

Representing Rape: Language and Sexual Consent by Susan Ehrlich

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Recommended Citation

Kimberly Wolf, *Representing Rape: Language and Sexual Consent by Susan Ehrlich*, 2 U. Md. L.J. Race Relig. Gender & Class 115 (2002).

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BOOK REVIEW

REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT. By Susan Ehrlich. New York, NY: Routledge. 2001. Pp. 174. \$25.95.

*Reviewed by Kimberly Wolf**

I. INTRODUCTION

Modern psychiatrists have amply studied the behavior of errant young girls and the women coming before the courts in all sorts of cases. Their psychic complexes are multifarious and distorted One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste mind finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim The real victim, however, too often in such cases is the innocent man.¹

In her most recent linguistic study, *Representing Rape: language and sexual consent*, Susan Ehrlich² endeavors to expose the hegemonic notions of sexual assault victims that permeate our legal system.³ The author quotes evidence authority John Wigmore, above, as representative of attempts to justify “special rules of evidence” that place far more emphasis on the complainant’s behavior than is permitted in other criminal trials.⁴ Ehrlich reveals the existence of cultural myths surrounding rape trials, exemplified by Wigmore’s “special rules of evidence,” that are embedded in our sexual assault

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1. SUSAN EHRLICH, *REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT* 66 (Routledge 2001) (citing JOHN WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 736 (Little Brown and Company 1970)).

2. Susan Ehrlich is a professor in the Department of Languages, Literatures and Linguistics at York University, Toronto, Canada.

3. See *id.* at 4. Ehrlich cites Connell’s definition of hegemonic masculinity as follows: A dominant cultural ideal of masculinity that does not necessarily correspond closely to the personalities of actual males. The public face of hegemonic masculinity is what sustains powerful men and what large numbers of men are motivated to support. *Id.* at 156, n. 17 (citing R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 185 (Stanford University Press 1987)).

4. *Id.* at 66.

adjudication process.⁵ These myths, Ehrlich argues, ultimately constrain the complainants' ability to present their version of events and points of view.⁶

The book opens with a discussion of the ways in which stereotypes serve to shape and constrain women's ability to tell the story of their sexual assault experience.⁷ Ehrlich then considers the accused's ability to recast themselves as a non-actor, and the effects that such a characterization may have on the outcome of the trial.⁸ The third chapter focuses on the role attorneys and judges play in enforcing the stereotypical conceptions of sexual assault perpetrators and victims through evidentiary rulings and themes in questioning.⁹ Next, Ehrlich criticizes the emphasis placed on the victims' actions, or lack thereof, in attempting to stop the unwanted touching.¹⁰ In the closing chapter, the author addresses her misgivings about the "miscommunication model" of rape, which is gaining some acceptance in the linguistic arena.¹¹

Ehrlich's study focuses on two acquaintance rape trials—the first is a York University disciplinary tribunal hearing and the second is a criminal trial.¹² Two women made allegations of sexual assault against the same defendant, Matt.¹³ The first complainant, Connie, alleged that after having dinner with Matt, she invited him back to her dorm room, where they engaged in consensual kissing and back massaging.¹⁴ According to Connie, she began to protest as Matt continued in his sexual advances.¹⁵ She further alleged that Matt forced her to perform fellatio on him until orgasm.¹⁶ The second complainant, Marg, met Matt at a nightclub, where she and her friend,

5. *Id.* at 4.

6. *Id.* at 4, 152.

7. *Id.* at 1-35.

8. *Id.* at 36-61.

9. *Id.* at 62-93.

10. *Id.* at 94-120.

11. *Id.* at 121-152.

12. EHRLICH, *supra* note 1, at 31. The disciplinary tribunal consists of three tribunal members, in this case two faculty members and a graduate student. The witnesses are examined by the prosecution, defense and by the tribunal members. The standard of proof used was a "balance of probabilities," or to decide which of the parties was to be believed more. The criminal trial was a bench trial, in which the Crown (the Canadian government) had to prove "beyond a reasonable doubt" that the complainants had not consented to the sexual acts. *Id.* at 33-35.

13. *Id.* at 31-32.

14. *Id.* at 32.

15. *Id.*

16. *Id.* The facts were not at issue in either the criminal trial or the university tribunal. The issue was whether these acts were consensual.

Melinda, were socializing.¹⁷ After Marg realized her car had been towed, she asked Matt and Melinda's boyfriend, Bob, for help.¹⁸ The four students reached Marg and Melinda's dorm room at approximately 4:00 a.m., and given the late hour, Matt and Bob spent the night.¹⁹ Marg agreed that Matt could sleep in her bed, but warned him that she would not tolerate any sexual advances.²⁰ Despite her objections, Marg alleged that Matt persisted in his unwanted sexual behavior.²¹

The university tribunal described Matt's behavior as "below the standard of conduct [they] expect from all members of the University community."²² Despite the university lawyer's recommendation that Matt be expelled from the school, the tribunal penalized him solely by restricting his access to the residences on campus where the events had taken place.²³ They stated that nothing indicated that Matt posed a "clear and present threat" to others.²⁴ The criminal court judge convicted Matt of one count of sexual assault, for the incident with Marg.²⁵ The judge acquitted him of events linked with Connie.²⁶ From the criminal judge's perspective, the major factor distinguishing the two incidents was that *some* consensual activity took place between Connie and Matt, whereas Marg did not grant permission for *any* intimate acts.²⁷ The judge issued the following warning in his opinion:

Young men must be sensitive to a woman's right to say no, and young women, in turn, must realize that when a young man becomes aroused during sexual activity beyond a moderate degree there is a danger that he will be driven by hormones rather than by conscience.²⁸

17. *Id.*

18. *Id.*

19. *Id.* at 33.

