IDEALIZED INTO POWERLESSNESS: HOW A JUDICIAL ORDER IN NEBRASKA V. SAFI COULD SEND WOMEN’S RIGHTS BACK TO COLONIAL AMERICA

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“No written law has ever been more binding than unwritten custom supported by popular opinion.”

I. INTRODUCTION

Since colonists first arrived in America nearly four centuries ago, the country has made great strides in various areas. Today, most children attend a free education system, women are allowed to vote, and male heads-of-households no longer hold the power to decide whether to pursue rape complaints. These changes resulted from society’s shifting values, and the law’s adaptation to match these values. Even with these improvements, problems in these areas remain; still most people would agree that the United States has progressed significantly since colonial times. The decision in a recent Nebraska rape case, however, leaves one to wonder whether criminal rape laws really changed significantly or if we are now reverting back to colonial values.

In this article, I examine American rape law through Nebraska v. Safi. In Safi, the trial court issued a “language” order, i.e., an injunction, barring the prosecution and all witnesses from using words like “rape” during the trial. This article contends that the court order perpetuates patriarchal values and undoes centuries of progress made by Women’s Rights Movements. Part II examines how American colonial society viewed rape. Part III looks at more recent issues, including rape shield laws and the criminal justice system’s perceptions of rape. Part IV reviews “language” orders barring the word “victim” and the impact of these earlier cases on the Safi language order. Part V assesses the Safi language order and determines whether that order is sound under Nebraska evidence law. Finally, I will argue that this order impedes women’s ability to testify in court, pursue rape charges, and control their sexual rights. The Safi order

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* J.D., University of Tennessee, May 2008.
1 Women’s Suffrage: Hearing Before the S. Comm. on Woman Suffrage, 56th Cong, 32 (1900) (statement of Carrie Chapman Catt, President of the Nat'l Am. Woman Suffrage Assoc.).
3 Order at 2, Nebraska v. Safi, No. CR 05-087 (D. Lancaster July 12, 2007)
regresses women’s rights to the colonial era when only men had the authority to pursue rape charges and a woman’s word was not trusted.

II. RAPE IN THE COLONIAL AND ANTEBELLUM PERIOD

Believing that rape was “so serious that a woman would not lie about it,” early Puritan communities often did not question women’s rape allegations. For example, prior to 1700, Connecticut courts had a sexual assault conviction rate that “approached 100 percent.” The Puritans wanted to punish both male rapists and anyone who helped to conceal the crime. With this goal, Puritan societies in colonial America distanced “themselves from the skepticism harbored by the English legal system toward women who brought rape accusations.” Thus, unlike many modern American rape trials, Puritan society did not initially question the woman’s word. The colonial magistrates looked at “various accounts of the incident itself, not on the previous character or truth-telling habits of the parties.”

Even with this perspective, however, American colonial courts did not give women much power to pursue their cases. The courts refused to treat these sexual assaults as violations of women’s autonomy. Rather than viewing rapes as unwanted aggression, the courts considered rape similar to burglary or theft, i.e., “[r]ape destroyed [the woman’s] property value on the marriage market.” The rapist took something of value, most often “virginity,” from her father or husband. Even if a woman’s word was

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6 Id.

7 Id. at 238-39. In fact, Governor Eaton of New Haven relied on Biblical interpretation to prove why a woman’s story should be believed. Id. at 239. Writing in Old English, he stated that with rape “there is no witness onely the testimony of the maid and the effects found upon her; the damsell cryed and there was none to save her: then none but herselfe to testifye, yet that was accepted.” Id. However, Governor Eaton relied “on the broad, probing judicial interrogations so central to his juryless system to expose when an accuser was dissembling or hiding her own complicity.” Id.

8 Id. at 239.

9 In the New Haven colony, “women were discouraged from exercising control over the social ramifications of assault incidents.” Id. at 240. Generally, Puritan society preferred women to defer to their husbands or fathers on “how to respond to rape or serious harassment.” Id.

10 Roy Porter, Rape—Does it have a Historical Meaning?, in RAPE 216, 217 (Sylvana Tomaselli & Roy Porter eds., 1986).

unquestioned, the remedy did not protect her interests. Instead, courts sought to protect her father’s or her husband’s interest. If a single woman’s family did not actively pursue the matter, she likely would not prevail in court. Women who independently proceeded with their cases, however, “were not treated with undue skepticism.” The courts often expressed concerns about rape complaints, e.g., fear of accidentally encouraging female autonomy, incorrectly imposing the death penalty on “innocent” defendants, and accidentally discouraging the “cultural entitlement” that “men had proprietary rights to women’s bodies.”

Additionally, colonial law proved slightly less forgiving about a woman’s actions than today’s law. If a woman had a checkered sexual history, encouraged a man’s advances, or was considered a prostitute, then colonial courts most likely did not believe her rape charge. Although similar perceptions of women persist, today’s women are also protected by rape shield laws, evidentiary rules that bar the introduction of a victim’s past sexual history.

To prove rape in colonial law, a woman was required to prove that she had used her “utmost resistance” to refuse an attacker’s efforts. If a victim showed a “willing[ness] to socialize alone with her attacker... or... put up little resistance,” then courts could consider these actions “consent,” lowering the probability of conviction. The chances of a conviction


12 Dripps, supra note 12, at 1782.

13 Id.; see also Lindemann, supra note 5, at 80 (“Rape was considered an offense not against a woman so much as against her father or husband.”).

14 DAYTON, supra note 6, at 250.


16 DAYTON, supra note 6, at 234.

17 Id. at 242. As an example of ambiguity between coercion and consent is the case of Hannah Spencer, who went on an overnight boat trip with a number of people, including William Elliott. Id. at 241. Ms. Spencer claimed that he raped her in a cabin, and Elliot claimed that she had lain “down with him out of sympathy because he was shaking with cold—then she consented to sex.” Id. No one heard her scream, and several passengers heard that the two ‘[f]ell] into a... treaty of marriage.” Id. The court concluded there was no forced rape and classified the incident as lascivious carriage, which sent the message that if women “in any way encouraged or tolerated the dalliance” they would be punished. Id. at 241-42.

18 MCGREGOR, supra note 12, at 28 (stating that the law of rape initially provided a statutory exemption for husbands and “required a finding of force and absence of consent.”).

