated sentential metaphors abstracted away from the actual linguistic and practical complexities of real-life language usage, however, we may be missing interesting clues as to the ways in which metaphors work, or in which metaphorical interpretation may be taking place. (Leezenberg 11)

Furthermore, it seems that issue of metaphor in trauma related language is not confined to academia, but has an impact in the courtrooms of the United States as well, specifically in rape trials. In her 2007 on-line

article for the Washington Post, *Gag Order*, Dahlia Lithwick quotes Wendy Murphy, leading victim-rights advocate and nationally recognized legal analyst. Murphy, also an adjunct professor at New England Law in Boston states:

[Issues of metaphor are] part of a growing trend on the part of the defense bar to scrub the language of trial courts... The big shifts she's noticing: Whereas defense attorneys once made motions to limit the use of the word victim in trials, there is an uptick in efforts to get rid of the word rape.

Moreover, she points out, these strategies used to be directed toward prosecutors, but they are now being directed toward witnesses as well (Lithwick).

Wendy Murphy's recent response to President Obama's statement recognizing April as "Sexual Assault Awareness Month" goes beyond the admonishment of language practices in the courtroom, describing them as a symptom of a larger issue.

While it's nice to suggest that victims need services, the truth is they already have access to plenty of support – free of charge. What's missing is justice, a basic right denied victims

of sexual violence every day across the United States. Vice President Joe Biden knows this already. He submitted an important study to Congress in the 1990s, aptly titled “Rape: Detours on the Road to Equal Justice,” in which he noted a gross disparity in prosecution and punishment rates when comparing theft crimes to sex crimes. Nothing much has changed since then. In fact, if the president’s failure to mention this is any indication, this disparity appears to be widely accepted (Murphy).

Luchjenboers and Aldridge have similar findings in their studies of European court discourse. “Despite improvements in equal opportunities and significant changes in legal legislation, witnesses in cases of rape and sexual abuse still seem, to a large extent, to be going unheard in the criminal justice system” (Luchjenboers & Aldridge 1).

Similar to the studies of metaphor as a psychological phenomenon, a surface scan of academic texts on the effects of language use in judicial rape cases in the US turns up very little. It takes a serious investment of research, time, and effort in order to turn up primary data and studies on the topic. Even then, the resources with empirical data are scarce. The

discrepancy between the need for and the number of studies done on courtroom language in response to the accusations and crimes of sexual assault and rape is not due to a lack of evidence for the case. In response to multiple declarations of a need for more research, I intend to address the use of metaphor and its implication as a leading cause of the loss of control over the desired balance between legality and justice in sexual assault cases.

The multiple legal cases and the controversy surrounding the alleged rape of Tory Bowen from 2006 to 2009 provide a frame for the investigation of how the historical presentation of women in rape cases, and the semantics of metaphor have affected the mutation of legal discourse surrounding sexual crimes. The ongoing legal battles and dissenting public, as well as academic, opinions surrounding these cases began in October of 2006. Unfortunately, most of the rhetorical attention given to the case focuses strictly on the question of First Amendment rights, as the trouble began with a bench order from the judge banning specific terms and topics from the courtroom. Despite what seems to be the obvious conclusion that this is a freedom of speech issue, further examination proves that it is actually a question of metaphoric use of

language tangled with legal implications.

One of the first indications of this is a response from a member of the jury after the first trial was declared a mistrial due to a hung jury. The impact of the language on the jury is made implicit in the article “Jurors Saw Witnesses Differently” published by Clarence Mabin in the Lincoln Journal Star. According to Mabin,

Milt Foreman belonged to the minority who favored acquittal. Yet, Foreman expressed relief when he learned the Lancaster County Attorney’s office had decided to retry the case. “I prayed they’d try this guy again... Not guilty didn’t mean we didn’t think he did it. ‘Not guilty’ says the state didn’t prove its case’”(Mabin1).

A second indication comes from a court-documented hearing held between the first and second trial, during which Judge Jeffre Cheuvront and Ms. Bowen discuss their differences about the judge’s gag order. Following the mistrial, Judge Jeffre Cheuvront asked Tori Bowen to sign the following two-page court document:

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Case Number: CR 05-087
	)	
Plaintiff,	)	
	)	
v.	)	ACKNOWLEDGMENT OF
	)	COURT'S ORDER
	)	
PAMIR J. SAFI,	)	
	)	
Defendant.	)	

The undersigned witness in the above entitled case has been advised, and acknowledges that the court, in order to insure a fair trial before an impartial jury, has entered an order prohibiting the use of the following terms or phrases during the trial of this case:

1. The terms "victim," "assailant," or "rape."
2. The term "sexual assault kit;" it is permissible to refer to such a "kit" as a "sexual examination kit."
3. The term "sexual assault nurse;" it is permissible to refer to one as having special training in "sexual examinations."

4. That there was a previous trial of this case, or that testimony was given at a previous trial.

5. That Bethany Bowen may have consumed controlled substances or drugs, other than intoxicating liquor, on the evening of October 30 and morning of October 31, 2004.

The undersigned understands that if he or she violates the order of this court and if it is determined that such violation is willful or deliberate, the undersigned could be held in contempt of the court's order and certain sanctions could be imposed.

Dated July \_\_\_\_\_, 2007.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

(State)



The judge made his case for the document in the following statement:

As we all know two of our, really, or most cherished constitutional rights if not the most important are the right of free speech and the presumption of innocence and the right to a fair trial. As pointed out by Mr. Mock [, the defense lawyer,] and all of us that know anything about the law, free speech is not without limitations and actually the presumption of innocence, and we all know that, is paramount right and it trumps everything else. And the right to a fair trial trumps everything else. (State)

Judge Cheuvront cited the state law of Nebraska, Section 27 Rule 403 when asked to defend his request for the above order by members of the press, the public, and the academic community with an interest in legal cases of sexual assault.

Nebraska State Law Section 27 Rule 403, Exclusion of relevant evidence; reasons, reads as follows: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence. (Nebraska)

Ms. Bowen refused to sign this request:

I wish to testify, but I do not wish to commit perjury.... the legal definition of a sexual assault nurse practitioner, a SANE, is what she was. Not a sexual examiner. Rape is not a legal definition in Nebraska law. It is a verb which I wish to use to describe what happened to me. (State)

As a senior at the University of Nebraska, Lincoln, and president of her college's Sigma Tau Delta English Honor Society, Ms. Bowen recognized both the importance and the implication of the words she would use to describe the events to the Jurors, Jurors who would be unaware of the bans.

## CHAPTER I: THE ENTRY OF METAPHOR INTO LEGAL AND COURTROOM DISCOURSE

Metaphors are part of our every day communications. We use them for explaining everything from feelings and ideologies to the representation of solid and manifest objects. They help us to navigate the complexities of human emotions, interaction, social constructions, moral concerns, and even artistic invention. I am looking specifically at one subset of metaphors, which I have chosen to call vernacular euphemism. I use this term to specify the common words in our every day vocabulary that we use to signify an event, action, or other topoi that cause discomfort on a personal or social level.