20. *Id.*

21. *Id.*

22. *Id.* at 54.

23. *Id.*

24. *Id.*

25. *Id.* at 56.

26. *Id.*

27. *Id.* at 57. A second distinguishing point is that Marg had two witnesses in her room that night, Melinda and Bob, both of whom testified on her behalf.

28. *Id.* at 57.

Such a statement epitomizes the potential for cultural myths about sexuality to influence sexual assault adjudication. The judge becomes implicit in Matt's grammar of non-agency,²⁹ casting the defendant's behavior as dependent on his sexual impulses.³⁰ Further, both the university and criminal decisions reveal the true status of sexual assault laws: although the law ostensibly constrains male violence against females, in reality it allows such violence to continue.³¹

II. SUMMARY

*A. The institutional coerciveness of legal discourse*³²

Ehrlich begins her discussion of the nature of gender identity and its social construction by discussing conceptual changes that have occurred since the early 1990s, when feminist debates about the correlation between linguistic practices and social identities began.³³ The author argues that "conceptions of gender as categorical, fixed and static have increasingly been abandoned in favour of more constructivist and dynamic ones."³⁴ She cites the sociolinguistic argument that linguistic behavior determines aspects of social identity³⁵ as typical of the earlier school of thought that focused specifically on "the correlation of linguistic variables with the independent variable of sex."³⁶ To represent the more modern approach to the relationship between language and gender, coined 'critical theory,' Ehrlich includes the claims of Deborah Cameron, a scholar noted for her new developments in feminist thought about language.³⁷ Cameron contends that linguistic practices form social identities—that is, language is one of the components that constitute the speaker's identity as a particular type of subject.³⁸ At first glance,

29. See *infra* text accompanying notes 54-62.

30. *Id.*

31. *Id.* at 60.

32. Throughout her book, Ehrlich only uses capital letters for the first letter of each chapter title. All other words in the title are in lowercase letters.

33. See *id.* at 5.

34. *Id.*

35. *Id.* at 5 (citing C. West and D. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 25-51 (1987)).

36. *Id.*

37. *Id.* at 5 (citing DEBORAH CAMERON, *VERBAL HYGIENE* 15-16 (Routledge 1995)).

38. *Id.*

this distinction does not appear to have the capacity to affect one's everyday life, since the idea that one's linguistic practices forms one's social identity or vice versa seems to have minimal consequences. On the contrary, by viewing language as performative, Ehrlich forms the backbone of her assertions. Ehrlich contends that "linguistic practices . . . continually bring into being individuals' social identities. Under this account . . . gender is something individuals do—in part through linguistic choices—as opposed to something individuals are or have."³⁹ The ability of women to vary their 'performances of gender' depending on context challenges stereotypical descriptions of male and female speech styles as an unchanging result of their social identities.⁴⁰

Supporting her argument that women can vary their linguistic performances, Ehrlich cites a 1996 study by Freed and Greenwood, which found that "language and gender studies conducted in natural settings may often find differences . . . in women's and men's speech simply because women and men are frequently engaged in different activities and not because of any differences in women and men themselves."⁴¹ Freed and Greenwood concluded that, because the activities in which people are participating produce certain speech patterns, "communicative styles are customs related to actions, activities and behaviors . . ."⁴² This analysis introduces the possibility that individuals can resist hegemonic notions of masculinity and femininity through linguistic practices, a concept Ehrlich more fully develops throughout this work.⁴³

In declaring that women have the ability to alter their performances of gender, Ehrlich accounts for the difficulties in such a process. The author identifies "institutionally coercive environments (those in which "dominant gender ideologies often mold and/or inhibit the kinds of gendered identities that women and men produce")⁴⁴ as the main obstruction preventing women from taking advantage of this opportunity.⁴⁵ Applying the theory of institutional coerciveness to the

39. *Id.* (citing C. West and D. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 25-51 (1987)).

40. *See id.* at 5-6. Ehrlich challenges the language and gender research of the 1970s and 1980s that "took the 'difference' between men and women's linguistic behavior as axiomatic and as the starting point for empirical investigations," particularly the studies that claimed that the female speech style is cooperative, while the male speech style is competitive. *Id.* at 6.

41. *Id.* at 7 (citing A. Freed & A. Greenwood, *Women, Men and Type of Talk: What Makes the Difference?*, 25 LANGUAGE IN SOC'Y 1, 67 (1996)).

42. *Id.*

43. *Id.*

44. *Id.* at 9.

45. *Id.*

legal sphere, the author argues the following: "Not only are dominant notions about male and female sexuality and violence against women implicated in legal statutes and judicial decisions surrounding sexual assault . . . they also penetrate the discursive arena of the trial."⁴⁶ Casting sexual assault adjudication as a vehicle that shapes and constrains performances of gender, Ehrlich begins her demonstration of the ways in which courtroom language transmits androcentric values, privileging the male's sexual prerogatives at the expense of the woman's sexual autonomy.⁴⁷ Furthermore, she declares that these representations "shape and structure the witnesses' *own* accounts of the events . . ."⁴⁸

To Ehrlich, the law not only has the power to enact rules and impose punishments, but also "has the capacity to impose and affirm culturally powerful definitions of social reality."⁴⁹ Laws that do not extend to gay and lesbian couples, for example, both communicate social convictions about normal and acceptable lifestyle choices *and* enforce the convictions through direct punishment or by withholding a right granted to heterosexual couples.⁵⁰ With regard to sexual assaults, the criminal justice system defines the characteristics of a legitimate victim and a legitimate perpetrator as follows:

'Legitimate' perpetrators . . . are strangers to their victims, carry a weapon, and inflict physical injury upon their victim, beyond the sexual violence; 'legitimate' victims are women raped by precisely these kinds of perpetrators. The discourses of rape . . . construct stranger rape as 'real rape' and render the vast majority of rapes invisible.⁵¹

Many theorists speculate that this assumption results in an inaccurate count of not only the rapes prosecuted, but also the rapes reported each year.⁵² MacKinnon argues that women only report rapes that they

46. *Id.*

47. *See id.* at 10-11.

