# The Language of Sexual Violence[1]

Judges' words matter – a great deal. Witnesses, attorneys, and jurors pay close attention to what judges say and how they say it. Judges need to remain neutral and impartial in their demeanor and in their language. They are also required to strictly adhere to the presumption of innocence in all criminal cases. Because they are so laden with myths and stereotypes, sexual assault cases present a unique challenge to judges. Much of the language commonly used in talking and writing about sexual violence is neither neutral nor impartial.

The language of sexual violence is challenging for everyone, but it is particularly important for those working within the legal system to get it right. "Written judgments not only express current law, but also shape future law and society itself."[2] Language is especially important in the legal system. "[T]he language in which events are described becomes the official version of those events, in the courtroom and beyond."[3] Legal language "represents a 'public discourse (and not uncommunicated thoughts, attitudes, or motivations) that has an impact and is acted upon.'"[4] For instance, in a large-scale study of 230 media articles discussing domestic violence homicides or attempted homicides, one in four articles relied on court records and one in five cited law enforcement sources.[5]

This chapter discusses the language of sexual violence and how the language we use often fails to reflect the seriousness or gravity of these crimes. Topics include: (1) the use of the language of consensual sex to describe assaultive acts; (2) the use of victim blaming language; (3) linguistic avoidance, or "the invisible perpetrator;" (4) other common examples of minimizing language; (5) language restrictions in the courtroom (word bans); and (6) recommendations for judges to help them use language that more accurately reflects the realities of these crimes, while still maintaining their neutrality and impartiality and respecting the presumption of innocence. The goal is to provide judges with the social science research on how the language we use helps shape our response to sexual violence.

For many years, linguists and others have studied the importance of language and the word pictures created as a result of our choice of words. Their conclusion: "Language can never be neutral; it creates versions of reality. To describe an event is inevitably to characterize that event."[6] For example, consider the term "comfort women." That term is commonly used to describe women and girls "recruited" to "work in brothels" by the Japanese military during World War II. The term implies affectionate care and consolation.[7] In fact, soldiers kidnapped

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[1] Written by Claudia J. Bayliff, Attorney at Law, Falls Church, Virginia, an attorney and educator with more than 29 years of experience working on issues related to sexual violence. Copyright © 2017 Claudia J. Bayliff. All rights reserved.

[2] Clare MacMartin, (Un)reasonable Doubt? The Invocation of Children's Consent in Sexual Abuse Trial Judgments, 13 Discourse & Soc'y 9, 11 (2002).

[3] Janet Bavelas & Linda Coates, Is It Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments, 10 J. Soc. Distress & Homeless 29, 30 (2001).

[4] MacMartin, (Un)Reasonable, supra, at 11.

[5] Judge Chuck Weller, Needed: A Guide for Media Coverage of Domestic Violence (2009) (unpublished M.J.S. thesis, University of Nevada) (on file with the University of Nevada, Reno Library).

[6] Bavelas & Coates, Is it Sex or Assault?, supra, at 29.

[7] *Id*.

these women and girls from their homes and serially raped them for years. Nearly 200,000 women and girls were forced to live in "comfort stations" throughout East Asia from 1932 through the end of the war. The euphemism "comfort women" conveys none of the brutality the soldiers inflicted on these women and girls. The women's violent ordeal is "silenced and hidden."[8]

**Using the Language of Consensual Sex to Describe Assaultive Acts:** Much of the language used to describe sexual violence ends up ascribing blame to the victims and minimizing the perpetrator's responsibility. One common practice is to describe violent sexual assaults using the language of consensual sex. In other words, we are more likely to describe sexual assaults as sex, rather than as assaults. Describing assaultive behavior using the terms usually used for pleasurable or affectionate acts minimizes and hides the intrinsic violence of the assault. It also makes it harder to visualize the acts as unwanted violations. By not describing the violence, this language also tends to normalize the acts, allowing society to rationalize, justify, and even excuse sexual aggression. The victim's fear, objectification, and pain are completely hidden.[9]

**Language of Consent:** Consider the difference between the following two sentences: He had sex with her" versus "he forcefully penetrated her vagina with his penis." The first sentence paints the incident as a mutual, consensual act, negating the factors of power and violence. The second sentence focuses on the offender's unilateral and forceful actions against another person.

Researchers Janet Bavelas and Linda Coates did an extensive analysis of the language Canadian judges used in their written trial judgments in sexual offense cases. The researchers looked at seven years of written judgments. The fact that Canadian judges write formal trial judgments at the conclusion of their trials makes it easier for researchers to study the judges' language. Bavelas and Coates found that the judges often used eroticized language that created an intimate and non-threatening scene.[10] Examples of the judges' language include: "He fondled her breasts," "he kissed her holding her tight," "they had sex on the bed," "oral sex," and "the first episode of intercourse."[11] The judges' most frequent descriptions used erotic or affectionate language. These terms "ignore the difference between sexual activity and the crime of sexual assault."[12] The judges were much less likely to use terms describing the acts as violent.[13]

**Language of Mutuality:** The Canadian judges also used statements that implied consent, without the context of either physical or emotional force. In addition, the judges often used language that suggested the acts were mutual, rather than a forceful act perpetrated by one individual against another. The researchers found phrases such as "they had intercourse" and "she performed oral sex" in the trial judgments.[14] The word "perform" is particularly

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[8] Bavelas & Coates, Is It Sex or Assault?, supra, at 29-30.
[9] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[10] Other examples of case law in which appellate judges use the language of consensual sex to describe the acts of convicted defendants can be found at the Judicial Language Project website, at https://student.nesl.edu/centers/clsr_jlp.cfm.
[11] Bavelas & Coates, Is It Sex or Assault?, supra, at 33-34.
[12] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.
[13] Bavelas & Coates, Is It Sex or Assault?, supra, at 35.
[14] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.

problematic because it implies the victim was the actor, rather than the recipient of someone else's violent act.