Vernacular euphemism differs from other types of metaphor in that the sole intent of using a vernacular euphemism is to avoid distress while still addressing the topoi in a way that the topoi remain immediately recognizable to all parties of the conversation. Vernacular euphemism functions to allow the conversation to remain in “good taste.” This means the speaker can avoid the use of “suspect” terminology for highly emotional subjects or topics that typically yield a socially or emotionally distasteful discourse. As previously addressed by Arnovick and Brinton,

over time these tropes are worn thin by use and replaced by others. This allows the discourse to continue comfortably, without the risk of triggering undesirable ramifications.

The problem with vernacular euphemism in cases of rape is that these terms begin to subvert, rather than explain, our ideas and meanings. Rather than protect, they begin to do active harm. Luchjenbroers and Aldridge suggest a second form of covert linguistic operation at work in the courtroom as well. Using data collected from numerous interviews with law officials and court transcripts, they posit the notion of ‘Smuggled Information.’ This is negative information covertly used by the rhetoricians (lawyers or witnesses) to manipulate the perception of the jury, and in some cases that of the victim (Luchjenbroers and Aldridge 342). The case is then won or lost through highly selective phrasing and other linguistic hat tricks, such as the appropriateness of the chosen frame, defined as “culturally accepted information sets surrounding every lexical term (ibid 331).” These types of less subtle manipulation serve to draw attention off the far more passive, but never the less dangerous, vernacular euphemisms.

The vernacular euphemisms and metaphors for rape all assist in cementing the false conception of the act's true legacy. The semantic and metaphoric modes of understanding the act of rape, a split defined by Burke, are divided by its historical representation in courts of law.

### The Historic Representation of Rape in Court

Historical US laws have spanned orders and considerations from requirements that the accuser produce at least two witnesses to file a complaint, to laws making it impossible for a wife to file rape charges against her husband. In the early Puritan colonies rape was defined as unlawful carnal knowledge of another. Whether rape is described as force, ravish, violate, despoil, plunder, ravage, or obligatory sex, it is reducing it to an act of physical, sexual violence. In fact, this ideology of rape became so common through the 18<sup>th</sup> to the mid 20<sup>th</sup> century ideals of a woman's proper public and private decorum that it was not uncommon to see the public sanctioning sexual attacks by men on women, turning the victims into people who "asked for it."

A growing awareness of the true nature of rape and sexual assaults began in the late 1960's and early 1970's with the surging feminist movement. These crimes were finally recognized as acts of violence about obtaining power over the victim or something or someone represented by the victim, rather than being simply a he said she said question of sexual consent. These realizations were followed by legal legislation designed to protect the rights and dignity of the victims, under the umbrella term of Rape Shield Laws.

Rape shield laws are statutes or court rules that limit the introduction of evidence about a victim's sexual history, reputation, or past conduct. Every state and the District of Columbia have a rape shield law that applies in criminal cases; only a few extend such laws to civil cases. Many of these laws were adopted in the 1970s to combat the practice of discrediting victims by introducing irrelevant information about their chastity. (NCVC)

Unfortunately, the legislation was passed too quickly and with too heavy a hand. Those responsible were under pressure from political, social, and religious groups, as well as media coverage of victim's rights advocate

rallies in an extremely volatile climate. This pressure led to the hasty restructure of laws protecting the victim's rights. However, when these legislative moves were made, there was very little attention paid to more than a gloss of rape law history. The ramifications of ignoring the work of metaphor would come back to haunt the court.

This tactic of legislative freedom for the victims backfired on them in the judicial setting. The shield laws led to a situation where it appeared that the law now favored anyone claiming to be a victim of sexual abuse, assault, or rape. Graphic terminology and images as well as angry accusations from the accusers, which had been used only reluctantly in the past, were now being displayed in open court on a regular basis. With the victim in a position of obvious power in the courtroom setting, and the defendant almost silenced, the needle of public opinion began to rapidly swing back in the opposite direction. Several highly publicized rape cases in the early 21st century, led to public questioning of the judicial validity of the rape shield laws enacted in the 1970's and 1980's. These particular cases included defendants such as Kobe Bryant, the Duke lacrosse team, and Darryl Littlejohn, whom were all found innocent by the courts, in some cases due to the "victim" withdrawing the initial complaint.

Following these incidents, the suspicious eye of the court turned away from the legal counsel of defendants. It landed stone cold on the language being used by the prosecution and in witness statements. Since this time “suspect terms” – those terms the courts are most often willing to constrict use of or ban - have come to include victim, rape, assault, and others, as earlier described by Wendy Murphy. Public demands for justice forced responses from the judicial system, in order to sustain an impartial court. Judges in the United States courtrooms have been cornered into the use and presentation of vernacular euphemisms as analogies for the more naturally forceful and often offensive sexual language once more. This disrupts the credibility of courtroom communications and ultimately leads to a breakdown where legality and justice are no longer equivalencies in the legal system or the public social eye.

## The Current Representation of Rape in Court

The development of a government based point of research for the monitoring of both legal and private discourses about crime and services



for victims indicates a federal awareness of the increasing problematic issues surrounding trauma and public safety policies (OVC) (DOJ). Further attention to the matter comes in the form of increasing public protests and reportage about the exploitation of rape and sexual assault victims. Much of the movement is seen through federally funded private groups such as RAINN, the Rape, Abuse, and Incest National Network (RAINN), and groups which monitor the journalistic discourse of criminal cases such as the Criminal Justice Journalist's website "Covering Crime and Justice" (Criminal).

While these groups recognize the existence of a problem in the court system surrounding language in rape cases, they do not always agree on the cause. It is not contested that the lack of a shared, common definition for rape causes further damage. In addition to struggling with the initial trauma of the rape, the victim must defend their choices of wording. For the defense, the disconnect creates difficulty in attempting to represent clients against amorphous charges. Because of both of the former issues, the jury is influenced more by virtue of which side has the best rhetorician - as opposed to the facts of the case. The power of the court then is subject to suggestion and smuggled information rather than the ideal

system designed to promote social welfare and truth. Luchjenbroers attests to this in “Conceptual manipulation by metaphors and frames: Dealing with rape victims in legal discourse.”

...These [examples] have been drawn to illustrate how (i) conceptual metaphor and (ii) frames are used to undermine or promote the witness’s functioning in the legal context, and how ‘smuggled information’ might serve to manipulate a jury’s perception of the witness as well as the ongoing narrative.