48. *Id.* at 11.

49. *Id.* at 18.

50. *Id.* at 18-19.

51. *Id.* at 20.

52. *Id.* at 21 (citing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 81 (Harvard University Press 1987)).

consider to be believable.⁵³ Thus, the criminal justice system protects male sexual interests through culturally-powerful legal discourse which controls the female victims themselves.⁵⁴

Judicial decisions are yet another source of 'institutional coercion,' Ehrlich argues, especially where the legislature fails to adequately define what constitutes the sexual offense. Even in evidentiary rulings, however, judicial decisions are influenced by traditional cultural mythology surrounding rapes.⁵⁵ Ehrlich cites the infamous William Kennedy Smith, Jr. rape trial⁵⁶ to exemplify the way in which defense attorneys can maneuver around the rape-shield laws to introduce negative evidence about the victim's past sexual history.⁵⁷ The judge permitted each juror to examine the complainant's dress, bra, and panties on the premise that they were examining the clothing for tears or stains.⁵⁸ In reality, the defense attorney was using the suggestive articles of clothing to paint a picture of the complainant as a sexually provocative, fortune-seeking woman—in spite of the severe restrictions on admitting such evidence and testimony in a sexual assault trial.⁵⁹ The prosecuting attorney, however, was not permitted to introduce the testimony of three other women who alleged that the defendant sexually assaulted them within the past ten years, an evidentiary ruling that many commentators believe to have "won the case for the defense".⁶⁰ Because judicial decisions often reproduce the cultural misunderstandings that progressive feminist legislation attempts to defeat, Ehrlich argues that scholars and feminists should critique not the law, but rather, the "actual practices whereby legal concepts (e.g., 'consent' and 'sexual assault') give rise to . . . meanings and interpretations."⁶¹

53. *Id.* (citing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 81 (Harvard University Press 1987)). MacKinnon defines "believable rapes" as those committed by a stranger and/or by a black male. *Id.*

54. *See id.*

55. *Id.* at 25.

56. *Id.* (citing *Florida v. Smith*, Fla. West Palm Beach County Ct. (1991)).

57. *Id.* at 26.

58. *Id.*

59. *Id.* at 27.

60. *Id.* (citing PEGGY R. SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* 219 (Doubleday 1996)).

61. *Id.* at 28. In discussing these judicially-enforced cultural misunderstandings, Ehrlich argues that these rape myths also reflect social discourses about normative sexuality. That is, women are supposed to be the passive recipients of male sexual desire, and protests from the female are an expected part of normal heterosexual sex. Sexual encounters in which the female does not give consent, or even overtly resists, are considered acceptable. *Id.* at 29.

B. The accused's grammar of non-agency

Ehrlich explains that she approached Matt's sexual assault trial transcripts using "critical discourse analysis," an approach that "expos[es] the linguistic mechanisms of hegemony in order to facilitate the access to a language of empowerment by marginalized groups."⁶² By exposing the "ideological loading" of linguistic practices, people become aware of other ways in which to think about the world.⁶³ The author argues that language, and the particular perspective it entails, mediates our experience of reality. She points to Cameron's analysis of the androcentric nature of terms such as penetration, fuck, screw, and lay, which portray consensual sex as something that men do to women.⁶⁴ Language has a considerable impact on the way listeners interpret and visualize events—a fact that becomes extremely important in a sexual assault trial, where oral testimony is often the only evidence available to persuade jurors.⁶⁵

Sexual assault defendants typically employ linguistic tactics that work to portray themselves as innocent of acts of unlawful sexual aggression, a strategy Ehrlich labels the "grammar of non-agency."⁶⁶ The author points to a psycholinguistic study of the role that active and passive voice can play in the listener's interpretation of the event being described.⁶⁷ The LaFrance and Hahn study found that subjects tended to attribute greater causality to patients, as opposed to agents, when interpreting sentences represented in the passive voice.⁶⁸ Therefore, when listening to passive-voice defendant testimony in a sexual assault trial, jurors assign less responsibility to the perpetrator and more responsibility to the victim.⁶⁹ Utilizing direct quotes from the criminal and university trials, Ehrlich provides numerous specific examples of Matt's attempts to use non-agency to mitigate, diffuse, obscure or eliminate his role in the event. An example of each technique follows:

62. *Id.* at 35.

63. *Id.* (citing Norman Fairclough & Ruth Wodak, *Critical Discourse Analysis, in DISCOURSE AS SOCIAL INTERACTION* 258, 258 (T. A. van Dijk ed., 1997)).

64. DEBORAH CAMERON, *FEMINISM AND LINGUISTIC THEORY* (St. Martin's Press 1992).

65. EHRLICH, *supra* note 1, at 36.

66. *Id.* at 38. Ehrlich defines an agent as a "willful initiator of an event that is depicted as having consequences for either an object or an animate patient." *Id.*

67. *Id.* at 40 (citing M. LaFrance and G. Hahn, *The Disappearing Agent: Gender Stereotypes, Interpersonal Verbs and Implicit Causality, in THE WOMEN AND LANGUAGE DEBATE: A SOURCEBOOK* 348 (Camille A. Roman et al. eds. 1994)).