Bavelas and Coates described the problem with using these types of terms as follows:

> [O]nly when both individuals agree to participate in sexual activity can their actions be accurately called, for example, *intercourse*. In contrast, if one of them has put a body part inside the body of the other without his or her consent, then the action is more accurately described as an *assault* or *forced penetration*. It is a unilateral rather than mutual activity even though the same parts of the body and somewhat similar actions are involved. Similarly, consider the difference between describing certain acts as *touching* or *rubbing* versus describing them as *fondling* or *caressing*. What has been added in the latter terms is a characterization of the acts as positive, consensual, mutually pleasurable, erotic, and even affectionate. The second set of terms ignores the difference between sexual activity and the crime of sexual assault.[15]

Using the language of consensual sex to describe assaultive acts "does not just euphemize; it actively misleads and misdirects. Rather than naming or describing the violence, sexual language may even normalize the acts, bringing them discursively into the range of everyday human behavior."[16] One particularly troubling aspect of the analysis of the Canadian judges' language is that there was no statistically significant difference in the way the judges described acts in cases in which the defendant was acquitted or convicted. Judges were equally likely to use the language of consensual sex to describe acts that were legally found to be assaults as they were when describing acts that were deemed consensual and not criminal.[17] Even in cases of sexual assault on a child, where there is no possibility of consent, judges were just as likely to use eroticized language. As a matter of fact, familial assaults on children were twice as likely to be described using the language of consensual sex as assaults on adult women by former husbands or boyfriends.[18]

With the widespread availability of DNA evidence, consent is now the most likely defense in a sexual assault case. Defense attorneys often categorize the incident as consensual, creating images of an affectionate or romantic act. Once a category is established in the courtroom, others, including judges, are also likely to adopt it, which is a phenomenon called "semantic contagion."[19] However, if the same language is used to describe both consensual and nonconsensual acts, "then a crucial distinction in the law has been obscured."[20] Therefore, judges must be careful not to just adopt the language of consensual sex to describe assaultive acts.

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[15] *Id*. (emphasis in original).
[16] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[17] Bavelas & Coates, Is It Sex or Assault?, supra, at 35.
[18] Bavelas & Coates, Is It Sex or Assault?, supra, at 38.
[19] Andrew Taslitz, Rape and the Culture of the Courtroom 85 (1999).
[20] Bavelas & Coates, Is It Sex or Assault?, supra, at 31.

**Presumption of Innocence:** On the other hand, judges must be also mindful of the presumption of innocence, one of the cornerstones of our criminal jurisprudence. The context is particularly important. For instance, if a judge is taking a plea or sentencing a defendant, the judge should avoid using the language of consensual sex to describe the defendant's actions. In those instances, the judge should make clear that the defendant was solely responsible for his or her actions. Prior to conviction, judges must be careful to use neutral and impartial language. They must take care not to just automatically use the language of consensual sex, which is neither neutral nor impartial.

**Victim Blaming Language:** In another fascinating study of Canadian judges' sentencing decisions, researchers analyzed trial court judges' sentencing language over a seven-year period to determine how the judges apportioned responsibility for crimes of sexual violence. The researchers focused on how the judges characterized the defendants and how the judges wrote their accounts of the crimes. What the researchers found is that "judges typically mitigated offenders' responsibility for sexualized violence by portraying them as compelled by forces beyond their control (e.g., alcohol, sexual urges, pathology, emotion, stressful experiences, or past experiences)."[21] The judges often relied on psychological explanations or causal attributions that resulted in them minimizing the perpetrators' responsibility and reformulating deliberate acts of violence into non-deliberate and non-violent acts.[22]

The researchers also concluded that, in sentencing sex offenders, judges often blamed or pathologized victims.[23] As part of the study, the researchers also reproduced one entire sentencing judgment and reviewed it line-by-line, dissecting the language used in each part of the opinion. In that case, an elementary school teacher pleaded guilty to two counts of sexual assault against two of his students (who were both seven-year-old girls).[24] The victims were portrayed as "the catalysts who excited the sexual desire of a good man who [was] among the 'best' of teachers."[25] In the sentencing judgment, the judge reformulated the child victims into perpetrators who were responsible for the acts committed against them, while describing the perpetrator – an adult male teacher – as a victim who was not responsible for his actions.[26]

Most of the sexual assault cases in which judges end up on the front page of the newspaper or on the receiving end of negative media attention involve these types of victim blaming statements, often from sentencing hearings. For example, a Montana judge was publicly reprimanded and suspended for inappropriate comments he made in sentencing a former high school teacher to 30 days in jail for raping a 14-year-old child.[27] The teacher pled guilty and was being sentenced for violating the plea. The child committed suicide prior to the hearing. During the sentencing, the judge referred to the victim as "older than her chronological age" and

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[21] Linda Coates & Allan Wade, Telling It Like It Isn't: Obscuring Perpetrator Responsibility for Violent Crime, 15 Discourse Soc'y 499, 514 (2004).
[22] Coates & Wade, Telling It Like It Isn't, supra, at 499.
[23] *Id*.
[24] Coates & Wade, Telling It Like It Isn't, supra, at 514.
[25] Coates & Wade, Telling It Like It Isn't, supra, at 520.
[26] *Id*.
[27] Maya Srikrishnan, *Montana judge publicly reprimanded for comments about rape victim*, LOS ANGELES TIMES (Jul. 22. 2014), http://beta.latimes.com/nation/nationnow/la-na-nn-montana-judge-censured-rape-comments-20140722-story.html.

stated that the child was "in as much control" as the 49-year-old rapist.[28] A Utah judge described a convicted rapist as "an extraordinarily good man," and went on to say, "but great men sometimes do bad things."[29] A Dallas judge received a public warning from the State Commission on Judicial Conduct after she said that a 14-year-old sexual assault victim was "not the victim she claimed to be" and sentenced the perpetrator to probation.[30]

In a recent series of studies of victim blaming, researchers found that something as simple as shifting the position of the victim's name and the offender's name in an experimental scenario can have a statistically significant impact on the amount of blame ascribed to a victim.[31] The researchers used identical scenarios, but changed whether the victim's or the perpetrator's name was first in the majority of the sentences in the scenario. When researchers gave participants scenarios that contained the victim's name first, the study participants "imbued victims with more responsibility, reported more ways that victims could have changed the outcome…and perceived victims as less forced."[32] However, "shifting focus off victims and onto perpetrators reduce[d] victim responsibility and, as a result, victim blame."[33] Although the study primarily demonstrated that the participants' moral judgments had the greatest impact on victim blaming, it is important to also recognize that the linguistic manipulation of focus also played a significant role. These studies reinforce the importance of language in sexual assault cases by showing that a subtle shift in language, with its resultant shift in focus, actually impacts the amount of blame ascribed to the victim.