(Luchjenbroers & Aldridge 342)

Common sense infers that the issue of ambiguous discourse caused by vernacular euphemism should be negated by having an active legal definition of the events and parties involved. As such, current legislation does well in the dictation of these definitions. For example, current U.S. laws dealing with rape and/or sexual assault no longer describe the crimes solely in terms of forced sexual intercourse and specifically forbid the requirement of witnesses in all 50 states. The legal federal definition of rape is an individual asserting dominance over another via coercion that is manifested in the form of non-consensual sexual contact. Most states have passed their own versions of the same law; in some instances, these state

laws are given even further definition through exacting details. The specific intentions of Nebraska State Sexual Assault Law, which seek to provide a victim dignity, and a defendant a fair trial is stated as follows:

Nebraska State Law Section 28 Rule 317, Sexual assault; legislative intent. It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of this state as such system is employed in the area of criminal sexual offenses.

To this end, it is implicitly spelled out in the Nevada Penal Code.

Nebraska State Law Section 28 Rule 318 Terms, defined as used in sections 28-317 to 28-321, unless the context otherwise requires:

- Actor means a person accused of sexual assault;

- Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;
- Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;
- Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
- Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also

include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under section 28-320.01;

- Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or non-health purposes.

Sexual penetration shall not require emission of semen;

- Victim means the person alleging to have been sexually assaulted;
- Without consent means:
  - (A) (i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the

actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

- (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and
- (c) A victim need not resist verbally or physically where it would be useless or futile to do so; and
- Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

With such clarity in the language of the law, and such importance placed on specific definitions, it is still obvious, by the example of Ms. Bowen's trial, that legal definitions do not restrain the rhetorical work of metaphor today any more than they have in the past. On the surface,

these might appear as anything from harmless choices to tacitly undesirable tactics which are the better of two evils. However, looking back at the findings of Luchjenbroers & Aldridge and the response of the jurors in the Bowen trial, it is clear these judicial gesticulations of grammatical circumlocution, moves to maintain the illusion of neutrality, are very harmful in many cases of rape trials. Clearly, vernacular euphemism has a direct impact on both the content and outcome of the judicial conversations and findings, as well as on both parties involved.

The lack of open dialogue about this situation has led to the court into a necessity of renewing the definition of rape. However, it is again being remade by the subversive rhetorical work of vernacular euphemism, metaphor, and casual slang. Historically, the act of remaking had redefined the word rape as a depiction of a physical act. This effectively excommunicated the social, emotional, and mental processes involved. Therefore, an alternative response needs to be explored.

## CHAPTER II: WHY LEGAL DEFINITIONS CAN'T RESTRAIN METAPHOR

With current research in the field of neuro-linguistic science, there is more empirical evidence than ever before to support the crossover between language and psychology. Not only is understanding the basic rhetorical difference between semantic and metaphoric language important to clarity of courtroom communication; but lack of it may lead to incongruence between past understanding and new learning. This is explained as a common routine for maintaining balance in the human mind by social psychologist Leon Festinger.

When our expectations of reality do not match our perceptions in times of pressure, the average person will be more likely to subvert the perception than accept a change to their [p]ersons frequently have cognitive elements which differ markedly from reality at least as we see it...[c]onsequently the major point to be made is that the reality which impinges on a person will exert pressures in the direction of bringing the appropriate cognitive elements into correspondence with that reality. (Festinger 11)



The topoi of rape are areas of extremely high social pressures and emotional stresses. They are a natural breeding ground for the protective and defensive technique of self-deception. The harmful influences of this subversion are found regularly in the judicial courtroom. These moments of disruption can do more than slow down the process of communication. They can create paradoxical definitions for one act. This is key in understanding that metaphor plays several roles. In response to a specific study of linguistic forms and metaphor used in the courtroom during rape trials, Luchjenbroers states:

The generality that metaphor is a frequent feature of courtroom discourse, as it is of other types of discourse, is less significant than identifying the types of metaphor used in reference to men and women in cases of rape and sexual abuse (Luchjenbroers & Aldridge 345).

## The Linguistic Operation of Metaphor

As seen in the previous chapter, it was ignorance of the power and operation of metaphor, and our willingness to use them without understanding the power and operative factors involved in their use, that led to the disastrous consequences of the victim's protection acts in the courts. George Lakoff and Mark Johnson, the authors of Metaphors We Live By, propose the following as a reason for the failure of metaphor to be freely exchanged with semantic terms, such as those used by the court in written laws.

We do not believe that there is such a thing as *objective* (absolute and unconditional) *truth*, though it has been a long-standing theme in Western culture that there is. We do believe that there are *truths* but think that the idea of truth need not be tied to the objectivist view. We believe that the idea that there is an absolute objective truth is not only mistaken but socially and politically dangerous. As we have seen, truth is always relative to a conceptual system that is defined in large part by metaphor (Lakoff and Johnson 159).

Despite the fact that laws in general set out specific and active definitions in order to counter a certain set of behaviors, attitudes, or actions, they are addressed in a negative implication. That is to say, they are constructed to forbid, stop, or negate a force or action rather than to encourage, suggest, or seek to aid in the expansion or commencement of a force or action. For example, Nebraska state rape laws do not state that a good citizen is one who treats the person they are interacting with as an equal with identical rights in regards to sexual contact. Instead, the law describes by what means the actor (the person accused of rape) must remove the ability of the victim (the person making the accusation of rape) to object to the act as seen earlier, in the Current Representation of Rape in Court. This creates a law that effectually describes rape by defining it as the absence of consent.

These laws, which seek to constrain a behavior, share a common “ancestral derivation” with the power of defining when looked at through the Burkean lens. This is because Burke does not seek to describe through positive naming (granting the referent certain attributes, as the legal definitions do), but through describing what the referent is not. As Ross Winterowd argued, Burke’s use of definition is a “process [that] always

implies the negative. You tell what something is, by telling what it is not”  
(Winterowd 151.)

According to Burke, from vocabulary to grammatical forms, we imply meaning through our choices and the guidance of those choices. In Dramatism and Development, a reprint of Burke’s 1971 lecture on the same, Burke states “(e)very nomenclature has its implications, leading us to such-and-such observations rather than such-and-such other....even the most empirical of term-guided studies...has a built-in deductive aspect.” Additionally, our implications have a direct effect on the attitudes of the recipients about the topic of the discourse. This theory is called Language as Symbolic Action (Burke 1 2). The main idea of language understood as symbolic action is the belief that all sentient communication is innately imbued with intention, and from intention comes attitude. Let’s break this idea down into parts, as often looking at how the idea functions at each step can give us a more clear vision of how it functions as a whole.

*Communication* – Burke identifies communication as a courtship process involving motives of rhetoric for both parties, which is influenced by the way in which they view each other. In *Rhetoric Society Quarterly*

Winterowd distills several of Burke's ideas and statements about rhetoric in a hierarchical setting, such as the court:

The master motive of rhetoric is "identification," which is anti-hierarchical. Thus, two conflicting forces --centrifugal and centripetal -- create the social structure. If one of the forces becomes predominant, the social structure must fly apart. If we have nothing but awe for those above us, we are intimidated and alienated; if those above us do not try to identify with us, they become autocrats or tyrants (Winterowd 150-151).