19 Lindemann, supra note 5, at 68. As an additional problem, early medical authors believed that women could physically prevent their rapes “by using hands, limbs, and pelvic muscles.” MCGREGOR, supra note 12, at 31. They believed “that any woman who wasn’t willing could stop any man, regardless of size, from penetrating her.” Id. (emphasis added).
decreased further if the woman showed no “visible and serious injuries” to prove that the attack occurred.\textsuperscript{20} Although women could present evidence of deception or drugging by their attackers, courts “viewed the crime as less grievous and the victim as partially complicit.”\textsuperscript{21} In all rape cases, especially these cases, women’s “character and morals” came “under suspicion” because the men displaced the blame onto the victims.\textsuperscript{22}

An additional hurdle existed with evidentiary rules in colonial America. Over time, the New England colonies altered their Puritanical “belief that assailants and victims alike were bound in an ethical pact with both their God and their earthly communities to tell the truth.”\textsuperscript{23} The colonies increased their use of English legal procedure and opinions, which influenced their perspectives and increased their suspicion of rape cases.\textsuperscript{24} In fact, “[t]he rules of evidence were weighted for the defendant,” which is eerily similar to the modern-day evidentiary rulings in rape trials.\textsuperscript{25} Courts were concerned about false accusations especially because colonial rape convictions carried a death sentence.\textsuperscript{26} Matthew Hale gave the best embodiment of this concern in 1736: “It must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho [sic] never so innocent.”\textsuperscript{27}

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\item \textsuperscript{20} Lindemann, supra note 5, at 68. In fact, one court reversed a rape conviction in which resistance was lacking. The court stated,

Can the mind conceive of a woman, in the possession of her faculties and power, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she resists, does not resist to the extent of her abilities on the occasion, must it not be that she is not entirely reluctant?

\textit{McGregor}, supra note 12, at 30 (quoting People v. Dohring, 59 N.Y. 374, 384 (N.Y. 1874)).

\item \textsuperscript{21} Moore, supra note 16, at 898. In fact, rape cases involving deception or drugging often resulted in lesser sentences. Rape by force had “a minimum sentence of ten years,” but rape that used drugs or deception had only a “five year maximum” sentence. \textit{Id.} The problem of drugging is especially prevalent today with the easy availability of alcohol and date rape drugs. \textit{See McGregor}, supra note 12, at 146-55. Women who drink were viewed as “more promiscuous, more available, and they are perceived by men to be easier to get sex from since alcohol depresses reaction time and loosens their inhibitions.” \textit{Id.} at 148-49.

\item \textsuperscript{22} Porter, supra note 11, at 225.

\item \textsuperscript{23} \textit{Dayton}, supra note 6, at 234.

\item \textsuperscript{24} \textit{Id.} at 246.

\item \textsuperscript{25} Lindemann, supra note 5, at 68.

\item \textsuperscript{26} \textit{Dayton}, supra note 6, at 247.

\item \textsuperscript{27} \textit{Id.}; \textit{see also} Sharon Block, \textit{Rape and Sexual Power in Early America} 17 (2006) [noting that even though people wrote about rape, it was considered “a difficult crime to charge and to successfully prove”). In fact, “until very recently, [courts] recited [the statement] to juries before their deliberations.” \textit{McGregor}, supra note 12, at 31. Glanville Williams rationalized the
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Because defendants had an advantage at the outset, women had to make sure that their stories had maximum impact. Women’s attack stories had to be believable and successful, which “depended upon the response of those who heard it.” 28 In fact, single women often “chose other women as their first confidantes,” which may have been due to embarrassment, a hope that women would be more sympathetic, or colonial views that “sexual matters had long been women’s purview.” 29

If the women believed the stories that were told to them, they then typically informed the men in the community. When the men learned about such an attack, they “focused on seeking retribution, often first attempting to find the attacker” to bring him to justice. 30 They were the “ultimate arbiters of whether to file a complaint,” which meant that the words used by the victim to tell her story were critical. 31

These considerations were critical because of the colonial perceptions of rape and sex. Society considered women’s normal sexual activity as sinful and “made sexual language an inappropriate medium through which to report a rape.” 32 Thus, women focused more on the attackers’ violence and less on the “sex.” Rather than using more direct language, victims characterized the forced penetration as “‘carnal knowledge’ or the ‘use’ of a woman ‘against her will’, or (another term with legal force) ‘ravishing,’ ‘abusing’ or ‘violently using’ her.” 33 For courts and juries to believe the woman, her story had to indicate “that penile penetration had occurred without [the woman’s] consent.” 34

III. IMPROVEMENTS UNDER RAPE SHIELD LAWS

use of this statement to mitigate against the possibility “of deliberately false charges, [due to] sexual neurosis, phantasy [sic], jealousy, spite or simply a girl’s refusal to admit that she consented to an act of which she is now ashamed.”  id. at 31-32 (citing GLANVILLE WILLIAMS, THE PROOF OF GUILT 159 (1963)).
29 Block, supra note 28, at 107-08. Colonial communities considered women to be “the experts on the female body” before the nineteenth century.  id. at 108.
30 id. at 119.
31 id. at 121. Women were often considered “the unofficial gatekeepers to legal redress, but white men held the keys to the courthouse door.”  id. at 125.
32 Walker, supra note 29 at 5. Speech about rape “was semantically restricted” because rape is a sex crime, it “is not [legally] regarded as a crime when it looks like sex.”  id. at 6 (quoting CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989)).
33 id. at 7.
34 id. at 6 n. 29. In Some jurisdictions, the woman’s demeanor was also critical. If a woman appeared passive and demur, then her appearance “aided [her] credibility when advancing a rape charge.”  DAYTON, supra note 6, at 250.
Despite changes in women’s legal status, puritan attitudes about rape,\textsuperscript{35} concerns about false accusation, and damaging rape myths continue to exist.\textsuperscript{36} Courts and legislatures responded to reformers’ concerns by revising rules of evidence and procedure in rape cases.\textsuperscript{37} States abolished resistance requirements and enacted rape shield laws to bar the introduction of a victim’s past sexual history.\textsuperscript{38} Still, many rape trials continue to focus on “force and nonconsent.”\textsuperscript{39}

The purpose of rape shield statutes is to protect women from remaining societal biases about women’s sexual freedom. These laws try to defuse perceptions that a woman who is raped was “promiscuous or had a bad reputation.”\textsuperscript{40} These laws are especially important in trials because many jurors still possess troubling attitudes about rape.\textsuperscript{41} Still some states’ rape shield laws do not apply in all cases. For example, Michigan law allows the defendant to introduce evidence of a victim’s sexual history under two circumstances: (1) when the defendant and the victim engaged in “past sexual conduct” or (2) when “the evidence relates to the source of

\textsuperscript{35} DAYTON, supra note 6, at 247 (quoting Michael Hale).

\textsuperscript{36} Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013, 1018 (1991). Many rape myths exist in society, including the following:

- women mean “yes” when they say “no”;
- women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night;
- only virgins can be raped;
- women are vengeful, bitter creatures “out to get men”;
- if a woman says “yes” once, there is no reason to believe her “no” the next time;
- women who “tease” men deserve to be raped;
- the majority of women who are raped are promiscuous or have bad reputations;
- a woman who goes to the home of a man on the first date implies she is willing to have sex;
- women cry rape to cover up an illegitimate pregnancy;
- a man is justified in forcing sex on a woman who makes him sexually excited;
- a man is entitled to sex if he buys a woman dinner;
- women derive pleasure from victimization.

\textit{Id}. at 1015; see also Susan Estrich, Rape, 95 YALE L.J. 1087, 1095 (1986).

\textsuperscript{37} Dripps, supra note 12, at 1783.