68. *Id.*

69. *Id.*

Mitigation: Matt changes the word “entwine” to the more affectionate, consensual term “caress”.

University Prosecutor: Okay she says that during this oral sex you have your hand entwined in her hair? Do you recall that?

Matt: Yeah I was caressing her hair.⁷⁰

Diffusion: Matt transforms assertions in which Matt alone is responsible for the sexual aggression into ones where Matt and Marg are co-agents.

Criminal Prosecutor: Do you remember her saying to you that she was tired and wanted to go to sleep?

Matt: Yes.

Criminal Prosecutor: And you didn't let her—well, *you* proceeded to touch her anyway, isn't that correct?

Matt: No, *we* started kissing.⁷¹

Obscuring: Matt uses agentless passives to obscure his role in the initiation of sexual events. He provides no overt information as to the cause of these acts.

Matt: Well, as we were talking *our pants were undone*.⁷²

Elimination: Matt turns grammatical subjects into nominalizations, making the events appear to have no particular cause or agent. The agents of the actions below are “sexual activity” and “something sexual,” with no reference to Matt's participation.

Defense Attorney: All right. What happens next, please?

Matt: The sexual activity started escalating even further.

70. *Id.* at 44.

71. *Id.* at 45.

72. *Id.* at 47.

Matt: Well, he knew that something sexual was going on in my bed—well, in Marg's bed. He knew there was something sexual going on.⁷³

Utilizing these four techniques, Matt's portrays his acts of sexual aggression as having a force of their own—they are not under his control.⁷⁴

C. *Questions and ideological work*

Ehrlich continues her “critical discourse analysis” in the following chapter, focusing on the role of attorneys in re-circulating discriminatory views of violence against women.⁷⁵ The author argues that defense attorneys ask questions that frame and structure the complainants ‘talk’ about the sexual assault experience. Using this technique, the lawyers are able to “produce the complainants as particular kinds of subjects—as subjects who are ‘passive’ in their responses to sexual aggression, as opposed to strategic and active.”⁷⁶

Ehrlich argues that many still view rape trials through the ideological frame of the ‘utmost resistance standard’, the standard of proof required of complainants in the 1950s and 1960s.⁷⁷ Ehrlich adopts Fairclough’s conclusion that “a defining characteristic of an institutionally-dominant ideological frame is its capacity to be naturalized—to be accepted as commonsensical,” a characteristic that makes the ideological frame more insidious.⁷⁸ The author asserts that framing functions to characterize the woman as not resisting to the utmost and ultimately reconstructs events as consensual sex.⁷⁹ Using

73. *Id.* at 50.

74. *Id.* at 52.

75. *Id.* at 63.

76. *Id.* Ehrlich uses the 1992 Rodney King criminal trial as an example of the role linguistic practices can play in ‘framing’ events. The expert witnesses reconstructed the beating by four policemen into a situation where King was “in control of the interaction.” The linguistic choices of the experts tended to shape the policemen’s actions as responsible police behavior. *Id.* at 64 (citing C. Goodwin, *Professional Vision*, 96 AM. ANTHROPOLOGIST 606 (1994); C. Goodwin & M. Goodwin, *Contested Vision: The Discursive Constitution of Rodney King*, in *THE CONSTRUCTION OF PROFESSIONAL DISCOURSE* 292 (Britt-Louise Gunnarsson et al. eds., 1997)).

77. *Id.* at 67. If a woman did not resist a man’s sexual advances to the utmost, then rape did not occur. Such strict requirements were established to safeguard men against fictitious claims, since society believed women to fabricate most accusations of rape. *Id.* at 65. *See also supra* text accompanying note 1.

78. *Id.* at 65 (citing NORMAN FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS: THE CRITICAL STUDY OF LANGUAGE* 27 (Longman 1995)).

79. *Id.* at 67.

the questions asked of complainants by members of the university tribunal, Ehrlich demonstrates how the ideological frame of the ‘utmost resistance standard’ pervades the discourse of today’s neutral decision-makers.⁸⁰

Tribunal members repeatedly asked complainants questions regarding why they did not exercise other ‘options’ such as yelling out or banging on the wall, to call for help.⁸¹ In the following example, a tribunal member undermines Connie’s claim that she was in trouble, by pointing out that her actions did not conform to the “natural actions” of one in danger:

Tribunal Member: Why is it that you made no attempt to scream? Can you explain what you mean by ‘I really didn’t want anybody to know?’ If you were in such difficulty, if you felt threatened, if you felt that an assault was taking place, *it strikes me as only natural to cry out and that help probably was available as that wall was extremely thin*⁸²

The tribunal member imposes his expectation that Connie’s actions should have conformed to the ‘utmost resistance standard’—that is, she should have used every possible method of stopping her assailant. This discussion about ‘options’, Ehrlich argues, “fails to acknowledge the power dynamics that can shape and restrict women’s behaviour in the context of potential sexual violence.”⁸³

D. Complainants’ ineffectual agency or strategy agency?

Ehrlich expands upon the ‘utmost resistance’ ideological frame and the role it played in Matt’s sexual assault trials. The complainants’ version of events are constrained not only by the questions asked, but also by stereotypical notions of femininity that shape the complainants’ own representations of themselves.⁸⁴ By emphasizing the victims’ failure to act in their own behalf, the defense attorney portrayed them as “ineffective agents,” unable to act in ways

80. *Id.* at 76-78.