For our purposes, communication is also the desire to convey a message from one sentient party to another. In the case of the courtroom, let us use a witness wanting to convey her understanding of an action to the jury.

*Intention* – As the witness re-tells her understanding of the truth out-loud to the court, she has a unique understanding of what that truth is from her own perception. Let us assume the witness' intention is to tell the jury what happened on a particular day, at a particular time, as she remembers it. She chooses words, body language, and eye contact - or

non-contact - to convey her message as clearly as she can. All the time, the witness is aware that other witnesses will testify with their own versions of the truth, from their own perspectives, with their own desired outcomes. These desired outcomes are what Burke calls Intention.

“Intention cannot be wholly conscious, since it reveals itself in "motivational clusters" of imagery which are 'generalizations about acts that can only be made inductively and statistically after the acts have been accumulated” (Burke2 p. 239).

*Attitude* – According to Burke’s theory, no matter how hard the witness may try to suppress her goals for the desired outcome, her intention will register with the jury via all of the cues in tone, body language, word choices, etc. This conveyance of the witness’ intention is what Burke is referencing when he describes attitude.

An attitude towards a body of topics has a unifying force. In effect its unitary nature as a response "sums up" the conglomerate of particulars towards which the attitude is directed. ... Attitudes, in this respect, are a kind of censorial entitling, reduced to terms of behaviour. They are an implicit charade, a way of "acting out" a situation. (Burke2 290)

How the witness feels about the act being described, which is defined for the jury by her attitude, and how the jury feels about the witness' attitude toward the act being described, will have a distinct impact on the way the re-telling is received and processed by the jury.

*Reception* – When the jury receives the communicated re-telling from the witness, it is now more than just a series of relayed facts. These facts are now inextricably marked by both the witness' active intention, and the attitude perceived by the jury. Burke's explanation of this non-verbal communication is an "...intuitive expression as a dialogue between two persons that are somehow fused with each other in a communicative bond whereby each question is its own answer, or is answered without being asked..." (Burke 273.)

A second theory posited by Burke works in tandem with language as symbolic action to identify lapses in understanding between two communicating parties. This second theory posits two distinct ways in which a speaker codes words. We have already addressed one of the two, when we suggested that the traditional shaping of language intends to give fixed meaning to a word. Burke calls this the fixed, or the semantic ideal. This type of language, the semantic ideal, can be applied to any text,

object, thought, or idea. The intention is to remove all emotional response and deviation from the pure and unadulterated reference to the subject. However, as we have already seen in the work of Lakoff and Turner, any reference will bring about unique responses in different individuals based on the previous experiences and knowledge of these individuals.

Enter the second type of language that Burke posits. This is an understanding of the metaphoric ideal, otherwise called the poetic ideal. This type of language serves to convey attitude and intent primary to the text, object, or other topic. In other words, the metaphoric ideal is intended to convey 'drama.' For Burke:

The five key terms of dramatism are, of course, the Pentad: In a rounded statement about motives, you must have some word that names the act (names what took place, in thought or deed), and another that names the scene (the background of the act, the situation in which it occurred); also, you must indicate what person or kind of person (agent) performed the act, what means or instruments he used (agency), and the purpose. Men may violently disagree about the purposes behind a given act, or about the character of the person who



did it, or how he did it, or in what kind of situation he acted; or they may even insist upon totally different words to name the act itself. But be that as it may, any complete statement about motives will offer some kind of answers to these five questions: what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose). (Winterowd 153)

According to these theories, we can improve the ability to identify both the intention and the attitude of the delivering party. We do this by actively recognizing the intentional use of the semantic or the metaphoric ideal of a speaker, and understanding the two ideals as being situated with the opposing intentions of eliminating or creative drama, respectively.

## The Harm in Misconceived Language

Following Lakoff and Johnson's definition of truth, we can examine the rhetoric of the courtroom involving semantic definitions and metaphor more closely. The legal definitions provided for the use of all parties will

never objectively define a concept. If the declaration of perfect balance does anything for the parties involved, it provides a false expectation of linguistic conceptual matching. This means that each individual is lead to believe that the concepts brought to mind by the words used in the courtroom are the same for everyone. This false expectation of a concrete language creates a false sense of safety.

The realm of metaphor research is anything but a safe haven from reality. Metaphor is not a harmless exercise in naming. It is one of the principle means by which we understand our experience and reason on the basis of that understanding. To the extent that we act on our reasoning, metaphor plays a role in the creation of reality. When that created reality is a grim reality, it becomes all the more important to understanding the mode of reasoning that helped create it (Lakoff & Johnson 79).

The “grim reality” addressed by Lakoff and Johnson certainly describes the atmosphere in and surrounding the courtroom in which the case being tried is about rape.

In 1987, George Lakoff and Mark Turner published “The Metaphoric Logic of Rape.” This article describes the way in which folklore and metaphor might be used by individuals to justify the act of rape as a response to a perceived threat of, or use of, power over themselves. In short, the attacker is reacting to a primal response triggered by signals generated by the potential victim. While they go on to describe this concept as irrational to the point of being absurd, they make an excellent point of how easy it is to accept the powerful manipulation of metaphors taking place, while ignoring the harm they do; thus substantiating the arguments of Aldridge and Luchjenboers. (Lakoff & Turner 77-78.)

Jean-Francois Lyotard promotes academic attentiveness to these moments of heterogeneous understanding. He states these moments are impossible to avoid, given “the impossibility of indifference... and.... the absence of a universal genre of discourse to regulate them,” as necessary to the operation of “legitimate judgment” in his book The Differend: Phrases in Dispute (Lyotard xii). While this might leave us at a dead-end, Lyotard insists, like Wendy Murphy, that the issue is not necessarily one that necessitates the perfect translation of ideas and statements. Rather, Lyotard claims that the harm being done by language like vernacular

metaphor and other linguistic circumlocutions lays in the refusal to acknowledge the *differend*.

As distinguished from litigation, a differend [differend] would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule).

(Lyotard xi)

The *differend* thus becomes a concise definition for the situation we have set up as the typical courtroom case involving rape.

## CHAPTER III: CASE STUDY

The inspiration for this paper began with the words of Tori Bowen: “This law ends with me.” She was speaking about the Nebraska State law Section 27-403 Rule 403, Exclusion of relevant evidence. The rule, covered earlier in chapter 1, allowed Judge Jeffre Cheuvront to ban the words and phrases “rape,” “victim,” “assailant,” “sexual assault kit,” and “sexual assault nurse practitioner” from use by all active internal participants in the trial, including Bowen. As previously stated, these words and phrases could not be used or alluded to in testimony, questioning, or any other discourse that may have been heard by the jury or the public.