\textsuperscript{38} Ronald J. Berger, et al., Rape-Law Reform: Its Nature, Origins, and Impact, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 223, 225-26 (Patricia Searles & Ronald J. Berger eds., Westview Press 1995). The reforms have also been prevalent in defining the offense of rape, the “statutory age offenses,” and rape’s “penalty structure.” \textit{Id}. Other reforms include getting rid of “the corroboration requirement,” special jury instructions, and gender-neutral statutes. \textit{Id}.

\textsuperscript{39} Dripps, supra note 12, at 1784.

\textsuperscript{40} Torrey, supra note 37, at 1018; see \textit{id}. at 1015 (discussing the most prominent rape myths).

\textsuperscript{41} Rape shield laws generally address rape cases that reach trial, but “most cases are handled informally through plea bargaining.” Berger, et al., supra note 39, at 229.
the origin of the semen, pregnancy, or disease. Often rape shield laws do not totally prevent defendants from addressing an alleged victim’s past. This may be due to “many criminal justice officials continu[ing] to operate on the basis of traditional assumptions,” which prevent these officials from complying with the statutes.

IV. ATTITUDES OF THE CRIMINAL JUSTICE SYSTEM

Even with these reforms, attitudes towards rape and rape complainants are still major obstacles in prosecuting rape. These attitudes are incredibly pervasive and not limited to jurors or the general public. Police officers, medical personnel, lawyers, judges, and mental health professionals also may harbor similarly “traditionalist” attitudes. For example, many male police officers may lack the experience and training necessary to understand rape victims and appropriately investigate cases. This inexperience is distressing because police officers possess a great deal of discretion in determining if, when, and how rape complaints are investigated. The police can “found,” i.e., pursue, or “unfound,” fail to pursue, a complaint. To decide whether to found a complaint, police generally examine a number of factors:

(1) evidence that the victims was intoxicated; (2) the victim’s delay in reporting; (3) lack of physical conditions supporting the allegations; (4) the victim’s refusal to submit to a medical examination; (5) existence of a previous relationship between the victim and the offender; (6) the use of a weapon without accompanying battery; (7) the victim’s failure to preserve the necessary physical evidence; or (8) the victim’s refusal to cooperate fully with the police.

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43 Berger et al., supra note 39, at 229 (noting that standards like “in closed (in camera) hearings” are just “procedural barriers” because “most judges eventually admit the evidence” of the victim’s sexual history).
46 See id. District attorneys only see founded complaints. Id. Unfounding does not imply that the complaint is false. Torrey, supra note 37, at 1029.
47 See Torrey, supra note 37, at 1029. Susan Estrich’s first interaction with the police indicates the chances of a complaint’s survival:
If the complainant does not pass this initial assessment, then the police will likely unfound her complaint and the case will never reach a prosecutor.

Even if the complaint does reach the prosecutor, “a conviction is not guaranteed.” Prosecutors know that rape cases are difficult to win due to prevalent societal attitudes toward rape, attitudes which the prosecutor may also harbor. As an added pressure, prosecutors must “screen” cases by deciding which cases are likely to result in a win at trial. Prosecutors will also consider other factors including, “a prior relationship between victim and offender; lack of force and resistance; and the absence of evidence corroborating the victim’s account.”

If the case goes to trial, the complainant must navigate the criminal justice system, including its procedural rules, courtroom spectators, defense

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I told the two officers I had been raped by a man who came up to the car door as I was getting out in my own parking lot (and trying to balance two bags of groceries and kick the car door open). He took the car too. They asked me if he was a crow. That was their first question. A crow, I learned that day, meant to them someone who is black. They asked me if I knew him. That was their second question. They believed me when I said I didn’t. Because, as one of them put it, how would a nice (white) girl like me know a crow? Now they were on my side. They asked if he took any money. He did... [The cops stated] that made it armed robbery. Much better than rape. They got right on the radio with that.

Estrich, supra note 37, at 1087-88. Her account demonstrates the assessment of a prior relationship and cooperation with the police. The account also shows that the cops thought that the armed robbery charge was more meritorious than her rape; though no one could honestly say that the violation of a human being is worth less than a car.

For example, an assistant district attorney interviewed a complainant who had been attacked by her ex-boyfriend. Id. at 183. The assistant district attorney reported that she wore “[v]ery tight” blue jeans and “a see-through blouse,” which he thought were “[v]ery revealing,” Id. The ex-boyfriend had invited the complainant to his home to watch a video after they ran into each other. Id. at 183-84. He made advances, which she refused, but in the end, he raped her. Id. at 184. She had no visible injuries and immediately reported the rape to the police. Id. The assistant district attorney warned her that a conviction was unlikely, which she managed to accept. Id. She knew at least that he would have “to go through the time and expense of defending himself.” Id. The assistant district attorney concluded, “She was just trying... to harass her ex-boyfriend” and filed no charges. Id.

See MADIGAN & GAMBLE, supra note 45, at 95 (“We are using the taxpayers’ dollars to try a case, and there are too many complaints to take all of them to trial. This win mentality makes prosecutors reluctant to proceed with cases that have a low probability of conviction.”).

Estrich, supra note 46, at 186-87 (describing how the Battelle Memorial Institute conducted a survey of prosecutors and found that a past relationship with the accused, along with “the circumstances of [the complainant’s and offender’s] initial contact,” is an important factor “in screening rape cases and obtaining convictions;” in the same survey, prosecutors deemed lack of force as the most important factor for screening cases).
attorneys, juries, and judges. The complainant may not be able to testify about certain matters due to procedural rulings. The complainant must also be comfortable discussing the rape in front of strangers like police officers, civilian jurors, and attorneys. Finally, defense attorneys will question the veracity of the complainant’s charges throughout the trial.

The complainant will likely wonder if the judge or jurors hold certain negative or traditional attitudes towards rape, rape victims, and women. Although most scholarly observers appear “to accept the biases” that defense attorneys and police present about rape victims “as inevitable,” they believe that judges will prevent these biases from affecting the trial. Observers view the judge as an “objective source of authority and control in courtroom procedures and the [judge’s] presence assures a balance between these highly charged, goal-oriented factions.” Judges, however, are like

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53 Id. at 212.
54 Defense attorneys try to exploit nuances in language to tap into juror and judicial attitudes about women. For example, defense attorney Roy Black conducted this cross-examination in the Kennedy Smith rape trial:

DA: So even though it was early in the morning, you wanted to see the house?
[Complainant]: It didn’t pose any problem for Mr. Smith.
DA: My question is even though it was early in the morning, you wanted to see the house?
[Complainant]: Yes.
DA: All right. Even though you were concerned, for example, about your child, you still wanted to see the house.
[Complainant]: Yes.

Gregory M. Matoesian, Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial, 29 LAW & SOC’Y REV. 669, 680 (1995). This cross-examination attempts to imply that the complainant wanted to be with Mr. Smith rather than go home to tend to her child, which could turn the jury against her by making her appear to be a “bad” mother.
55 Torrey, supra note 37, at 1057. One judge stated his perspective towards rape as follows:

The typical rape case involves a tremendous amount of asking for it. The average rape victim is a girl, well-endowed... went to a tavern, drank all night, expected a sexual encounter and got raped... I believe biologically it is wrong to entice a man knowing the situation you’re creating and then saying “no.” There is a button a man has that cannot be turned off and on like a light switch. And a man can go to prison for a very long time because of it.