81. *Id.* at 77-78.

82. *Id.* at 79.

83. *Id.* at 78. Ehrlich refers to the socialist feminist argument that pointing out ‘options’ that victims could have explored “denies the socially-structured inequalities among individuals that shape and restrict so-called options.” *Id.*

84. *Id.* at 95.

that effectively expressed their resistance to Matt's sexual aggression.⁸⁵ In making their determinations of guilt, the university tribunal considered the complainants' assessment of their own actions.⁸⁶ Their opinion stated: "Both complainants conceded in their testimony that they did not take the most sensible and available steps to prevent the sexual touching from continuing. They both agreed that in hindsight their actions were irrational and ineffective."⁸⁷ Ehrlich criticizes the tribunal's use of the complainant's testimony. She argues, "their identities [were] shaped and constrained by the innumerable questions that presupposed the inadequacy of their response to Matt's sexual aggression, [yet] here the complainants are criticized for precisely these self-representations."⁸⁸

Additionally, the author claims that the complainants exhibited signs of resistance to the gendered identities they were forced to reproduce.⁸⁹ In the following example, Ehrlich argues that Connie resists the questioner's characterization of her efforts as weak and limited:

Defense Attorney: So do I take it then—correct me if I am wrong—that the only effort that you would have made to try and jolly him out of this or have him leave was to say that, 'I have a class in the morning so you'll have to leave,' or words to that effect?

Connie: No. That was not the only effort I made with regards to making him stop doing what he was doing. It may have been the only time that I outright said, 'Now you have to leave', but I certainly did make it clear beforehand.⁹⁰

Marg was able, at one point, to break free of her role of responder, asking a question of the defense attorney and recharacterizing the events in question from her perspective. Note, however, the attorney

85. *Id.* at 97.

86. *Id.* at 117.

87. *Id.*

88. *Id.* Ehrlich challenges the justness of a process that is "framed almost exclusively by a culturally-dominant ideological perspective that presupposed the complainant's behavior to be lacking in appropriate resistance—this lack of resistance being equivalent to consent." *Id.* at 119.

89. *Id.* at 97.

90. *Id.* at 107.

abruptly shifts topics once Marg has effectively challenged his suggestion that she gave a mixed message to Matt.⁹¹

Tribunal Member: You never asked Mr. A. to leave?

Marg: No.

Tribunal Member: I am suggesting that's another mixed message. You said that you wanted to ignore this?

Marg: Can I comment on that?

Tribunal Member: Sure. If I am suggesting something to you I think you are entitled to do that.

Marg: If you are suggesting by my telling Matt not to leave was a mixed message, 'I just want to go to sleep,' not responding to him and saying, 'No I don't want to do anything,' and 'Good night everybody,' is a pretty loud message to me and I am sure it would be to any person that chose to listen to it.

Tribunal Member: Did you say yesterday that you wore his shirt in the course of all this going on?⁹²

Immediately after Marg disputes the tribunal member's portrayal of the events as consensual, the tribunal member refers to an act by Marg that may have indicated consent by wearing the defendant's clothes.

Direct examination, then, becomes the vehicle by which complainants can utilize their own voice in retelling the events from their perspective.⁹³ Ehrlich argues, however, that even in direct examination, the attorneys for the prosecution are "controlled in their ability to radically redefine the defence lawyers' and tribunal members' representation of events."⁹⁴ She again relies upon the ideological framework of the 'utmost resistance standard' as the underlying cause behind this control.⁹⁵ As evidence of this phenomenon, Ehrlich cites examples from the transcript where the Crown attorney asks the complainant a question on redirect that contains quotes from a defense attorney question.⁹⁶ The Crown

91. *Id.* at 108. Ehrlich quotes A.G. Walker's comment that in legal settings, "it is in the hands of the questioner that the real power lies." *Id.* at 108 (citing A.G. Walker, *Linguistic Manipulation, Power and the Legal Setting*, in *POWER THROUGH DISCOURSE* 79 (Leah Kedar ed., 1987)).

92. *Id.* at 107-08.

93. *Id.* at 109.

94. *Id.*

95. *Id.* at 110.

96. *See id.*

attorney uses this tactic to get a strong denial from the witness, thereby undermining any weak response by the witness on cross-examination.⁹⁷ Ehrlich argues that this type of questioning reveals the limited capacity of the Crown attorney to “recontextualize, or reframe, the ‘meaning’ of the events within an alternative interpretive framework” (i.e., not the ‘utmost resistance standard’).⁹⁸

E. Miscommunication and acquaintance rape

The author concludes her linguistic study with a commentary on the new cultural explanation for acquaintance rape, labeled male/female miscommunication.⁹⁹ Though some proclaim the miscommunication account of rape “as a progressive alternative to the victim precipitation model with its associated victim-blaming,”¹⁰⁰ Ehrlich contends that the process does not eliminate victim blame, but rather, incorporates traditional mythologies surrounding sexual violence.¹⁰¹ The author notes that while studies show that complainants were not held accountable for rape on the basis of provocative dress or promiscuous sexual past, they *were* held accountable for not clearly communicating their lack of consent.¹⁰²

Furthermore, advocates of the miscommunication model herald it as legitimizing both male and female conversational styles, a description Ehrlich recharacterizes as “separate, but equal.”¹⁰³ The

97. *Id.*

98. *Id.* at 109-10. Ehrlich argues that an additional reason for the Crown attorney’s inability to reframe the events is their own ideological perspective. As representatives of the state, and not the complainants, they are themselves constrained by the values of the state, which often do not serve the interests of women. *Id.* at 111.