A large and growing vocal public interested in human rights and social justice, have argued extensively for another overhaul of the way rape cases are handled in the US courts. This case gives them a vocal and educated, self-described victim of a rape, who states she is being re-victimized by the court system in the United States. The direct impact of Tori Bowen’s own voice can be seen in her promotional material. (Appendix D)

Making the case of Tory Bowen unique, and more powerful, is her claim that a court injunction against specific terms and allusions to those terms not only suborned her ability to testify against her alleged attacker, but also amounted to an order to commit perjury on the stand. The coming together of these parties provide a very fertile ground for First Amendment arguments dealing with the important issues of freedom of speech and of the press. Unfortunately the weight of this important, but often studied and published, subject of first amendment rights overshadows another important issue brought to light by this case - the decision Judge Cheuvront handed down before the case was tried before a jury for the first time, and why he chose to do so.

## The First Trial and Pre Trial Exposition

Before court is called to session in October of 2006, the judge mandates that the now familiar terms and phrases “rape,” “victim,” “assailant,” “sexual assault kit,” and “sexual assault nurse practitioner” not be used during the course of the trial. When he bans these words and

phrases, Judge Cheuvront is making a clear gesture toward eliminating what Burke calls attitude, from the courtroom. The judge is cognitively and acutely aware of the ramifications language has on the reactions of individuals and therefore on the outcome of publicly juried cases.

After the injunction is placed, the defendant's counsel also seeks to have the words "sex" and "intercourse" banned from the trial. The defense claims these words are "unfairly inflammatory, prejudicial, or misleading, and they invade the province of the jury." However, The latter two requests are denied on the grounds it leaves too few means by which the act in question may be described.

On the psychological face of the court case, as opposed to the linguistic, TF-CBT echoes the literary rules of Burke, Lakoff, Johnson, and Lyotard. Studies from this area show that recognizing and locating the items to be used in the narrative is the first step in obtaining agency over them. So it would seem everyone is playing by the same rules of understanding that language has agency, even if no one are not voicing it directly.

Well, maybe everyone but Tori Bowen, that is. However, it is the job of the prosecution to run the case on her behalf. Tori Bowen is a "witness"

and not a “victim” according to the court, until her “alleged” rapist has been both proven, and found, guilty.

During the first trial, Bowen testifies that she “woke up with vomit in [her] hair and a man [she] did not know on top of, and inside [her].” During her thirteen hours of testimony, Bowen uses some of the banned words and is chastised by the judge. She is told that if she continues to use these terms she could face fines, a mistrial, and be jailed for contempt of court. While Tori Bowen does her best to submit to the will of the court, and thereby surrenders the way in which her story is told to the jury, some of the other witnesses do not.

The court later names them as Ms. Bowen’s “two sorority sisters who, uh, whether it was deliberate or not...violated the orders of the court” as they pertained to banned language. The following quote, from the hearing held between the first and second trials, shows the judge’s implicit understanding of the importance of the vernacular euphemism and metaphor:

[If I allowed this testimony, the defense] would say... The Supreme Court of Nebraska has told us that we should use motions in limine...so that we know what the evidentiary



issues are in advance. What good does it do to file the motions if the witnesses violate them And the words are used or things are mentioned that should not be. And then I tell the jury, well, the objection is sustained and you are to disregard the comments but all of us know that's very difficult to do. [sic] (State)

However, the judge fails to recognize that while this is undoubtedly true of the banned words and testimony in all cases, it is also true of whatever is substituted or cut from the witnesses' testimony. Banning or removing certain language leaves a vacuum, which will always be filled by something else.

This is played out in both in both verbal and bodily communication. A complaint filed with the Federal Court in 2007 discusses precisely these effects through the understanding of Tori Bowen as a witness on the stand during the first trial. She states that she felt that the injunction had a direct impact on the jury and gives the following reasons: She was forced to use words that did not properly describe her reaction to the situation. The search for these words caused her to appear uncertain as she paused

and cautiously responded in order to avoid violating the injunction. She felt as if she were lying.

This is extremely important, as the human psyche is programmed to detect even subtle hints of deception, as stated by Professor Jeffery Kirvis and Lawyer Mariam Zadeh in their co-written article, “Hunting for Deception in Mediation – Winning Cases by Understanding Body Language.” Citing Bok, Ekman, and Frieman, Kirvis and Zadeh explain:

Since truth-telling is considered preferable to telling lies, most people are not well-practiced liars and as such will need to work hard to control the undesirable feelings associated with deceiving another. In their strained attempt to look credible, they cannot help but reveal cues that reflect their deceptive behavior, commonly referred to in IDT (Intentional Deception Theory) literature as “leakage” (Kirvis & Zadeh)

As Tori Bowen’s directed testimony produced a false story in her perception, it then comes across as a lie to the jury. It is not important how or why the testimony seems false, only that her perceived intention will be tainted by her dramatic language.

## Second Trial and External Courtroom Drama

Following a meeting with the judge and both representing attorneys, as discussed in the introduction and its accompanying documents, Bowen prepares to testify at a second trial, scheduled to begin July 7<sup>th</sup> 2007. However, the second trial does not advance beyond jury selection before Judge Cheuvront declares it a mistrial. According to Nebraska State Court transcripts this is in response to

publicity that would make it virtually impossible to summon additional jurors who would be untainted by the media reports [which resulted from the] inescapable conclusion ... [that]... Ms. Bowen and her friends hoped to intimidate [the] court and interfere with jury pool selection (State).

For the second time, the judge holds that the language being used and/or heard in the courtroom is highly affected by the external motivations and internalized conceptions. His reaction is to defend the court and the defendant's right to a fair trial evicting intention and subsequent drama on the part of the prosecution and supposed un-biased

witnesses. However, in the eyes of Tory Bowen and her advocates, Judge Cheuvront is not banning words which violate the defendant's right to a fair trial, so much as he is revoking her right to say she believes she had been victimized. This biased response from the court keeps justice from being served on both sides of the trial. It also rejects the public as interference, returning to the historical representation of rape as a crime of physical altercation and/or defacement of private property as opposed to a social gesture of violence and control.

### Third Trial and the Supreme Courts

Following the second mistrial, Bowen and her attorney file a petition with the Nebraska State Supreme Court to intervene on her behalf. This filing requests that Judge Cheuvront be forced to lift the language injunction (Mabin2). According to the United States District Court, D. Nebraska, The State Supreme Court found for Judge Cheuvront, citing that Bowen and her attorney had violated Rule 11 (State).

Rule 11 provides that:

when a party or a lawyer files a complaint, that person certifies that the claims ... and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law....

In common vernacular, the State Supreme Court found that Bowen's complaint was baseless. They determined that Bowen and her attorney failed to prove that any of the following were true:

- Bowen's testimony would have a substantially different, but still honest, impact on the jury if she were not barred from the use of the terms "rape," "victim," "assailant," "sexual assault kit," and "sexual assault nurse practitioner."