Id.
57 Id. at 161-62.
everyone else. They possess their own attitudes, biases, and perceptions about many issues, including rape.\textsuperscript{58} To combat these attitudes, a complainant will need to ensure that her story is consistent.

Besides the judges' possible biases, the complainant's testimony and language must convince the jury because "[a]s a society, we tend to identify with and root for the underdog," which in many cases is the defendant.\textsuperscript{59} In fact, juries "tend to be prejudiced against the prosecution in rape cases," and "will go to great lengths to be lenient with the defendants if there is any suggestion of 'contributory behavior' on the part of the victim."\textsuperscript{60} Thus, a rape complainant must be "perfect" during each stage of the case. She must pass the hurdles erected by the police to prevent the "unfounding" of her case, prosecutors must believe that her case is winnable, her story needs to be told consistently, and jurors, as well as the judges, must perceive the complainant as a person who cannot be pigeonholed into a rape myth. If the complainant fails to meet any of these "goals," then the likely outcome is either the defendant will never stand trial or the jury will acquit.

V. NEBRASKA V. SAFI

The Safi order perpetuates all of these attitudes, perceptions, issues, and concerns about rape. The order retards progress in changing the status and stigma of rape in modern society. It casts women back to the colonial period when they were at the mercy of their fathers' or husbands' decisions.

On October 30, 2004, Tory Bowen, the complainant in Safi, went to a downtown bar in Lincoln, Nebraska, with friends for a Halloween costume contest.\textsuperscript{61} At the bar, Bowen met Pamir Safi and had a few drinks with him.\textsuperscript{62} Bowen and Safi left the bar together after it closed at one a.m.

\textsuperscript{58} Wisconsin Judge Archie Simonson once commented "Given the way women dress, rape is a normal reaction."


\textsuperscript{60} MADDIGAN & GAMBLE, supra note 45, at 101-02.

\textsuperscript{61} Estrich, supra note 46, at 188.

\textsuperscript{61} Order at 2, Nebraska v. Safi, No. CR 05-087 (D. Lancaster July 12, 2007). See also Clarence Mabin, Jurors Saw Witnesses Differently, LINCOLN J. STAR, Nov. 12, 2006, at 1, available at http://www.journalstar.com/articles/2006/11/12/local/doc45565b90c3336f182485880 .txt (describing the events leading up to the incident between Safi and Ms. Bowen, who, accompanied by friends, arrived at the costume contest "dressed as the Jessica Rabbit character from the movie, 'Who Framed Roger Rabbit?'").

\textsuperscript{62} Meg Massey, Putting the Term "Rape" on Trial, TIME, July 23, 2007, at 1, available at http://www.time.com/time/nation/article/0,8599,1646133,00.html.
in Safi’s car. They then went to his apartment. At this point, their stories diverge: Safi claimed that they had consensual sexual intercourse, while Bowen states that “she was too drunk—and, she believes, drugged—to consent to sex.”

Bowen then went to the Bryan LGH Medical Center East and contacted the police. Her case survived both police scrutiny and the prosecutor’s assessment of its possible success at trial. At the trial stage, Bowen contended with jurors’ and judges’ attitudes, as well as skilled defense attorneys.

At the first trial, Safi’s attorney filed a motion to limit the prosecution’s ability to “elicit[] testimony or make[] argument before the jury” using certain words, including “victim,” “assailant,” “rape,” “sexual assault kit,” and “attack.” The attorney argued that the terms were “unfairly inflammatory, prejudicial and misleading.” Judge Jeffre Cheuvront agreed, granted the motion, and barred the prosecution and all witnesses from using these terms at trial. The prosecution believed that the ruling was “unlawful,” but did not file an interlocutory appeal. Under the order, Bowen could not use any of the covered terms. As a result, when she took the stand, she “had to pause... and think, re-navigate” how to express herself during her almost thirteen hours of testimony. Her description of the rape morphed from “that man raped me” to “[he] was inside of me and on top of me.” The two-week trial resulted in a hung jury.

After declaring a mistrial, the court scheduled a second trial, but

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65 Massey, supra note 63, at 1.
66 Mabin, supra note 63, at 1.
68 Id.
70 See Complaint, supra note 68, at 3 (explaining that he prosecution reached this conclusion because its office lacked the authority to seek judicial review).
71 Mabin, supra note 64, at 1-2.
72 Id. at 1; Massey, supra note 63, at 1.
several events prevented this trial from occurring. First, the prosecution filed a motion in limine to prevent the defense “from using terms such as ‘sex,’ and ‘intercourse’ or any other term which imply consensual participation.” Judge Cheuvront, however, denied the prosecution’s motion before the second trial. The judge also issued a second order, which “asked witnesses in the second trial to acknowledge an earlier order barring certain language from the trial.” This acknowledgment order listed the following words and terms: “victim,” “rape,” “assailant,” “sexual assault kit,” and “sexual assault nurse.”

Bowen initially refused to comply with or sign the order. Bowen sought to have the judge hold her in contempt so she could obtain an expedited appeal before the second trial, but the judge took no action on the motion. Bowen’s attorneys appealed to the Nebraska Supreme Court for relief on a habeas corpus writ, but the court denied her request.

While the order was still being appealed, jury selection for the second trial commenced on July 9, 2007. After two days, the judge concluded that the media coverage regarding the language order had unduly influenced jurors. Judge Cheuvront declared a mistrial and noted that the case might need to be tried in another county due to the media coverage.

At a meeting on August 23, 2007, the parties agreed to pursue a third trial in the same venue. As a result, Bowen filed a complaint against the trial judge, Judge Cheuvront, in federal court alleging that the language order violated her constitutional rights and seeking declaratory relief under

74 Mot. in Limine: Re: Prejudicial Terms at 1, Nebraska v. Safi, No. CR 05-087 (D. Lancaster May 31, 2007).
75 Complaint, supra note 68, at 3.
77 Acknowledgement of Court’s Order at 1, Nebraska v. Safi, No. CR 05-087 (D. Lancaster July 3, 2007) (in which the judge allowed the parties to refer to the sexual assault kit as a sexual examination kit and a sexual assault nurse as an individual with special training in sexual examinations).
78 Massey, supra note 63, at 2. But see Mabin, supra note 77, at 1 (noting that although Ms. Bowen would attempt to comply with the order, she felt as though doing so would force her to commit perjury and damage her credibility on the witness stand).
79 Complaint, supra note 68, at 4.
81 Order, supra note 62, at 1.
82 Id.
83 Id. at 3.
84 Complaint, supra note 69, at 4. The defendant also waived his rights to a speedy trial.
Section 1983.85 United States District Court Judge Richard Kopf issued a memorandum and order in response to the complaint.86 The district court determined that the defendant, Judge Cheuvront, did not have to respond to Bowen’s complaint until the district court ordered an answer.87 The district court also ordered Bowen and her counsel to “show cause” why the complaint should not be dismissed and why Rule 11 sanctions should not be imposed.88 Bowen filed a lengthy response, but to no avail.89 The district court held that its decision to provide declaratory relief was discretionary and should only occur in extraordinary situations.90 Additionally, the district court judge determined that such relief was unwarranted in this case and that Bowen’s attorneys had violated Federal Rule of Civil Procedure 11.91 Judge Kopf, however, noted in a footnote that he

[did] 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.92

With these statements, Judge Kopf, who also disclosed that he had never tried “an ordinary rape case,”93 dismissed the lawsuit against Judge Cheuvront.94 Bowen and her counsel filed a motion for reconsideration, but the motion was denied.95 They filed a notice of intent to appeal the
dismissal order to the United States Court of Appeals for the Eighth Circuit. While the federal appeal was pending, the state prosecution against Safi was dismissed on January 4, 2008.