Judges also need to be sensitive to the impact of class and race or ethnicity on victim blaming. Research on rape and the criminal justice system demonstrates a devaluation of women of color—crimes against women of color are often not taken as seriously as other crimes. For example, in a comprehensive study of rape cases from the initial report to the conclusion of the case, sociologist Gary LaFree found, "It is clear from the analysis that black offender-white victim rapes resulted in substantially more serious penalties than other rapes…. Moreover, black intraracial assaults consistently resulted in the least serious punishment for offenders."[34] Native Americans, both female and male, are subjected to interpersonal violence at much higher rates than other racial and ethnic groups. In addition, many Native Americans carry with them vestiges of historical trauma. Although most victims of sexual violence are women and girls, sex offenders also prey on men and boys. Men are much less likely to report sexual assault. In addition, they are often left out of the discussion and may have more difficulty obtaining assistance and services. Finally, it is important for judges to be sensitive to the unique challenges for victims of same-sex sexual violence.

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[28] *Judge apologizes for rape victims [sic] comments*, NBC NEWS, https://www.nbcnews.com/video/judge-apologizes-for-rape-victim-comments-45717571550 (last visited Aug. 18. 2017).
[29] *The latest: victim shocked by Utah judge remark in rape case*, ASSOCIATED PRESS, https://www.usnews.com/news/best-states/utah/articles/2017-04-14/the-latest-victim-shocked-by-utah-judge-remark-in-rape-case (last visited Apr. 14, 2017).
[30] John Council, *Judge warned over young rape victim comments*, TEXAS LAWYER, (Sept. 16, 2015), https://www.law.com/texaslawyer/almID/1202737344055.
[31] Laura Niemi & Liane Young, When and Why We See Victims as Responsible: The Impact on Attitudes Towards Victims, 42 J. of Personality and Sociology 1, 1 (2016).
[32] Niemi & Young, Impact Attitudes, supra, at 14.
[33] *Id*.
[34] Gary LaFree, Rape and the Criminal Justice: The Social Construction of Sexual Assault 145 (1989).

**Linguistic Avoidance: "The Invisible Perpetrator":** "Language both reflects and shapes our understanding" of an issue.[35] One of the most significant problems with the language we use in discussing sexual and domestic violence is what linguists call linguistic avoidance or "the invisible perpetrator." Linguistically, responsibility for an action "is assigned by naming agents of acts (*i.e*., subjects of verbs)."[36] However, when discussing sexual and domestic violence, we often use passive voice, "which presents acts without agents, harm without guilt."[37] This is problematic because:

> The 'degree of responsibility' apportioned to any offender depends only in part upon his or her actions. It hinges also on how both the offender's and victim's actions are represented linguistically in police reports, legal arguments, testimony, related judgments, and more broadly in professional and public discourse.[38]

Accounts written in the passive voice reduce attributions of responsibility. Readers of passive constructions are more likely to attribute significantly less responsibility to the offender and less harm to the victim.[39] Consider, for example, the difference between these two sentences: "Jen was raped" versus "Daniel raped Jen." Another example is the word "occur." We often talk about how rapes "occur," which suggest that they just happen, and which also allows the perpetrator to remain invisible.

Two ways in which linguistic avoidance can obscure perpetrators' responsibility are: (1) using language to deflect responsibility away from the perpetrator; and (2) diffusing responsibility by describing a situation in which there is no identified perpetrator.[40] Under the first scenario, victims are described as objects of acts for which there are no specified agents. For example, they are depicted as "abused women" or "battered women." In the second instance, language is used to nominalize the violence so that no agent is necessary, such as by talking about "the violence" or "the abuse."[41] Researchers have found a direct correlation between use of these particular linguistic strategies and attribution of responsibility. Individuals who use more passive language and employ these distancing strategies tend to ascribe greater responsibility to the victim and less responsibility to the assailant.[42]

Another common linguistic devise used in sexual and domestic violence cases is to identify the subjects together in a way that suggests mutual responsibility for the criminal acts. Examples include: "marital aggression," "violent relationship," and "family violence." In each of these instances, a criminal act perpetrated by one individual on another is described in such a

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[35] Sharon Lamb, Acts Without Agents: An Analysis of Linguistic Avoidance in Journal Articles on Men who Batter Women, 61 Am. J. Orthopsychiatry 250, 250 (1991).
[36] Lamb, Linguistic Avoidance, supra, at 251.
[37] *Id*.
[38] Coates & Wade, Telling It Like It Isn't, supra, at 514.
[39] Coates & Wade, Telling It Like It Isn't, supra, at 502.
[40] Gerd Bohner, Writing About Rape: Use of the Passive Voice and Other Distancing Text Features as an Expression of Perceived Responsibility of the Victim, 40 Brit. J. Soc. Psychol. 515, 518 (2001).
[41] Lamb, Linguistic Avoidance, supra, at 251.
[42] Bohner, Writing About Rape, supra, at 527.

way to suggest that the acts were mutual, thus obscuring responsibility for the perpetrator's violence.[43]

The goal when talking about sexual and domestic violence is to use accountable language that focuses attention on the person committing the crime. However, language commonly used does the exact opposite. The evolution of "the invisible perpetrator" is demonstrated in the following series of sentences:[44]

- *Andrew beat Jessica.* In this simple declarative sentence, the actor, Andrew, is the subject of the sentence, so responsibility for the act is clearly attributed to him. But that is not the way we talk about domestic violence.
- *Jessica was beaten by Andrew.* In this version, Jessica is now the subject and the construction is more passive.
- *Jessica was beaten.* In this sentence, Andrew is completely invisible, therefore, his responsibility is obscured completely.
- *Jessica was battered.* In this sentence, the word "beaten" is replaced with the word "battered." This construction is much more commonly used in discussions of domestic violence and suggests that the violence is not quite as serious.
- *Jessica is a battered woman.* In this sentence, Jessica is completely defined by what Andrew did to her, but he is completely out of the picture. This common type of language functions to keep the attention off of the perpetrator and allows him to remain invisible and unaccountable.