- Rule 403 requires extension, or modification, to clarify how it should be used in the Nebraska State Courts.

- New laws should be established in regard to what specific words or phrases should or can be used in Nebraska State Courtrooms.

Before the date of the third court trial of The State of Nebraska vs. Safi Pamir on the charge of rape, Bowen and her counsel filed an appeal of

the State Supreme Court's decision to uphold the judge's orders. The United State Court of Appeals, Eighth Circuit, found that Judge Cheuvront was not properly served with his notice of the court proceedings naming him as the defendant. It was on this legal technicality that the case was decided in favor of the judge on March 27, 2008 (Gibbs).

In the interim, the State Prosecuting Attorney's office dismisses the original rape case that is scheduled to be tried for the third time on July 12, 2008. They cite the lack of likelihood of a guilty verdict following two mistrials. No mention is made in this dismissal of the State Supreme Court cases. Instead, the "waste of public funds" is cited as a primary reason for the decision to drop the rape charges against Safi Pamir (Bratton).

The decision of the Federal Appeals Court is then appealed at its final stop, the last legal hope for any case not being presented to the President: the Supreme Court of the United States. The appeal was dismissed on October 20, 2008 with the following (complete) statement: "The petition for writ of certiorari is denied" (State). Each step along the way, the courts deny the importance of language's agency in the courtroom for all parties involved.

This final decision is met, as are many of the earlier decisions of both the State Supreme Court and the State Court of the original case, with public outrage. Media, from the local Nebraska paper, the *Lincoln Star*, to *Time Magazine*, to international public journalists, write scathing articles about the cases and private citizens flock to online and print venues in order to express disbelief and disdain for the judgments that are handed down. Despite continued public concern about this matter, there is no intent at this time to reconsider the original case, or the case against Judge Cheuvront's injunction. Looking at these legal cases, and the public discourse surrounding them, gives us an opportunity to see how both vernacular euphemism and denying the global agency of language can be extremely detrimental to both the content and outcome of rape cases.

Knowing this, it becomes necessary to extend this idea into the many spaces of trauma, where rhetoric is, and must be, employed according to both Burke and Lyotard. Philosophers, psychologists and rhetoricians each have a piece of the linguist puzzle that will help to create a public awareness of how language functions beyond the words on a page. With further study and more publication about the real life implications of

vernacular euphemism, we can move some of the healing and justice from  
Symbolic to Real.



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## Appendix A

### TABLE OF NEBRASKA LEGAL STATUES

1. Nebraska State Law Section 29 Rule 2028 Sexual assault; testimony; corroboration not required. The testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall not require corroboration.
2. Nebraska State Law Section 28 Rule 318 (4) Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
3. Nebraska State Law Section 28 Rule 317, Sexual assault; legislative intent. It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case

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

4. Nebraska State Law Section 27 Rule 403, Exclusion of relevant evidence; reasons, reads as follows: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

5. Nebraska State Law Section 28 Rule 318 Terms, defined as used in sections 28-317 to 28-321, unless the context otherwise requires:

- Actor means a person accused of sexual assault;
- Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;



- Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;
- Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
- Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under section 28-320.01;

- Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or non-health purposes. Sexual penetration shall not require emission of semen;
- Victim means the person alleging to have been sexually assaulted;
- Without consent means:
  - (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;
  - (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent

genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

- (c) A victim need not resist verbally or physically where it would be useless or futile to do so; and
- Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

## Appendix B

### ANNOTATIONS

#### **Jury instruction**

- Jury instruction approved, defining cunnilingus as including licking, kissing, sucking, or otherwise fondling the sex organ of a female with the mouth or tongue.
  - State v. Piskorski, 218 Neb. 543, 357 N.W.2d 206 (1984).

#### **Sexual contact**

- In proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose.
  - State v. Osborn, 241 Neb. 424, 490 N.W.2d 160 (1992).
- "Sexual contact," as defined in subsection (5) of this section, is established when the State proves that defendant intentionally touched the victim's underpants in the area between the legs.
  - State v. Andersen, 238 Neb. 32, 468 N.W.2d 617 (1991).
- In proving "sexual contact," defined in subdivision (5) of this section, the State need not prove sexual arousal or gratification, but only

circumstances and conduct which could be construed as being for such a purpose.

- State v. Berkman, 230 Neb. 163, 430 N.W.2d 310 (1988).

### **Sexual Penetration**

- Penetration need not be penile to be sufficient to establish first degree sexual assault.
  - State v. Shepard, 239 Neb. 639, 477 N.W.2d 567 (1991).
- The act of fellatio constitutes a sexual penetration within the meaning of this section.
  - State v. Gonzales, 219 Neb. 846, 366 N.W.2d 775 (1985).
- The slightest penetration of the sexual organs is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault.
  - State v. Tatum, 206 Neb. 625, 294 N.W.2d 354 (1980)

### **Source:**

- Laws 1977, LB 38, § 33; Laws 1978, LB 701, § 1; Laws 1984, LB 79, § 3;

- Laws 1985, LB 2, § 2; Laws 1995, LB 371, § 3; Laws 2004, LB 943, § 4.

- Effective date April 16, 2004.

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6. Nebraska State Law Rule 11, Excerpt.

When a party or a lawyer files a complaint, that person certifies that the claims ... and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law....

## Appendix C

### ORDER OF EVENTS: BOWEN TRIALS

November 2005 – Initial Charges Filed Against Actor

October 2006 – 1<sup>st</sup> Trial Commences, Bowen Testifies for 13 hours

October 2006 – Mistrial Declared due to hung jury.

July 7<sup>th</sup> 2006 – Case is declared a mistrial before jury selection commences  
due to non-availability of an impartial jury pool.

July 11, 2007 – Bowen is questioned by the Court about her intent in  
regard to use of the prohibited words in testimony.

July 2007 – Bowen's attorney asks NE Supreme Court to overrule State  
Court's injunction.

July 12, 2007 – Case is thrown out by State Prosecution.

July 2007 - State Supreme Court finds in favor of State Court.

October 2008 – US Supreme refuses to hear the case.