The Eighth Circuit Court of Appeals granted Bowen the right to submit her case to a three-judge panel. The North Dakota State’s Attorney Association submitted an amicus brief on Bowen’s behalf. Unfortunately, the additional support did not aid Bowen because the Eighth Circuit issued a published per curiam decision dismissing the lawsuit against Judge Cheuvront. The panel dismissed the case based on procedural grounds, noting that “[Judge Cheuvront] was never served summons in this matter,” which prevented both the Eighth Circuit and the District Court of Nebraska from obtaining personal jurisdiction over him.

Additionally, the Eighth Circuit panel noted that the dismissal of the state criminal prosecution against Safi mooted “all issues initially presented to the federal court.” The United States Supreme Court had established that if a civil case coming from “a court in the federal system . . . has become moot,” then the court should “reverse or vacate the judgment below and remand with a direction to dismiss.” The panel followed this mandate, by vacating the district court’s judgment, and remanding the case with directions to dismiss.

Even with the dismissal, Bowen continued to press her case. She established a website for contributions to her legal defense fund. Her attorneys filed a brief with the United States Supreme Court. The Supreme Court, however, denied certiorari (I have updated, but check spelling in Black’s Law Dictionary) on October 20, 2008, and signals the

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98 Id.

99 See generally Brief for North Dakota State’s Attorneys Association as Amicus Curiae Supporting Appellant, Bowen v. Cheuvront, 521 F.3d 860 (8th Cir. 2008).

100 Id.

101 Id.

102 Id.

103 Id. (quoting U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship, 513 U.S. 18, 22 (1994)).

104 Id.


end of her legal battle to tell her story as she perceived it.\textsuperscript{107}

VI. THE USE OF LANGUAGE ORDERS

With this background, the article will now examine whether the trial court's order restricting the parties' use of particular language is comparable to similar language orders and whether it is valid under Rule 403 of the Nebraska Rule of Evidence. First, this article will examine similar language orders issued by other courts that only barred the word "victim" and whether the \textit{Safi} language order is merely a natural extension and consequence of those previous language orders. Second, this article will examine the \textit{Safi} order under Nebraska's Rule 403 and determine whether the words encompassed in the trial court's order satisfy Nebraska's standards.

A. Language Orders Regarding the Word "Victim"

Several state courts have issued orders that bar the use of the term "victim" in criminal trials, predominately rape and sexual assault cases.\textsuperscript{108} The main rationale for such orders appears to be that the complainant technically "is not yet a victim" during the trial.\textsuperscript{109} These courts contend that, absent jury findings that the defendant is in fact guilty, the word "victim" "violates the defendant's presumption of innocence, is prejudicial, and is an improper expression of a personal belief in [the party's] veracity and the defendant's guilt."\textsuperscript{110} Courts come down on both sides of the issue in deciding whether to exclude the word at trial and determining to whom such exclusions should apply. All of the cases in which the states' courts granted language orders involved sex crimes. \textit{Safi}'s defense attorney successfully extended the rationale used by these courts to include terms other than "victim," particularly terms associated with sex crimes.

i. Courts Barring the Use of "Victim"


\textsuperscript{108} However, a growing trend is emerging in other criminal cases as well. Criminal cases in other states have succeeded in obtaining orders banning words like "crime scene," "murderer," "victim," and "rape." Tresa Baldas, \textit{Courts Putting Hot-Button Words on Ice}, \textit{The Nat'l. L.J.}, June 16, 2008, available at http://www.law.com/jsp/article.jsp?id=1202422274880.


\textsuperscript{110} \textit{Id.}
Texas was one of the first states to issue a victim language order. In *Talkington v. Texas*, the defendant, James Parker, and the complainant met in a bar and left together. The defendant claimed that they had consensual sex in a van, but the complainant claimed “that she did not consent.” The trial court’s jury charge referred to the complainant as the victim, and the defendant objected. On appeal, the Texas Criminal Court of Appeals determined whether the trial court “commented on the weight of the evidence” by labeling the complainant as a victim. Texas criminal procedure provided “that the judge shall not express ‘any opinion as to the weight of the evidence’ in the written charge.” The issue at trial was whether the complainant consented and the appellate court held that, because consent was at issue, the use of the term “victim” in the jury charge was reversible error. If the defendant was found not guilty, then the complainant was not a victim.

Delaware was the next state to comment on the use of the word “victim.” *Jackson v. Delaware* involved a complainant who went to her teacher’s home “for a social visit.” The complainant, her teacher, and the teacher’s husband then went to the defendant’s home to play cards. Later the teacher and her husband departed, but the defendant persuaded the complainant to stay and subsequently attacked her. The defendant claimed that the sex was consensual. The trial court allowed the

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112 Id.
113 Id.
114 Id. The charge stated,

Bart Talkington . . . did then and there unlawfully intentionally or knowingly by means of force or threats have sexual intercourse with (KB), hereinafter called victim, a female not his wife without the consent of the said victim and by acts, words, and deeds placed the said victim in fear of harm, then you will find the defendant guilty of the offense of rape.

115 Id. at 674-75 (emphasis added).
116 Id. at 674.
117 Id. at 675 (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1984)).
118 Id.
119 Id.
120 600 A.2d 21 (Del. 1991).
121 Id. at 22.
122 Id.
123 Id.
124 Id. at 23.
prosecution to refer to the complainant as the “victim.”¹²⁵

On appeal, the defendant argued that the trial court had committed “plain and prejudicial error by allowing the prosecutor to refer to the complaining witness as ‘the victim.’”¹²⁶ The defendant claimed that the complainant had consented, and any “reference to a ‘victim’ assumes that a crime had been committed and the sexual acts were non-consensual.”¹²⁷ The Delaware Supreme Court agreed “that the word ‘victim’ should not be used in a case where the commission of a crime is in dispute.”¹²⁸ The defendant failed to object at trial and therefore waived any objection to the use of the term.¹²⁹ Even under a plain error analysis, the Delaware Supreme Court allowed the word because it was regularly used by law enforcement.¹³⁰ The Delaware Supreme Court considered the word “victim” to be a term of art for law enforcement officers, like the phrase “complaining witness.”¹³¹ The court, however, noted that the word “victim” “should be avoided in the questioning of witnesses in situations where consent is an issue.”¹³²

On rehearing, the Delaware Supreme Court provided further explanation and focused on the determination of whether a crime had occurred.¹³³ If a “crime has, in fact, occurred,” no harm exists “in referring to the existence of a victim.”¹³⁴ In certain cases, “[i]t is improper for a prosecutor to assume as a given, or to suggest to the jury, the existence of that which is in dispute.”¹³⁵ The Court indicated that in this case, and others like it, such use of the term “victim” should be avoided.