**Other Common Examples of Minimizing Language:** There are numerous other examples of words or phrases commonly used in relation to sexual violence that serve to minimize the seriousness of the crime and to reinforce pervasive myths and stereotypes. We often use these terms without even thinking about the word picture they create or their impact. These phrases appear most often in media accounts, but they have been used in the criminal justice system as well. Here are several examples of this type of language:

- **Accuser:** This term has become the accepted term used to describe sexual assault victims by the media. It is not used to describe victims of other crimes, such as robberies or burglaries. This term is actually "an act of subtle but profound victim blaming…."[45] Referring to an alleged victim as an "accuser" shifts the dynamics. The victim is now "the one who is doing something to him – she's accusing him. It is her actions – not his – that become the object of critical scrutiny. And he is transformed into the victim – of her accusation. Thus, the use of the word 'accuser' effectively shifts public support from the alleged victim to the alleged perpetrator."[46] Referring to the person by her or his name, or by using

[43] Lamb, Linguistic Avoidance, supra, at 253.
[44] These examples are based on the excellent TED talk, *Violence and Silence: Jackson Katz, Ph.D.*, TEDX TALKS (Feb. 11, 2013), http://www.youtube.com/watch?feature=player_embedded&v=KTvSfeCRxe8 (which cites Julia Penelope, Speaking Freely: Unlearning the Lies of the Father's Tongue (1990)).
[45] Jackson Katz, *Let's stop calling Bill Cosby's victims "accusers"*, WOMEN'S NEWS (Jan. 15, 2015), http://womensenews.org/2015/01/lets-stop-calling-bill-cosbys-victims-accusers/.
[46] *Id.*

the term "victim" or "alleged victim," depending on the context, can easily solve this problem.

- **He Said/She Said:** This phrase, which seems to be used most often by law enforcement and prosecutors to explain why they are not proceeding with a sexual assault case, also appears to only be used in cases involving sexual violence. No one refers to a drug deal or a robbery as a "he said/he said" case even though they are often crimes involving two people with competing accounts of what happened. Besides, the legal system is designed to resolve credibility disputes. No one is suggesting that sexual assault cases are easy to investigate, prosecute, or try, but the phrase "he said/she said" is often used as an excuse and serves to minimize the seriousness of the crime.
- **Date Rape:** This is another extremely common term, which serves to distinguish nonstranger rape from "real (stranger) rape." It minimizes the harm and also includes an element of victim blaming.[47] "You went on a date with him?" One participant in a lecture on the language of sexual violence described it as "rape light."
- **Domestic Dispute:** This phrase is frequently used to describe serious acts of domestic or sexual violence. It implies a mutual problem or dispute. It also implies a verbal disagreement, not a physical assault. "When a mugger assaults and robs a cab driver, it is not described as a 'fare dispute.'"[48]
- **Abusive Relationship:** This common phrase avoids placing the blame on the abuser. A relationship can't be abusive; a person is. Using the term "partner" instead keeps blame focused on the abuser and takes the blame off the victim. In this context, the term "relationship" also misrepresents how the problem can be solved, by putting the partners in the role of "provoker" and "provokee," rather than "abuser" and "victim."[49]
- **Victims "Confessed" They Were Sexually Abused as Children:** As more celebrities, politicians, and other famous people have disclosed that they were subjected to sexual abuse as children, media accounts often describe how these victims "confessed" to sexual abuse. This phrase obviously suggests that the victims have done something wrong or should be ashamed or feel guilty about what someone else did to them.
- **Child Pornography or "Kiddie Porn":** These terms, particularly the phrase "kiddie porn," imply that the children are actually active participants in their own victimization. The phrases minimize and sanitize the violence and criminal nature of the acts depicted. The current phrase preferred by some experts in the field is

[47] Linda Wood & Heather Rennie, Formulating Rape: The Discursive Construction of Victims and Villains, 5 Discourse Soc'y 125, 145 (1994).
[48] Phyllis Frank & Barry Goldstein, *The Importance of Using Accountable Language*, NATIONAL ORGANIZATION FOR MEN AGAINST SEXISM, http://nomas.org/the-importance-of-using-accountable-language/ (last visited Dec. 5, 2017).
[49] James St. James, *It's Not Your Relationship That's Abusive, It's Your Partner – Here's Why That Distinction Matters*, EVERYDAY FEMINISM (Mar. 19, 2015), https://everydayfeminism.com/2015/05/its-not-your-relationship-thats-abusive-its-your-partner-heres-why-that-distinction-matters/.

"child sexual abuse images," which more accurately depicts the true nature of the acts.[50]

- **Child Prostitute:** With the increased attention on trafficking, the phrase "child prostitute" appears in media coverage more and more frequently. This phrase is a legal oxymoron: a person cannot be both a child and a prostitute. By definition, a child cannot consent to any type of sexual contact. A prostitute is one who engages in sexual conduct in exchange for money. Washington statutes used to criminalize "patronizing a juvenile prostitute," but the statute was revised in 2007 to redefine the crime as "commercial sexual abuse of a minor."[51] The phrase "child prostitute" should not be used.[52]

**Word Bans: Language Restrictions in the Courtroom:** Defense attorneys often file motions asking trial judges to prohibit witnesses and prosecutors from using certain terms at trial. These word bans make it difficult for witnesses to testify and inhibit prosecutors' ability to argue their case.

**Background – The Nebraska Case:**[53] On October 30, 2004, a 21-year-old college student left a downtown bar in Lincoln, Nebraska with a 33-year-old Army reservist she met that night. The student said she did not leave willingly and that she had no memory of the rest of the night. She believed she was incapacitated with a rape facilitation drug. The defendant was charged with first-degree sexual assault, and the case went to trial. Following a motion in limine by defense counsel, the Nebraska judge entered an order to exclude the use of the following words at trial: "rape," "victim," "assailant," "sexual assault kit," and "sexual assault nurse examiner." The judge held that these words might be unfairly prejudicial to the defendant. The judge also held that the use of the word "rape" would allow the witness to testify to a legal conclusion. The victim was encouraged by the judge to use words like "sex" or "intercourse." She said being forced to use the word "sex" to describe her experience was like being assaulted all over again. The Sexual Assault Nurse Examiner was required to refer to the evidence kit as the "sexual examination kit" and to herself as the "sexual examiner."