## Appendix D

### Tory Bowen's Promotional Material

1

Statement for Emergency National Protest "Call it RAPE!"<sup>1</sup>

From Angela Rose, Executive Director of PAVE: Promoting Awareness, Victim Empowerment

**Thank you everyone for coming out today and standing in solidarity with concerned citizens all across this country. From New York to California, America is united today in this emergency call to action. Thousands of people are speaking out together in this first ever "Call it RAPE!" Protest against the silencing of rape victims.**

**In an abominable ruling against rape survivors, issued by Judge Jeffre Chevront from Lincoln, Nebraska, rape survivor Tory Bowen was forbidden to use the words "victim," "assailant," "rape," "date rape drugs," "sexual assault kit," and "sexual assault nurse examiner." The Judge allowed the victim to call the crime "sex" and "intercourse." In other words -- erotic and consensual terminology is ok - but the language of violence -- the truth about what rape is -- is forbidden. The Judge then created a written document and instructed Ms. Bowen to sign it indicating that she could go to jail if she used the word "rape".**

**Ms Bowen explained to the judge that she could not swear to tell the truth, the whole truth and nothing but the truth and then use words that did not truthfully describe what happened. The Judge nevertheless told Ms. Bowen that if she violated his order and used the word "rape" during trial, she could go to jail for up to six months! Ms Bowen did not back down and her resistance is being celebrated today.**

**This protest and rally was organized by national nonprofit PAVE: Promoting Awareness, Victim Empowerment.**

**PAVE held protests in Lincoln, Nebraska on July 9 and July 11, 2007 near the courthouse where Judge Chevront issued his controversial rulings.**

**On July 12, 2007 the Judge declared a mistrial on the grounds that there was too much publicity in the case. The Judge specifically blamed the protesters as causing the media coverage. The irony of course is that it was not the protests that caused excessive media attention - it was his unprecedented unfair silencing of a rape victim.**

**Let's be clear about this -- the judge silenced a rape victim by forbidding her to call it rape -- and then delayed the trial, essentially punishing a rape victim for speaking out against his decision.**

**Is there a more un-American way to run a justice system?**

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**Every person in this country has a fundamental right to testify fully and truthfully in a court of law - and every person in this country has an equally**



fundamental right to protest unfair government conduct. Judge Cheuvront is the government -- and his unconstitutional silencing of not only Tory Bowen but also the people who protested his decision is exactly why thousands of people are gathered all across the nation today. And we will gather again the next time and the time after that until Ms Bowen is allowed to call it rape!

This is not only about rape victims, it is about respect for the most fundamental of civil rights! If this judge can forbid Ms. Bowen to call it rape, then any judge can forbid any victim - indeed any witness to any crime -- to tell the truth in a court of law.

This silencing will not be tolerated. We stand today in support of Tory Bowen and her family and we will continue to speak out in this fight for justice, fairness, respect and free speech.

At a Halloween party in 2004, Tory Bowen, then a 21 year old student at the University of Nebraska-Lincoln, was at a college pub with her sorority sisters. 31 year old Pamir Safi, whom Ms. Bowen did not know, was also at the pub. Tory has no memory of meeting Safi. She was having fun with her friends, and the next thing she remembers is regaining consciousness, with vomit crusted in her hair, while Safi was raping her.

Ms Bowen believes that she became unconscious because she was drugged that night. And we all know that it is a common experience for a victim who has been drugged to become unconscious for several hours.

Unfortunately, the vial of urine that should have been tested for the presence of drugs was somehow damaged en route to the lab so it was never tested.

Ms. Bowen immediately reported the crime and later learned that Safi had been arrested twice in the past for rape, though he was never convicted.

Ms Bowen also learned that Safi lied to police when he denied having been arrested for committing sex crimes in the past. Judge Cheuvront excluded this evidence from Ms Bowen trial at roughly the same time he ordered Tory not to use the word "rape" during trial.

We stand her today in support of Ms Bowen's refusal to obey a court order that essentially requires her to lie on the witness stand.

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"The word "sex" implies consent," Ms Bowen said. "I could never, ever, describe what happened to me as sex. It was rape. I intend to call it rape. I will not lie. I will not commit perjury by calling it sex."

When Ms Bowen made this clear to the judge, she was threatened with contempt and incarceration.

Also threatened with punishment was Ms Bowen's lawyer, Wendy Murphy, a well-known attorney and professor at the New England School of Law in Boston, who traveled to Nebraska to represent Bowen for free. Because she was not licensed in Nebraska, Attorney Murphy did what lawyers do when they travel to other states: she filed a document seeking permission to represent Ms Bowne in Judge Cheuvront's courtroom. The judge completely ignored Attorney Murphy for three straight days, though each day promising to hear her when jury selection was completed. As soon as Murphy headed to the airport to return to her family in Boston, the judge summoned Tory Bowen to court to hold a hearing. With Attorney Murphy unavailable, the judge again threatened Ms Bowen with incarceration if she did not obey his order forbidding use of the word rape. Tory stood strong

and advised the court that she understood the order and respected the court but could not promise to comply with an order requiring her to lie under oath.

The following day, the judge declared a mistrial blaming Ms Bowen and the protesters for causing too much publicity.

While Ms Bowen and her family are frustrated at yet another delay in their quest for justice, the prosecutor has made it clear that he will take the case to trial again in the near future. In the meantime, Attorney Murphy is preparing an appeal to federal court in the hope a federal judge will order Judge Cheuvront to reverse his ruling forbidding use of the word rape.

The judge's ruling is unfair but equally infuriating were the comments of defense attorney, Clarence Mock, who said, "Trials should be deliberations based upon reasons, and the facts and the law. Not about who can think up the most juicy terms to apply."

Well, Mr. Mock, we would never refer to the word rape as a "juicy" term - but we now have insight into your perspective on the seriousness of rape. Shame on you Mr. Mock. Maybe you haven't read the leading Supreme Court case, Mr. Mock, where the US Supreme Court ruled that describes rape not as "juicy", Mr. Mock but as the most severe violation of the self, short of murder. Rape is a devastating but under-reported crime and guess why Mr. Mock? - Because people like you think it's appropriate to use words like "juicy" to describe the crime.

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It's bad enough that victims are violated by rape -- they should never be revictimized

in the name of justice!

Shame on Judge Cheuvront, shame on Mr. Mock, shame on Pamir Safi and shame on our legal system if this outrageous ruling is not reversed before the next trial!

This protest is only the beginning we will not be silent - we will be at every trial - and we will call it rape!