After a ten-year gap, Ohio issued a language order at the defendant’s request in 2003. In Ohio v. Wright,¹³⁶ the defendant claimed that the use of the word “victim” by the prosecutor, the defense attorney, and the trial court resulted in an unfair trial.¹³⁷ The defendant, however, failed to object at trial to the prosecutor’s use of the word and thus, waived the issue on appeal.¹³⁸ Additionally, the Ohio Court of Appeals found that the

¹²⁵ Id.
¹²⁶ Id. at 24.
¹²⁷ Id.
¹²⁸ Id.
¹²⁹ Id.
¹³⁰ Id.
¹³¹ Id. at 24-25.
¹³² Id. at 25.
¹³³ Id.
¹³⁴ Id.
¹³⁵ Id.
¹³⁷ Id. at #1. The defendant also raised several other issues on appeal.
¹³⁸ Id.
defendant’s claim about his defense attorney’s use of the word was “groundless and without merit.” The appeals court concluded that the defendant failed to prove that his “substantial rights” were “affected by the use of the term ‘victim’ by the court, prosecutor, and defense counsel.”

The court, however, noted that the trial court should not use the word “victim” because “it suggests a bias against the defendant before the State has proven a ‘victim’ truly exists.”

Two years later, Vermont also dealt with the use of the word “victim.” In Vermont v. Wigg, the complainant, an eleven-year-old girl, went on a ski trip with the defendant, whose brother was dating the complainant’s mother. During the trip, the defendant assaulted the complainant. At the trial, the complainant and the investigating officer testified about the assault. The officer used the word “victim” repeatedly, and the trial court allowed the word’s use despite the defendant’s objections. The defendant was convicted of lewd and lascivious conduct.

On appeal, the defendant challenged the trial court’s allowance of the word “victim” and claimed that its use “violated his constitutionally-based presumption of innocence.” The trial court believed that the word “was not ‘highly prejudicial’ because ‘the jury knows [the state’s attorney] wouldn’t be here if the State didn’t believe this act occurred.’” The Vermont Supreme Court, however, agreed with the defendant. If “the commission of a crime is in dispute,” and “the complainant’s credibility” is an issue, then the trial court should not allow “a police detective to refer to the complainant as the ‘victim.’”

The Vermont Supreme Court noted that trial courts possess the discretion to exclude or admit testimony depending on its probative value when weighed against the chance of unfair prejudice. In this case, the Vermont Supreme Court believed that “a danger of unfair prejudice”

139 Id. at *2.
140 Id.
141 Id.
142 889 A.2d 233 (Vt. 2005).
143 Id. at 235.
144 Id.
145 Id. at 235-36.
146 Id. at 236.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
existed because the word choice indicated “that [the investigating officer] and the prosecution believed the complainant’s testimony, adding weight to the State’s case.”\textsuperscript{153} The trial “court should have required the officer to use a more neutral term to identify the complainant.”\textsuperscript{154}

Despite this finding, the Vermont Supreme Court found that the error was harmless.\textsuperscript{155} The court referred to the explanation that was used by the Delaware Supreme Court in \textit{Jackson}—that the word was a term of art for the police.\textsuperscript{156} The detective had also called the defendant a suspect, which “indicat[ed] that he did not intend to convey an opinion of defendant’s guilt.”\textsuperscript{157} With all this testimony, the jury likely “would not have returned a different verdict” even if the detective had used a more neutral term.\textsuperscript{158}

Finally, in 2006, Utah received an opportunity to address the issue. In \textit{Utah v. Devey},\textsuperscript{159} the defendant was on trial for rape and sodomy of a child as well as other charges.\textsuperscript{160} Before trial, the defense attorney filed a motion in limine to bar the use of the word “victim” at trial.\textsuperscript{161} The trial court denied the motion, and one of the prosecution’s witnesses referred to the complainant as “the victim.”\textsuperscript{162} The defendant was convicted and appealed.\textsuperscript{163}

On appeal, the defendant argued that the use of the word “victim” deprived him of his “presumption of innocence.”\textsuperscript{164} The Utah Court of Appeals agreed with the defendant.\textsuperscript{165} The defendant claimed that the incident alleged in the indictment had never happened, and the Court of Appeals stated that “the allegations ...are based almost exclusively on the [complainant’s] testimony — the trial court, the State, and all witnesses should be prohibited from referring to the [complainant] as ‘the victim.’”\textsuperscript{166} The Court of Appeals cited \textit{Jackson} and \textit{Talkington} to support its
rationale.\textsuperscript{167} The Court of Appeals believed “that the term should be avoided generally in cases where the ultimate issue before the jury is whether any crime actually occurred.”\textsuperscript{168}

Despite agreeing with the defendant, however, the Court of Appeals determined that the error had been harmless.\textsuperscript{169} The trial court’s ruling was not memorialized in the record, so the Court of Appeals could not evaluate whether “the ruling was appropriate.”\textsuperscript{170} The term was also not used repeatedly at trial by the prosecution or the court.\textsuperscript{171} With only one use of the term, the Court of Appeals determined that the defendant did not lose his presumption of innocence.\textsuperscript{172}

\textit{ii. Case Allowing the Use of “Victim”}

The only case in which a court allowed the term “victim” to be used at trial arose in the state of Washington. In \textit{Washington v. Chism II},\textsuperscript{173} the defendant and a group of his friends were traveling to Seattle.\textsuperscript{174} The defendant got into a fight with one of his friends, Wimmer, and was charged with second-degree assault.\textsuperscript{175} He was convicted and appealed.\textsuperscript{176}

On appeal, the defendant argued that the trial court should not have denied his motion in limine regarding the use of the term “victim.”\textsuperscript{177} The defendant cited \textit{Jackson} in support of his argument, but the Washington Court of Appeals disagreed with the Delaware Court’s reasoning in \textit{Jackson}.\textsuperscript{178} The Court of Appeals thought that “victim applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally”\textsuperscript{179} and does not “express[] an opinion that the defendant was guilty of a crime.”\textsuperscript{180} Therefore, the Court of Appeals considered the

\begin{footnotes}
\item[167] \textit{Id.} The court also cited another Texas case, \textit{Veteto v. State}, 8 S.W.3d 805 (Tex. Crim. App. 2000), which also barred the use of the phrase “alleged victim” due to concerns of increasing the complainant’s credibility. \textit{Devey}, 138 P.3d at 95.
\item[168] \textit{Devey}, 138 P.3d at 95 n.5.
\item[169] \textit{Id.} at 96.
\item[170] \textit{Id.}
\item[171] \textit{Id.}
\item[172] \textit{Id.}
\item[174] \textit{Id.} at *1.
\item[175] \textit{Id.}
\item[176] \textit{Id.}
\item[177] \textit{Id.} at *3.
\item[178] \textit{Id.}
\item[179] \textit{Id} (quoting \textsc{Webster’s Third New International Dictionary} 2550 (1993)).
\item[180] \textit{Id.}
\end{footnotes}
complainant to be a victim regardless of whether he had received his injuries “in self-defense or was injured unlawfully.”\textsuperscript{181} It held that the trial court’s ruling was not an abuse of discretion.\textsuperscript{182}