99. *Id.* at 121. The miscommunication account of rape is based primarily on the “dual-cultures” theory of communication between women and men. Advocates of this model of communication suggest that miscommunication results from segregated play during childhood, which causes an “inadequate or incomplete knowledge of the other group’s communicative norms.” *Id.* at 122 (citing DEBORAH TANNEN, *YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 47 (Morrow 1990)).

100. *Id.* (citing MARY CRAWFORD, *TALKING DIFFERENCE: ON GENDER AND LANGUAGE* 123 (Sage 1995)). Ehrlich acknowledges that, though the miscommunication model has become the dominant method of explaining acquaintance rape, Crawford explicitly stated that she does not apply her version of the model to “serious instances of gender struggle” such as “rape, domestic violence, sexual harassment or sexual abuse.” *Id.* at 122.

101. *Id.*

102. Ehrlich claims that the miscommunication model is simply a well-disguised version of the ‘utmost resistance standard.’ In applying it to the trials examined in her study, she states: “Because the complainants’ signals of non-consent did not take particular forms, their resistance to Matt’s sexual aggression was deemed as weak and equivocal—such equivocation being tantamount to success. *Id.*”

103. *Id.* at 122.

author argues that miscommunication-model supporters “ignore[] the power or dominance relations within which men’s and women’s conversational styles are developed—power relations that help to shape the particular forms that these styles take.”¹⁰⁴ Applying her critique of the miscommunication model to Matt’s sexual assault trial, the author argues that that model holds women responsible for failing to signal their lack of consent in a certain (traditionally masculine) manner, thereby deflecting men’s responsibility for rape.¹⁰⁵ Ehrlich claims that “separate but equal” models of communication work to conceal “androcentric assumptions that legitimize the defendant’s defence of weak and equivocal ‘signals’ on the part of the complainant.”¹⁰⁶ Ehrlich further alleges that Matt actively exploits this weakness in the miscommunication model in order to rationalize his interpretation of the events.¹⁰⁷ “It is not that Matt mistakenly believes that women’s expression of non-consent are variable and not definitive; rather he strategically relies on dominant notions of masculinity . . . and of male sexuality . . . in interpreting Marg’s signals of resistance.”¹⁰⁸

In this final chapter, Ehrlich introduces *Ellison v. Brady*,¹⁰⁹ a Ninth Circuit decision in which the court introduced a “reasonable woman” standard for evaluating charges of sexual harassment, in lieu of the traditional “reasonable person” standard.¹¹⁰ The court justified the new standard by explaining that they “believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”¹¹¹ According to Ehrlich, there exists “a consensus among feminist legal scholars and critical legal scholars alike that a shift from universal standards to contextual or subjective standards exposes the masculine bias

104. *Id.*

105. *Id.* at 133.

106. *Id.*

107. *Id.* at 128.

108. *Id.* The dominant notion of masculinity is, in Ehrlich’s opinion, that resistance is expressed strongly and forcefully. *Id.*

109. 924 F.2d 872 (1991).

110. EHRlich, *supra* note 1, at 139.

111. *Ellison*, 924 F.2d at 881. In this court’s estimation, the reasonable person standard ignored that women were disproportionately victims of rape and sexual assault, which fact gives women a stronger incentive to be concerned with sexual behavior. “Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.” *Id.* at 878-81.

embedded in the ‘reasonable person.’¹¹² If the tribunal and criminal court hearing Matt’s sexual assault trials applied the reasonable woman standard, a very different outcome may have resulted.¹¹³ The complainants often explained that the main reason for their inaction was fear of being hurt—an explanation that did not satisfy the tribunal members or the judge.¹¹⁴ If viewed through a ‘reasonable woman’ ideological frame, however, the complainants’ inaction “can be recontextualized as strategic acts of resistance, and not indicators of consensual sex.”¹¹⁵

Ehrlich ends her case study with a brief summary of the points made throughout her book. She reiterates her main argument that the hearings did not allow the complainants’ version of events to emerge.¹¹⁶ The author maintains that the outcomes of the hearings may have been influenced by the subject positions that were “discursively ‘thrust upon’ the complainants.”¹¹⁷ In conclusion, she asserts that by recognizing language’s capacity to structure objects, one can also recognize the rape trial’s capacity for change.¹¹⁸

112. EHRlich, *supra* note 1, at 139. Ehrlich herself supports the “reasonable woman” standard because it recognizes that “socially-structured differences among individuals influence the sort of background knowledge that interlocutors bring to bear upon the interpretation of sexual acts of communication.” *Id.* at 140.

113. *Id.* at 140-42.

114. *Id.* at 142-43.

115. *Id.* at 144. One example from the trials that the decision-makers emphasized is that Marg promised to sleep with Matt later that weekend, if he let her go to sleep. She claimed that this was to placate him in the hope that he would leave her alone for the rest of the night, allowing her to deal with the promise in a more effective way such as staying with friends, leaving town, etc. *Id.* at 113. Ehrlich cites this example to demonstrate how the complainants’ alleged “inactions” could be characterized as choices that prevented more serious and prolonged instances of violence. *Id.* at 145.

116. *Id.* at 152.