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[50] Washington defines the crime as child pornography, so judges must use the statutory language when discussing or referring to this crime. The example is just included here to alert judges to the connotations of the commonly used phrases.

[51] RCW 9A.44.190(5)(a).

[52] *See also,* Yasmin Vafa, *There's No Such Thing as a "Child Prostitute"*, NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, http://www.ncjfcj.org/there-no-such-thing-child-prostitute (last visited Dec. 5, 2017).

[53] Sources for this case summary include: *Bowen v. Cheuvront*, 516 F. Supp. 2d 1021 (D. Neb. 2007), *vacated*, 521 F. 3d 860 (8th Cir. 2008), *cert. denied*, 555 U.S. 970 (2008); Randah Atassi, Comment, Silencing Tory Bowen: The Legal Implications of Word Bans In Rape Trials, 43 J. Marshall L. Rev. 215 (2010); Tony Rizzo, *Judge's Ban On the Use of the Word 'Rape' At Trial Reflects Trend*, KANSAS CITY STAR (June 7, 2008), www.kansascity.com/105/v-print/story/654147.html; Dalia Lithwick, *Gag Order: A Nebraska Judge Bans the Word "Rape" From His Courtroom*, SLATE (June 20, 2007), http://www.slate.com/id/2168758/; Meg Massey, *Putting the Term "Rape" On Trial*, TIME U.S. (July 23, 2007), http://www.time.com/time/nation/article/0,8599,1646133,00.html; and Alissa Skelton, *Judge Restricts Use of Word 'Rape,' 'Sexual Assault,' In Bowen Trial*, THE DAILY NEBRASKAN (July 15, 2007) http://www.dailynebraskan.com/news/judge-restricts-use-of-words-rape-sexual-assault-in-bowen-trial-1.283175.

The first case ended in a mistrial because the jury could not reach a unanimous verdict. The case received a great deal of national media attention and protesters picketed the courthouse. The second trial ended with the judge declaring a mistrial because protesters had interfered with jury selection. Prosecutors declined to pursue a third trial with the word bans in place, so they dismissed the charges against the defendant. The victim filed a lawsuit in federal court, challenging the judge's actions on the grounds that the word bans violated her constitutional rights. A federal district court judge dismissed the lawsuit, ruling that the victim failed to prove that the federal court should intervene in an ongoing state court prosecution. The 8th U.S. Circuit Court of Appeals upheld the dismissal, finding that the federal court did not have jurisdiction. The U.S. Supreme Court declined to hear the case.

As a result of the national attention the case received, defense attorneys across the country began seeking word bans, filing motions to prohibit witnesses, prosecutors, and judges from speaking certain words or phrases in sexual assault trials. This represented a significant change in criminal sexual assault trials. There are many instances in criminal cases in which specific *subject matter* is excluded because it is deemed to be prejudicial to the defendant's rights, such as prior bad act evidence, certain confessions, or other evidence that has been suppressed. These word bans, however, are different because they exclude specific *words* used to describe subject matter that is otherwise admissible. "There is considerable difference between the usual exclusion of prejudicial 'subject matter' and the exclusion of specific words used to describe perfectly permissible subject matter."[54]

**Word Bans Against Victims/Witnesses:** This is particularly problematic in a sexual assault case, where the defense will most likely be consent. In those instances, a victim is forced to describe a non-consensual act using the language of consent. As the federal judge in the Nebraska case found:

> For the life of me, I do not understand why a judge would tell an alleged rape victim that she cannot say she was 'raped' when she testifies in a trial about rape. Juries are not stupid. They are very wise. In my opinion, no properly instructed jury is going to be improperly swayed because a woman uses the word 'rape' rather than some tortured equivalent for the word.[55]

In an interesting article on the legal implications of word bans in rape trials, the author made a similar point, stating:

> Jurors expect accusations to be made at trial. They expect a person who is alleging to be a victim of a crime to make that allegation on the stand. A witness telling a jury that she was raped would not be unfairly prejudicial because it would merely tell the jury what they already know, that the victim believes [she was] raped.[56]

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[54] Atassi, Silencing Tory Bowen, supra, at 225.

[55] *Bowen*, 516 F. Supp. 2d at 1029 (held that federal court did not have personal jurisdiction over the state court judge and that dismissal of the state's case rendered the federal case moot).

[56] Atassi, Silencing Tory Bowen, supra, at 230.

There are not similar bans on words like "robbed," "murdered," "mugged," or "embezzled," even though they are also "ultimate conclusions" in criminal trials.[57] These bans are especially problematic in sexual violence cases because, "[p]erhaps, more so than any other crime, the crime of rape heavily depends on the narrative that takes place in the courtroom."[58]

In addition, these bans on victims or witnesses' language act as a prior restraint on their speech. This is particularly troublesome in sexual assault cases were the victim's credibility is key. The Nebraska victim explained that she had to pause and reformulate her answers to comply with the judge's word bans. As a result, she was concerned that it made her appear that she was fabricating details or that she did not know what really happened.[59]

**Washington Case Law on Word Bans:** Washington case law on word bans centers on the use of the word "victim" in a criminal trial. In every case identified, the Washington courts have rejected the defendant's argument that the use of the word "victim" constituted reversible error. The first, and only published case on the topic, is *State v. Alger*, 640 P.2d 44 (Wn. App. 1982). In that case, the trial court made one reference to the victim while reading a stipulation to the jury. The court rejected the defendant's argument that the reference constituted reversible error, holding, "In the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Alger,* 640 P.2d at 47. The court also held that while the judge's use of the term was neither "encouraged nor recommended," it did not prejudice the defendant's right to a fair trial. *Id.*

Washington appellate courts do not appear to have addressed the issue of word bans again until 23 years after the *Alger* case. Starting in 2005, after the outcry about the Nebraska case, Washington courts have issued at least ten unpublished cases denying the defendants' arguments that the use of the word "victim" constituted reversible error. Although unpublished cases do not have any precedential value, they are addressed here briefly so that judges can see the context in which the issues are raised and the reasoning applied by the court in rejecting the defendants' arguments.