iii. Safi’s Language Order

Safi’s language order will likely be upheld.\textsuperscript{183} This case, like the above cases, involves a sex crime. In sex crimes, ranging from rape to sodomy of a child, courts upheld language orders.\textsuperscript{184} With sex crimes, the main issue is whether a crime occurred, especially if the defendant claims that the acts were consensual.\textsuperscript{185} Safi contends that he and Bowen had consensual sex.\textsuperscript{186} Thus, the prosecution must prove that the incident was a crime and, under the existing case law of several states, the word “victim” would likely continue to be barred by the appellate courts. Nebraska appellate courts would likely be concerned about whether the use of the word “victim” might lead the jury to believe the prosecution’s version of events. Although “victim” would likely be upheld on appeal, the other words in the order might be more difficult to justify.

It is difficult to determine whether, under current case law, the Nebraska appellate courts would uphold the trial court’s order barring the use of the terms “rape” and “attack.” Safi claims that the incident was consensual, but Bowen states that the incident was rape.\textsuperscript{187} If the prosecution uses these terms at trial, it may strongly suggest to the jury that the incident involved a crime and bias the jury in favor of Bowen’s version of events.\textsuperscript{188} The Nebraska appellate courts may be concerned that the terms would violate the defendant’s Sixth Amendment rights and his presumption of innocence.\textsuperscript{189} Thus, the Nebraska appellate courts may still

\textsuperscript{181} Id. at #4.
\textsuperscript{182} Id.
\textsuperscript{183} See Complaint, supra note 69, at 3 (“Judge Cheuvront allowed Safi’s motion [to prohibit the use of certain words during trial] and issued an order forbidding all witnesses to use the words: ‘rape’, ‘victim’, ‘assailant’, ‘sexual assault kit’ and ‘sexual assault nurse examiner’.”).
\textsuperscript{184} See Utah v. Devey, 138 P.3d 90, 92 (Utah Ct. App. 2006) (stating that in child sexual abuse cases, the prosecution and witnesses should not refer to complainant as “the victim.”); Talkington v. Texas, 682 S.W.2d 674, 674 (Tex. Crim. App. 1984) (referring to the complainant as “the victim” in the court’s charge was reversible error).
\textsuperscript{185} Talkington, 682 S.W.2d at 674.
\textsuperscript{186} See Massey, supra note 63, at 1.
\textsuperscript{187} Id.
\textsuperscript{188} See Jackson v. Delaware, 600 A.2d 21, 25 (Del. 1991) (“Prosecutor’s repeated use of the term ‘victim’ ... was improper in that it suggested to jury that crime necessarily had been committed”).
\textsuperscript{189} See Devey, 138 P.3d at 95. (“where a defendant claims that the charged crime did not actually occur, and the allegations against that defendant are based almost exclusively on the
bar these terms.

The terms, "sexual assault kit," "sexual assault nurse," and "assailant," however, likely would not be upheld on appeal. These terms are similar to those that the Delaware Supreme Court deemed to be terms of art.\(^{190}\) The terms "sexual assault kit" and "sexual assault nurse" describe an object and a job respectively. "Assailant" is similar to the word "suspect," which courts do not consider as "convey[ing] an opinion of defendant's guilt."\(^{191}\) They do not indicate whether a crime occurred. These terms would likely arise at trial when medical experts and police officers testify. They would be a way to describe the incident in "technical" terms and to easily convey the investigation's results. They would not indicate whether a crime had occurred. In fact, the terms "kit" and "nurse" could help the defendant if they provide no evidence or indication of a crime. These terms alone do not fit within the rationale presented in the "victim" cases. The terms are unlikely to impact the jury's assessment of whether a crime occurred.

To ensure that all of the terms are allowed, the prosecution can distinguish this language order from the others discussed. First, the Safi order is more expansive than the others.\(^{192}\) By barring all the terms, the Safi order requires that the prosecution and witnesses find alternative ways to express themselves.\(^{193}\) During the trial, witnesses struggled for alternative language and their testimony often came off sounding stilted, halting, and clinical.\(^{194}\) Their stories and demeanors were also affected, which likely affected their credibility with the jury. This concern is especially salient because most jurors are not extensively knowledgeable about court procedure, including motions in limine and orders.\(^{195}\) Thus, juries may conclude that the prosecution is just going through the motions and that, by using language that is more neutral, the prosecution "agrees"

\(^{190}\) See _Jackson_, 600 A.2d at 24-25 (noting that the term "victim" is used by law enforcement officers and in court documents as a term of art).

\(^{191}\) Vermont v. Wigg, 889 A.2d 233, 237 (Vt. 2005).

\(^{192}\) See _Mot. in Limine: Prejudicial Terms, supra note 68, at 1._

\(^{193}\) See _Mabin, supra note 64, at 2._ Ms. Bowen "had to pause ... and think, re-navigate (how to say what happened)" during her testimony. _Id._

\(^{194}\) Ms. Bowen's description of the rape changed. She wanted to say "[t]hat man raped me," but due to the order, she said that he "was inside of me and on top of me." _Id._ at 1; _Massey, supra note 63, at 1._

\(^{195}\) See _Mabin, supra note 74, at 2._ The forewoman stated, "The order did not play a factor" in jury deliberations. _Id._ This forewoman, however, was part of the first trial and may have been unaffected by the national attention which affected the subsequent proceedings.
with the defense.\textsuperscript{196}

Second, the prosecution can argue that in the other cases, appellate courts took issue with the trial court, prosecution, or law enforcement’s use of the term. The trial court represents a neutral authority figure.\textsuperscript{197} Thus, using the terms may indicate support of the prosecution’s case and could cause the jury to believe the prosecution. The prosecution and law enforcement hold a similar status as authority figures, but they also hold a stake in proving the defendant’s guilt.\textsuperscript{198} “Juries are not stupid,” and they know that the prosecution wants to convict the defendant, while the defense wants to keep the defendant out of jail.\textsuperscript{199} Juries realize that the prosecution and defense hold stakes in the outcome of the case and may evaluate the case accordingly. Additionally, unlike the police and prosecutors, Bowen is not an “authority figure.” She is an everyday person like most jurors. As the complainant, she likely will not receive “instant” credibility from the jury.\textsuperscript{200} The jury would likely view her testimony with a skeptical eye, especially if Safi testifies that the incident was consensual and presents evidence supporting evidence.\textsuperscript{201} Thus, the appellate court could bar the trial court and if necessary, the attorneys from using the words. Normal witnesses, however, especially the complainant, should be allowed to use their own words to indicate how they perceived the events.