117. *Id.*

118. *Id.*

III. ANALYSIS

Ehrlich's linguistic study of the hegemonic notions of masculinity that permeate the legal arena is a well-documented, thought-provoking analysis of aspects of sexual assault trials that are rarely discussed. While she briefly cites the numerous studies exposing the rape trial as a revictimization of the complainant, forcing them to retell (and relive) the story of their attack, she moves beyond this commonly criticized characteristic of sexual assault adjudication.¹¹⁹ Ehrlich's case study explores the more subtle influences that male-dominated cultural ideologies may have on adjudication processes and exposes the difficulties in eradicating their presence from decision-making. In this analysis, I will analyze the author's placement of contradictory material within the text, overstatement in parts of the book, and lack of guidance for future improvement of the conditions she criticizes. After examining these criticisms of Ehrlich's book, I will then turn to well-earned praise.

A. Ehrlich Fails to Adequately Discuss Opposing Theories

On one occasion, Ehrlich fails to cite contradictory material in the body of her book, placing it instead in an endnote. The author cites a 1994 La France and Hahn study, which found that subjects tended to attribute greater causality to patients, as opposed to agents, when interpreting sentences represented in the passive voice.¹²⁰ Ehrlich does not indicate that there is any reason to doubt the validity of this study as applied to sexual assault cases. Located 100 pages after Ehrlich mentions the study, the endnote gives the following information: "When men were the agents of sentences, subjects attributed greater responsibility to them as opposed to patients of the sentences, whether or not the events were represented in passive or active voice."¹²¹ This revelation tends to discredit Ehrlich's argument that male defendants employ the passive voice to avoid accountability for their sexually

119. See *id.* at 1 (citing SUE LEES, CARNAL KNOWLEDGE: RAPE ON TRIAL 36 (Hamish Hamilton 1996); G. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 676 (1995); CAROL SMART, FEMINISM AND THE POWER OF LAW 161 (Routledge 1989)).

120. *Id.* at 40 (citing M. LaFrance and G. Hahn, *The Disappearing Agent: Gender Stereotypes, Interpersonal Verbs and Implicit Causality*, in THE WOMEN AND LANGUAGE DEBATE: A SOURCEBOOK 348 (Camille A. Roman et al. eds., 1994)). See also *supra* text accompanying notes 56-58.

121. *Id.* at 154.

aggressive acts. If greater responsibility is attributed to males than to their victims, regardless of whether the male uses passive voice, this study has far less relevance to sexual assault trials, where perpetrators are usually males.¹²²

A second instance of questionable placement of conflicting information occurs in Ehrlich's discussion of the new 'reasonable woman' standard, which has been introduced in some courts to replace the 'reasonable person' standard in sexual assault adjudication.¹²³ Ehrlich does not reveal the existence of this movement away from male-biased standards in the appropriate chapter that discusses hegemonic masculinity as it is enforced in judicial decisions. Rather, she places it on the tenth to last page in the book, where it is applauded as a great advance for women and then forgotten.¹²⁴ Ehrlich's strategic placement of the new standard serves to limit the potentially adverse effect it could have on her earlier statements regarding the inequality of rape trials.¹²⁵ Additionally, Ehrlich allots this novel approach, which reveals a possible method for reframing sexual assault discourse, only one page, whereas criticism of the judiciary's reliance on cultural mythology surrounding rape adjudication monopolizes much of the text.¹²⁶

The author's tendency to obscure relevant but contrary facts causes the reader to doubt the credibility of the author's assertions. Ehrlich advances sound, persuasive arguments and supporting evidence, even in the face of contrary theories and studies. By hiding conflicting information, Ehrlich leads the reader to believe that the concealed evidence is far more damaging to her contentions than it actually is. The author should acknowledge this opposing evidence and discuss the impact that it may have on her theories, even if it may serve to weaken her conclusions.

122. According to the U.S. Department of Justice, 91% of victims of rape and sexual assault are female and 9% are male. Nearly 99% of the offenders they described in single-victim incidents are male. Families in Crisis, Inc., *Sexual Assault Statistics*, at

http://www.familiesincrisis.net/sexual_assault_statistics.html (citing U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Violence Against Women* (1994)).

123. EHRlich, *supra* note 1, at 139. *See also supra*, text accompanying notes 97-100.

124. *Id.*

125. I am not suggesting that this new standard in any way would compensate for all inequalities women face in rape adjudication, or that Ehrlich's allegations regarding that inequality would be defeated by the existence of this standard. I do believe, however, that Ehrlich should have included the "reasonable woman" standard as part of her scrutiny of judicial decision-making where it would have made more sense contextually.

126. EHRlich, *supra* note 1, at 139.

*B. Ehrlich Frequently Fails to Offer
Sufficient Support for Her Conclusions*

While Ehrlich appropriately documents the majority of her thesis statements, a few were clearly overstated. While exaggeration may emphasize the importance of the underlying claim, its use caused the reader to doubt the validity of the author's assertions. The first noticeable example was during the author's discussion of "legitimate perpetrators" and "legitimate victims," wherein she claimed that women only reported rapes that they considered believable.¹²⁷ In support of her contention, Ehrlich cites a 1978 survey of approximately 1,000 women.¹²⁸ Her second choice of statistical support comes from Estrich, who "draws the generalization that women are less likely to report rape 'the closer the relationship between victim and assailant'" on the basis of "a number of other studies investigating rape reporting rates."¹²⁹ These "other studies" remain unidentified. Ehrlich published her book in 2001, yet the statistical data she cites is from 1978 and 1987.¹³⁰ The long time span between the statistical data and the present leads the reader to question whether those statistics were chosen not because they were the most accurate, but because they were the most supportive of her claims.