Most of these cases deal with the trial court's use of the word "victim" in jury instructions or in special verdict forms. The defendants claimed that the judge's use of the word "victim" constituted an impermissible comment on the evidence. In *State v. Wiatt*,[60] the Court of Appeals held that the trial court was not commenting on the evidence, but was "merely defining the elements of the crime" by using the word "victim." In *State v. Smith*,[61] the instruction used closely followed an instruction approved by the Washington Supreme Court, so the instruction did not constitute an impermissible comment on the evidence by the trial court. *See also*, *State v. Sanchez-Flores*, No. 63718-5-I, 2010 WL 3103056, at *1 (Wash. Ct. App. Aug. 9, 2010) (trial court's use of the word "victim" in aggravated domestic violence instruction was not an impermissible comment on the evidence); and *State v. Seth*, No. 42215-8-II, 2013 WL 992330, at *6 (Wash. Ct. App. Mar. 12, 2013) (use of the word "victim" in several jury instructions neither

[57] Atassi, Silencing Tory Bowen, supra, at 229.
[58] *Id*.
[59] Atassi, Silencing Tory Bowen, supra, at 237, 239.
[60] No. 30168-7-II, 2005 WL 950673, at *14 (Wash. Ct. App. Apr. 26, 2005).
[61] No. 63546-8-I, 2010 WL 2670863, at *3 (Wash. Ct. App. Jul. 6, 2010).

presupposed that the witness was a victim nor in any way removed that question of fact from the jury's consideration). The Washington Court of Appeals also rejected a similar argument when the word "victim" was used in a special jury verdict form. *State v. Dunn*.[62]

The Court of Appeals has also rejected defendants' claims that other witnesses' use of the word "victim" constituted reversible error. In *State v. Parks*, a law enforcement officer testified that another officer had "interviewed a victim and some witnesses." The court held that the officer's testimony was not improper.[63] In another case in which a law enforcement officer referred to a child as "the victim," the court rejected the defendant's argument that the officer's testimony was an impermissible opinion regarding the defendant's guilt or veracity. *State v. Sanchez.*[64] In *State v. Wilson*,[65] the court held that even though the prosecutor and a law enforcement officer referred to the child as "the victim" a total of six times, the comments were not impermissible opinions on the defendant's guilt.

In the most recent case addressing the use of the word "victim" in a criminal trial, the defendant filed a pre-trial motion to prohibit witnesses from referring to other witnesses as "victims," which the trial court denied.[66] The Court of Appeals affirmed, holding, "We believe that in some circumstances it could be error for a witness to use the word 'victim' to express an opinion or for a judge to use the word to refer to a disputed fact. That does not justify a blanket prohibition on use of the word."[67]

**Other Jurisdictions' Decisions:** Other jurisdictions have also rejected defendants' arguments that the use of the word "victim" is reversible error in criminal cases, using rationales similar to the ones used by the Washington Court of Appeals.[68] The only case we found in which a conviction was reversed for use of the word "victim" is a Connecticut case in which the word "victim" was used in the jury instructions over 76 times and the judge refused to give a curative instruction.[69] That case was recently distinguished on the facts.[70]

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[62] No. 42149-6-II, 2013 WL 2106953, at *7 (Wash. Ct. App. May 14, 2013).
[63] No. 41534-8-II, 2012 WL 3202110, at *3 (Wash. Ct. App. Aug. 8, 2012).
[64] No. 72807-5-I, 2016 WL 3281048, at *3 (Wash. Ct. App. Jun. 13, 2016).
[65] No. 45398-3-II, 2015 WL 786853, at *2-3 (Wash. Ct. App. Feb. 24, 2015).
[66] *State v. McFarland*, No. 32873-2-III, 2016 WL901088, at *1 (Wash. Ct. App. Mar. 8, 2016), *rev'd on other grounds,* 189 Wn.2d 47, 399 P.3d 1106 (2017).
[67] *Id.*, at 4.
[68] *See, e.g.*, *State v. Rodriguez*, 946 A.2d 294 (Conn. App. Ct. 2008), *appeal denied*, 953 A.2d 650 (Conn. 2008) (judge's use of word "victim" in instruction, with curative instruction, and prosecutor's use of word "victim" permissible here); *Gallegos v. State*, No. 13-14-00135-CR, 2015 Tex. App. LEXIS 6763 (Tex. Crim. App. July 2, 2015) (unpublished) (permissible for attorneys & witnesses to use the word "victim"); *State v. Bombo*, No. COA09-1339, 2010 N.C. App. LEXIS 1099 (N.C. Ct. App. July 6, 2010) (unpublished), *review denied*, 702 S.E.2d 493 (N.C. 2010) (judge's use of "victim" in instruction not error); *United States v. Spensley*, No. 09-CV-20082, 2011 U.S. Dist. LEXIS 5024 (C.D. Ill. Jan. 19, 2011) (unpublished) (jury not unfairly inflamed or prejudiced against defendant if victim is referred to as "victim"); and *Commonwealth v. Pierre*, No. 10-P-2254, 2012 Mass. App. Unpub. LEXIS 911 (Mass. App. Ct. July 23, 2012), *review denied*, 2012 Mass. LEXIS 966 (Sept. 27, 2012) (unpublished) (defendant not prejudiced when witnesses used "victim").
[69] *State v. Cortes*, 851 A.2d 1230 (Conn. Ct. App. 2004), *aff'd,* 885 A.2d 153 (Conn. 2005).
[70] *State v. Ciullo*, 314 Conn. 28, 100 A.3d 2014 (Conn. 2014) (use of term "victim" was not sufficiently excessive to be improper); *Rodriguez*, 946 A.3d at 304.