Today we share our *Call it RAPE!* 10 step action plan:

1. Visit: [www.pavingtheway.net](http://www.pavingtheway.net), sign the "free speech for survivors" petition
2. Write a letter to Judge Cheuvront to let him know what you think of his unconstitutional ruling.
3. Write letters of support to Tory Bowen.
4. Call your congressional leaders - ask them to protect victims' federal constitutional free speech rights.
5. Write letters to the editor and opinion editorials to your papers and to the leading Nebraska papers.
6. Talk to your friends and family about this case and other unjust sexual assault cases. Develop court watch programs to see whether judges in your community are restricting victims' free speech rights and continue to build your email list and contact information for people in your community so we can be even stronger in numbers.
7. File a complaint with the judicial conduct commission -- this judge exceeded his authority and may have engaged in unethical behavior
8. Sign up for our action alert on our website so that you will receive updated information and be ready to protest again when necessary.
9. Contribute time, money and resources to advocacy groups such as

**PAVE: Promoting Awareness, Victim Empowerment. Consider starting a PAVE chapter in your community**

**10. Make sure this is an issue at re-election time for every judge and every governor in every state. No person deserves the right to be called "judge" who would so disrespect a rape victim's fundamental right to testify fully and truthfully under oath in a court of law.**

**Thank you so much for coming out today, by your presence today, we have already made a difference! We support the strength and the voice of Tory Bowen who said, "Silencing rape victims has been going on for too long in this country."**

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**This is the final straw. This is the ultimate silencing of rape victims and it will not be tolerated.**

**We will always call it rape -- you should always call it rape -- Americans have a fundamental right to call it rape and together we will fight to make sure our courts will always call it rape.**

**Thank you for coming out -- thank you for your time and your commitment to this important cause.**

**Tory Bowen**  
Victim Advocate and Public Speaker

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202-321-0325

Tory Bowen has been featured on the Today Show, Fox and Friends, and the O'Reilly Factor in addition to receiving significant media coverage during the 2007 trial. She has appeared on; CNN, Fox, CBS, NBC, ABC, Star Jones show on Court TV and has been quoted throughout many AP articles, appearing in over 300 newspapers. She has spoken on several live radio interviews ranging from KNX news radio in Los Angeles, to NPR. Time Magazine also featured her story in a segment that was ranked number one as the most viewed; most shared, and most read articles of that week.

As much as she feels that the interviews and media coverage have helped spread the word regarding the legal battle, she finds that her public speaking has gained wonderful allies, friends, supporters, and pioneers in the movement. Her first speech on rape took place in the basement of her sorority house. Subsequently she has spoken at law schools, universities, and fundraisers.

**PUBLICATIONS and SPEECHES**

2008, November 2<sup>nd</sup>, "Welcome to Nebraska, the Rapist State" Editorial published in the Lincoln Journal Star, Lincoln, NE

2008, October 6<sup>th</sup>, "Rape Becomes You" Speech at University of Delaware in Newark, Delaware for the student body

2008, April 30<sup>th</sup> "Rape Becomes You" Speech at Dillon, MT for the Police Department and Sheriffs

2008, April 29<sup>th</sup> "Rape Becomes You" Speech at Dillon, MT for the Sexual Assault Nurse Examiners and Rape Crisis Center

2008, April 21<sup>st</sup>, "Rape Becomes You" Speech at Messiah College in Grantham, PA for the student body

2008, April 15<sup>th</sup>, "Rape Becomes You" Speech at Georgetown University in Washington, DC for the student body

2008, Feb. 25<sup>th</sup>, "Rape Becomes You" Speech at Marist College in Poughkeepsie New York for the student body

2007, Speech, "Start Here, Start Now" given for George Washington University in Washington, DC for "Take Back the Night"

2007-2008 RAINN (Rape, Abuse, Incest, National Network), member of National Speakers Bureau

2007, Speech, "Battle" given for the It Happened to Alexa Foundation Gala Fundraising dinner at the Niagara Falls Country Club, NY

2007, Speech, "The Linguistics of Rape" New England School of Law, Judicial Conference on "The Troubling Language of Rape: How Eroticism, Gender Myths, and Victim Blaming Affect Social and Legal Discourse"

## **APPEARANCES**

### **Media/Print Media/Radio**

- CNN • Fox • NBC • The O'Reilly Factor • Fox and Friends • CBS • ABC • Today Show • Star Jones (Court TV/ Tru TV) • Mike & Julia in the Morning • KNX News Radio Los Angeles • Feminist Radio Station • RAINN public service announcement • National Public Radio • Associated Press • The Wall Street Journal • Time Magazine • USA Today • Los Angeles Times • The Washington Post • The Chicago Tribune • The Daily News • Feministing.com • RAINN Speaker's Bureau • Slate.com • NOW.org • People Magazine

### **Upcoming Media**

- Monthly Guest Blogger column entitled "The Victim's Voice" on [www.CrimeJunkies.com](http://www.CrimeJunkies.com)
  - Upcoming article in the National Sexual Violence Resource Center Newsletter



## Tory Bowen is Speaking Out

And she wants to speak in  
your town!

### 2009 Speaking Topics:

#### • “Rape Becomes You”

Tory takes you through her life during her senior year and how it all changed in a moment when she was raped. She walks the audience through the ER experience, the arduous trials, and the Supreme Court. Recommended for those who are specifically interested in Tory’s case, Sexual Assault Nurse Examiners, Legal Advocates, High School students, College Students, General Audiences, Attorneys and Law School students.

#### • Being the “Nut and Slut”

Defense Attorneys commonly use a “Nut or Slut” defense in order to prove their client innocent. Tory takes a deeper look at the victim, and the effects of a trial on a victim, and how you can make it less difficult for victims. Recommended for Attorneys, Police Officers, Law School Students, Judges, County Officials, Media Members, and Victim Advocates.

#### • Truth Matters: Rape By any other Name is not Rape. One silenced rape victim’s journey from failed justice to activist for legal reforms

*Presentation with Attorney, Wendy Murphy*

After meeting Wendy Murphy, prominent Victim’s Rights Attorney Tory began a legal battle with Wendy that lasted nearly two years. Tory will discuss her rape and trial, where as Wendy will discuss the legal issues, procedural hurdles and novel constitutional dimensions of her work on Tory’s behalf as the case made its way from Lancaster County, Nebraska all the way to the United States Supreme Court. Audience members will learn how one person can make a difference in a legal system.

Tory Bowen has been featured on the Today Show, Fox and Friends, the O’Reilly Factor and most recently in People Magazine. She has appeared on; CNN, Fox, CBS, NBC, ABC, Star Jones Show (Court TV) and has been quoted throughout many AP articles, appearing in over 300 newspapers. She has spoken on several live radio interviews ranging from KNX news radio in Los Angeles, to NPR. Time Magazine also featured her story in a segment that was ranked number one as the most viewed; most shared, and most read articles of that week.

As much as she feels that the interviews and media coverage have helped spread the word regarding the legal battle, she finds that her public speaking has gained wonderful allies, friends, supporters, and pioneers in the movement. Her first speech on rape took place in the basement of her sorority house. Subsequently she has spoken at law schools, universities, and fundraisers around the nation. Now she is leading a nationwide fight for legal reform for victims.

*“Hearing a firsthand account of the situation is the most effective way of making an impact. The information I heard today is something that I will pass on to others.”*

*-Marist College Student, 2008*

*“This program really opens student’s eyes to the way people in this country view rape. I felt that Tory really presented in a way that people our age can relate to her. The whole presentation was attention grabbing and extremely impacting...I have friends still talking about it days after seeing it.”*

*-University of Delaware College Student, 2008*

**Please call or email to reserve your 2009 speaking date now!**

**Tory Bowen**

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**(202) 321-0325**