Ehrlich then quotes MacKinnon's *speculation* that "the rapes that have been reported . . . are the kinds of rape women think will be believed when we report them."¹³¹ MacKinnon similarly published her book in 1987.¹³² According to the National Crime Victimization Survey, conducted by the United States Department of Justice, only 31% of rape victims in 1996 reported the incident to law enforcement officials.¹³³ However, the victim purportedly knew the perpetrator in 75% of all lone-offender violence and 45% of violence involving multiple offenders.¹³⁴ Rape statistics are based on reporting rates,

127. *See supra*, text accompanying notes 42-44.

128. EHRlich, *supra* note 1, at 139 (citing DIANA RUSSELL, RAPE IN MARRIAGE (Macmillan 1982); DIANA RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT (Sage 1984)).

129. EHRlich, *supra* note 1, at 20 (citing SUSAN ESTRICH, REAL RAPE (Harvard University Press 1987)).

130. *Id.*

131. *Id.* at 21 (citing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 81 (Harvard University Press 1987)).

132. *See supra*, note 117.

133. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ-154348, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY (August 1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/femvied.pdf>.

134. *Id.*

which undoubtedly are influenced by the victim's perception of the believability of her claim. Nevertheless, statistics that report 75% of lone-offender violence as committed by an acquaintance of the victim contradict Ehrlich's claim that women rarely report acquaintance-rape. Indeed, the two cases that Ehrlich discusses in this book *were* acquaintance rape cases, yet the victims reported the events to both the university and to criminal justice officials.¹³⁵

A second instance of overstatement comes in the chapter that discusses the 'utmost resistance standard' and its impact on the ideological frame through which both participants and outsiders view sexual assault trials. The author provides several examples of how the tribunal members and criminal judge indicated that Marg's actions did not meet the utmost resistance standard.¹³⁶ She did so in an attempt to show that they are still influenced by that standard despite its removal from sexual assault adjudication.¹³⁷ Ehrlich later states that "without the utmost resistance on the part of the complainants . . . rape did not occur."¹³⁸ While Ehrlich fully explains the concept of the 'utmost resistance' ideological frame, and applies it to Matt's sexual assault trial, she never explains how Matt was convicted of the claim brought by Marg, given that Marg did not resist to the utmost.

In the final instance of overstatement, Ehrlich argues that the attorneys for the prosecution are "controlled in their ability to radically redefine the defence lawyers' and tribunal members' representation of events."¹³⁹ She states that the Crown attorneys are unable to avoid using the language and the characterizations used by the prosecution.¹⁴⁰ However, because the Crown has the burden of proof, it presents its case before the defense presents its witnesses. Therefore, it is only on redirect that the prosecution can use quotes from the defenses' cross-examination in addressing their witnesses. Indeed, Ehrlich uses re-direct questions asked by the Crown as illustrative examples.¹⁴¹ Ehrlich fails to mention that the prosecution can conduct direct examination of all of their witnesses without the influence of the defense's previous characterizations.

135. EHRlich, *supra* note 1, at 31-32.

136. *Id.* at 76-79.

137. *Id.*

138. *Id.* at 92.

139. *Id.* at 109. *See also supra*, text accompanying notes 83-86.

140. *Id.* at 110.

141. *Id.*

C. *Ehrlich Omits Presentation of Potential Solutions*

My final criticism of Ehrlich's work is the lack of suggestions regarding how sexual assault adjudication can be freed from the constraints of hegemonic masculinity. Her closing chapter reads as follows:

To locate the problem of rape trials in discursive practices, embodied in institutional settings, is . . . to recognize the structuring potential of language, its capacity to constitute the objects of which it speaks and the effects of this structuring on the particular way rules are enacted and sanctions are imposed. . . . [T]o understand rape trials in this way is to recognize their capacity for change.¹⁴²

Though the reader can "recognize the capacity for change," Ehrlich fails to communicate to the reader the true potential for change. She does not contribute information regarding positive changes thus far, or possible avenues that should be explored in the future. The replacement of the 'reasonable person' standard with the 'reasonable woman' standard is the only encouraging system modification discussed in the text.¹⁴³ Additionally, although she applauds the new standard as a great advance for women in sexual assault adjudication, Ehrlich fails to expand upon the idea. She does not advocate for other standards to be altered to reflect a more woman-friendly perspective. She also declines to address the possibility that, by using altered standards, the judiciary and attorneys will have a heightened awareness of the female point-of-view, causing them to question male-biased approaches to sexual assault adjudication. The noticeable absence of such comments leads the reader to the assumption that Ehrlich does not have much hope for changes in rape trials in the future, despite her claim that her book "recognize[s] their capacity for change."¹⁴⁴

142. *Id.* at 152.

143. *Id.* at 139. *See also supra*, notes 97-100.

144. *Id.* at 152.

IV. CONCLUSION

Susan Ehrlich's *Representing Rape: language and sexual consent* achieves its objective by making the reader aware of the all-encompassing influence of hegemonic masculinity upon sexual assault adjudication. Her case study provides insight into the subtle methods of manipulation, such as the accused's grammar of non-agency and the 'utmost resistance' standard ideological frame, that often go unnoticed. However, the strength of the author's conclusions were weakened by her tendency to overlook contradictory studies, lack of support for some of her conclusions, and failure to offer the reader promising solutions to the problem of male-dominated sexual assault trials. Nevertheless, given the increased emphasis on restructuring statutes that protect the victims of sexual assault crimes in the last decade, Ehrlich's linguistic study provides a timely and significant approach to eliminating cultural myths surrounding sexual assault. By acknowledging these subtle techniques and stereotypes, the author makes the reader aware of their overarching control of the adjudication process. Acknowledging the presence of culturally-dominant notions about rape and the manner in which they influence the outcomes of sexual assault trials is the first step towards meaningful progress for victims of sex crimes.