Courts in other jurisdictions have also rejected defendants' arguments that the use of other words or phrases, such as "rape," is reversible error. For example, the North Carolina Supreme Court held that it was permissible for a victim to testify that the defendant "was raping her."[71] Another court found that use of the word "rape" by the prosecutor and witnesses was not prejudicial.[72] In California, a court ruled that the victim's references to "rape" were not prejudicial error because the prosecutor made it clear that when the victim said "rape," she meant that the defendant was putting his penis into the victim's vagina.[73]

**What's a Judge To Do?:** Courts across the country have held that the use of words such as "victim" and "rape" do not undermine defendant's rights, violate the presumption of innocence, or constitute impermissible comments on the evidence, the defendant's guilt, or the defendant's veracity. Courts and experts also recognize that these types of terms allow prosecutors to argue their theory of the case and allow witnesses to testify about their experiences. There are numerous cases in Washington, and throughout the country, that hold that the use of the word "victim" in jury instructions does not violate the prohibition on trial judges' commenting on the evidence.

Requiring victims to use the language of consensual sex to describe criminal assaults in sexual violence cases puts an undue burden on them. Particularly since the defense is usually consent, it prohibits victims from describing what they experienced. As long as the subject matter is permissible, victims should be allowed to use their own language to describe the incident. The same guidelines should apply to other witnesses and prosecutors. "Jurors understand the respective roles between the prosecutor and defense counsel. It should not be assumed that jurors will be unduly influenced by the prosecutor's use of the word victim."[74] Therefore, word bans should be avoided.

During trial, judges should be cautious about their use of language. It is also important for judges to use limiting instructions, explaining to jurors that the judge's words and counsel's word are not evidence in the case. Appellate courts consistently uphold jury instructions that use the word "victim." Special jury verdict forms require a finding of guilt before jurors need to complete them, so use of the word "victim" in these forms is also permitted. After a defendant is convicted or has entered a guilty plea, it is important for judges to use language that reflects the unilateral, criminal nature of the defendant's acts and places responsibility for the criminal behavior squarely where it belongs: with the defendant.

**Written Orders, Appellate Opinions, and Court Records: A Cautionary Tale:** In 2011, the Wisconsin Supreme Court issued its opinion in *State v. Denson*,[75] a case in which the defendant was convicted of first degree reckless endangering the safety of a child and false imprisonment. In the opinion, the court identified the child victim by her initials. However, the

[71] *State v. Goss*, 235 S.E.2d 844 (N.C. 1977) (permissible for victim to testify that defendant was "raping" her).
[72] *People v. Pernell*, No. 12CA0510, 2014 Colo. App. LEXIS 1946 (Colo. App. Nov. 20, 2014), *cert. granted in part*, 2015 Colo. LEXIS 829 (Colo. Aug. 31, 2015) (cert. granted on unrelated issue) (use of the word "rape" by the prosecutor and witnesses was not prejudicial).
[73] *People v. Perez*, No. H038986, 2014 Cal. App. Unpub. LEXIS 3527 (Cal. Ct. App. May 19, 2014) (unpublished).
[74] *State v. Rodriquez*, 946 A.2d at 307.
[75] 335 Wis. 2d 681, 799 N.W.2d 831 (2011).

opinion included the child's mother's full name and where the mother worked, including the location. The opinion contained graphic details about how the defendant beat, threatened, and tied up the mother. In addition, the court noted that the mother was responsible for taking the nightly deposit to the bank from the fast food restaurant where she worked, but that she had not made the deposit on the night in question. Although the mother had done nothing wrong, the way the opinion was worded suggested that she had stolen the money. As a result, when anyone searched for the mother's name on the internet, the opinion showed up. The mother was unable to find a job because potential employers thought she had stolen the money. The mother had to hire an attorney, who requested that the court remove the identifying information from the original opinion and release a redacted one that included only those background facts necessary to the disposition of the legal issues on appeal.[76] As a result, the Wisconsin Supreme Court adopted a new administrative rule that prohibited the identification of crime victims by their names in appellate briefs in certain types of cases.[77]

Obviously, the Wisconsin Supreme Court did not intend to harm the mother. The case is included here because it illustrates how important judges' language is in appellate courts, as well as in trial courts. Judges should be careful about using identifying language in sexual assault cases. Although appellate judges need to provide sufficient factual information to explain and support their legal conclusions, they should use caution in cases involving sexual violence about which facts they disclose. It is also important for judges to educate law clerks and court clerks about these language issues and protecting victims' privacy, to the extent possible.

**Clever Example of Accountable Language:** Much of this chapter has focused on what language to avoid. The following is a good example of the use of accountable language to discuss sexual violence. This list, called *Sexual Assault Prevention Tips Guaranteed to Work!*,[78] originally appeared in a blog titled *Feminally*, written by Colleen Jamison. She had attended a sexual assault prevention program for resident advisors at her college campus. She was frustrated by the presentation and decided to post her own prevention tips. Her goal was to counter the "condescending tips" that focuses solely on what potential victims should or should not do. She noted, "It's fun to turn the tables." Many readers find this list to be a humorous way to counter "the invisible perpetrator" language. Here is her list:

**Sexual Assault Tips Guaranteed to Work!**

- Don't put drugs in people's drinks in order to control their behavior.
- When you see someone walking [alone], leave them alone!
- If you pull over to help someone with car problems, remember not to assault them.
- NEVER open an unlocked door or window uninvited.
- If you are in an elevator and someone else gets in, DON'T ASSAULT THEM.

[76] Interview with Meg Garvin, M.A., J.D., Executive Director, National Crime Victim Law Institute, and Clinical Professor of Law at Lewis & Clark Law School, in Portland, OR (June 23, 2015).
[77] Sarah Burgundy, *New Rule Protects Crime Victim Identity and Privacy in Appellate Briefs,* STATE BAR OF WISCONSIN INSIDE TRACK, May 2015, at 1.
[78] Colleen Jamison, *Sexual Assault Prevention Tips Guaranteed to Work!*, FEMINALLY, (Aug. 21, 2009), http://feminally.tumblr.com/post/168208983/sexual-assault-prevention-tips-guaranteed-to-work.

- Remember, people go to the laundry to do their laundry, do not attempt to molest someone who is alone in a laundry room.
- USE THE BUDDY SYSTEM! If you are not able to stop yourself from assaulting people, ask a friend to stay with you while you are in public.
- Always be honest with people! Don't pretend to be a caring friend in order to gain the trust of someone you want to assault. Consider telling them you plan to assault them. If you don't communicate your intentions, the other person may take that as a sign that you do not plan to rape them.
- Don't forget: you can't have sex with someone unless they are awake.
- Carry a whistle! If you are worried that you might assault someone '[by] accident' you can hand it to the other person you are with so they can blow it if you do.
- And, ALWAYS REMEMBER: if you didn't ask permission and then respect the answer the first time, you are committing a crime—no matter how 'into it' others appear to be.

**Responding to Media Coverage:** Judges need to be careful when dealing with the media, but one project undertaken by a Nevada judge demonstrates an interesting way for judges to help educate the media. It is described here in case any Washington judges would like to develop a guide for media coverage of sexual assault cases.

**The Judge's Personal Tragedy:** On June 12, 2006, a litigant shot Reno, Nevada Family Court Judge Chuck Weller in the chest. The assailant, who had a divorce pending in Judge Weller's courtroom, shot the judge from 170 yards away, through the window in the judge's chamber, using a sniper rifle. An hour earlier, the man stabbed his wife to death while their 8-year-old child watched television in another room.[79] Judge Weller was extremely frustrated by how the media covered the murder and his shooting. In his Master's thesis entitled, *Needed: A Guide for Media Coverage of Domestic Violence*, Judge Weller wrote:

> From my perspective as a judge who deals daily with family abuse, it was a tragic and too familiar story of planned domestic violence. Unfortunately, the story was the subject of typical domestic violence reporting. The societal problem of domestic violence was rarely mentioned in the coverage. The perpetrator was portrayed as a good guy who 'snapped.' The killer's justification that his violence was caused by the deceased wife's and my conduct was reported. His previous history of controlling behavior targeted at his now murdered wife remains largely unreported today. Headlines like 'On Trial: Family Court' tended to excuse the murderer and blame the 'system' for his crimes.[80]

**The Judge's Response:** In response to the perpetrator's violence and the subsequent media coverage, Judge Weller took several actions. He wrote his Master's thesis on the topic of media coverage of domestic violence, documenting the need for more accurate coverage and a media guide. In addition, Judge Weller wrote a media guide, *Covering Domestic Violence: A*

[79] Judge Chuck Weller, Needed: A Guide for Media Coverage, supra.
[80] *Id.* at 1-2.

*Guide for Informed Media Reporting in Nevada*.[81] The *Guide* is written for judges to use to educate the media about covering domestic violence.

**Recommendations for Judges:** The following recommendations are provided for judges to help them use more accurate, accountable language when speaking and writing about sexual violence, while maintaining their neutrality and objectivity. The goal is to assist judges in protecting defendants' rights, including the presumption of innocence, while also protecting victims' rights and their privacy:

- Choose your language carefully.
  - Use language that reflects the unilateral nature of sexual violence.
  - Avoid victim blaming language.
- Avoid using the language of consensual sex to describe assaultive acts.
  - Instead, use language that describes body parts and what the victim was forced to do.
- Place agency for criminal acts where it belongs. Avoid "the invisible perpetrator."
- Use "person first" language, whenever possible.
  - For example, use "woman with a disability," rather than "disabled woman," to avoid defining her by her disability.
- Avoid word bans.
  - Use limiting instructions, as needed.
- Educate about these issues, whenever possible.
  - Educate law clerks and court clerks about appropriate language and privacy.
- Be careful about using identifying information and factual details in written orders and opinions.
- Respond to media coverage, good and bad, when possible within the constraints of judicial ethics.

**Judges Can Make a Difference:** The Judicial Language Project at New England Law | Boston, a project that focuses on judicial language in appellate decisions about sexual violence, did an analysis of how Georgia appellate judges wrote about sexual assault on a child. The Co-Director, Judith Greenberg, and others wrote to the Chief Justice of the Georgia Supreme Court and the Chief Judge of the Georgia Court of Appeals about the language used in Georgia appellate opinions, particularly the use of the word "perform" to describe the actions of child victims in sexual assault cases. The letter stated, "When used to describe the actions of a child, this commonly understood term suggests that the child was morally responsible for his or her

[81] Judge Chuck Weller, *Covering Domestic Violence: A Guide For Informed Media Reporting In Nevada*, Office of the Nevada Attorney General, http://ag.nv.gov/uploadedFiles/agnvgov/Content/Hot_Topics/Victims/DVPC/MEDIAGUIDE.pdf (Oct. 2009).

own victimization."[82] Used with the term "oral sex," Ms. Greenberg wrote, suggests mutuality, pleasure, and consent and obscures the sexual violence involved.[83]

Chief Justice Hunstein wrote back, thanking the Judicial Language Project for the critique and promising the Georgia courts would be more mindful of the issue in the future. The next year, the Judicial Language Project did another study of Georgia appellate cases and found that the appellate judges had actually changed the language they used. In one case, instead of describing a child "performing oral sex" on the rapist, the court wrote, "The defendant attempted to anally rape the victim, orally sodomized him, and put his penis in the victim's mouth."[84] The revised language provides a much more accurate description of the defendant's actions.

**Conclusion:**[85] The goal of this chapter is to give judges the latest research on the language of sexual violence and how it helps shape our response to these difficult crimes. We do not often quote Mark Twain when discussing sexual violence, but this quote seems particularly apt here: "The difference between the almost right word and the right word is really a large matter – it's the difference between the lightening bug and the lightening."[86]

[82] Letter from Judith G. Greenberg, Co-Director, The Judicial Language Project, New England Law, to Chief Justice Carol W. Hunstein, Supreme Court of Ga., and Chief Judge M. Yvette Miller, Court of Appeals of the State of Ga. (Sept. 23, 2010) (on file with the author).
[83] *Id.*
[84] Letter from Wendy J. Murphy, Co-Director, The Judicial Language Project, New England Law (Apr. 7, 2011) (on file with the author).
[85] This chapter is based, in part, on a judicial education module the author developed for Legal Momentum, under a grant from the Office on Violence Against Women, entitled *Raped or "Seduced"? How Language Helps Shape Our Response to Sexual Violence*, Copyright ©
2013 by Legal Momentum.
[86] Letter from Mark Twain to George Bainton, Oct. 15, 1888.