Third, this order puts two constitutional rights at odds with each other. The defendant has a right to a fair trial with an impartial jury, but witnesses also have the right to speak freely.\textsuperscript{202} In Nebraska, the legislature believed that participation

in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement ... The laws, courts, and other agencies of this state must provide the utmost protection for the free exercise of these petition,

\textsuperscript{196} See Mabin, supra note 64, at 1-2 (noting the concern that the order could cause the jurors to believe that the complainant consented).
\textsuperscript{197} See Bohmer, supra note 57, at 161.
\textsuperscript{198} See id.
\textsuperscript{199} Dismissal Order, supra note 87, at 13 n.8.
\textsuperscript{200} See Estrich, supra note 46, at 188 (discussing how contributory factors by the complainant affects jurors’ judgments of the situation).
\textsuperscript{201} See Mabin, supra note 64, at 3 (noting that the jurors had issues with the complainant and the defendant’s testimony).
\textsuperscript{202} Compare U.S. CONST. amend. VI with U.S. CONST. amend. I.
speech, and association rights.[203]

Under the First Amendment, Bowen has the right to use her choice of words when she testifies. Utilizing the Nebraska statute section 25-21, 241(1), the appellate courts can protect Bowen’s speech rights during her testimony. Her participation in the prosecution’s case is critical. To convict Safi, Bowen must be allowed to testify in her own voice. The prosecution requires her support to prove that a rape occurred because no other witnesses exist to the contest Safi’s version of the incident. Physical evidence can help, but her testimony is critical. For Bowen to be effective, she must be allowed to testify in her own words. If the appellate courts are concerned about violating Safi’s Sixth Amendment rights, then the trial court could allow a more in-depth cross-examination to balance out any impact made by her word choice. The appellate court needs to consider and strike an appropriate balance between the conflicting constitutional rights of the victim and the defendant.

Although, the defendant’s constitutional rights include a presumption of innocence and a right to a fair trial with an impartial jury,[204] the prosecution also has a right to a fair trial.[205] The prosecution and Bowen are entitled to introduce evidence and use words to persuade the jury. As long as the court remains neutral, the prosecution and defense should be allowed to classify the incident as they perceive it. This is the classic conception of the American adversarial court system, in which the jury is allowed to weigh conflicting evidence and testimony to reach its own conclusions.[206]

To ensure a fair trial, the trial court could issue jury instructions to remind the jury of the prosecution’s burden of proof and to remind them that they must keep sympathy out of the deliberations. These instructions would prevent the jury from being unduly affected by the prosecution’s “authority” status as the State’s representative. If the prosecution is forced to use terms like “coitus,” “sex,” or “intercourse,” which imply consent, the case of the defense is improved. Given this, the prosecution would be unable to discuss the case effectively at trial, which, in turn, may prevent Nebraska prosecutors from pursuing future rape cases. The defendant has a right to a fair trial, but the defendant cannot be permitted to control the

[204] U.S. CONST. amend. VI.
[205] See Hayes v. Missouri, 120 U.S. 68, 70 (1887) (noting “[b]etween [the defendant] and the state the scales are to be evenly held”).
[206] See Mabin, supra note 64, at 2-4.
prosecution’s presentation of its case. In comparison to the “victim” orders, the Safi order is overly expansive and risks placing courts on a slippery slope that could prevent rapes from being prosecuted at all.

B. Nebraska Rule of Evidence 403

Safi’s defense attorney used the balancing test enunciated in Rule 403 of the Nebraska Rules of Evidence as the basis for excluding the terms in his motion in limine.\textsuperscript{207} The rules of evidence control what is admissible at trial. Some evidentiary rules imply judicial discretion when it is “a factor in determining admissibility.”\textsuperscript{208} Rule 401 implies this discretion for relevance, and rule 403 implies this discretion for evaluating prejudice.\textsuperscript{209} Generally, “[a]ll relevant evidence is admissible.”\textsuperscript{210} To be admissible, this evidence must “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”\textsuperscript{211}

Nebraska courts look at two factors for evaluating relevance: materiality\textsuperscript{212} and probative value.\textsuperscript{213} Even if evidence is relevant, however, it may be inadmissible under Rule 403 if the “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”\textsuperscript{214}

When parties appeal an evidentiary ruling, appellate courts struggle with whether to overturn trial judges’ decisions. Because each case presents unique evidentiary issues, appellate courts cannot “formulate rules of decisions to govern future cases.”\textsuperscript{215} Without rules, “prudence and necessity” dictate that these decisions “should be left in the control of the [trial] judge[s],” and appellate courts apply an abuse of discretion standard

\textsuperscript{207} See Mot. in Limine: Prejudicial Terms, supra note 68, at 1.
\textsuperscript{209} Id.
\textsuperscript{212} Materiality focuses on “the propositions that the evidence is offered to prove ...the issues in the case.” John W. Strong et al., McCormick on Evidence § 185 (5th ed. 1999).
\textsuperscript{213} Probative value focuses on “the tendency of evidence to establish the proposition that it is offered to prove.” Id.
\textsuperscript{215} Dixon, 482 N.W.2d at 578.
when reviewing trial court decisions.\textsuperscript{216}

In Nebraska, abuse of discretion arises if “the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.”\textsuperscript{217} The main struggle with the abuse of discretion turns on rule 403’s balancing test. Each side presents its evidence with the intent that it would “be prejudicial to the opposing party.”\textsuperscript{218} The issue then becomes whether this prejudice was unfair and how the trial judge evaluated this prejudice.\textsuperscript{219} Although unfair prejudice “suggest[s] a decision on an improper basis,” the degree to which evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case.”\textsuperscript{220}

In State v. Walker,\textsuperscript{221} the defendant sexually assaulted a fifteen-year-old girl.\textsuperscript{222} The complainant reported the incident and the defendant went to the police station for a polygraph test.\textsuperscript{223} He received his Miranda rights, signed a polygraph consent form, and participated in a pre-polygraph interview.\textsuperscript{224} During the taped interview, the defendant disclosed that he had had sex with the complainant and never took the polygraph test.\textsuperscript{225} At trial, the defendant tried to suppress his statements and testimony regarding the polygraph test.\textsuperscript{226} The motions were overruled, and the defendant was convicted.\textsuperscript{227}

On appeal, the defendant argued several points including the reference to a polygraph.\textsuperscript{228} The defendant argued that mentioning the word polygraph, when no polygraph test had ever been administered, violated rule 403 because it could mislead the jury.\textsuperscript{229} The Nebraska Supreme Court disagreed and concluded that “simply mentioning the word ‘polygraph’ does not constitute prejudicial error.”\textsuperscript{230} The Nebraska

\textsuperscript{216} Id.; see State v. Ironuanya, 719 N.W.2d 263, 278 (Neb. 2006), cert. denied sub nom. Ironuanya v. Nebraska, 127 S. Ct. 1129 (U.S. 2007) (mem.).

\textsuperscript{217} State v. Jacob, 574 N.W.2d 117, 135 (Neb. 1998).

\textsuperscript{218} State v. Wilson, 406 N.W.2d 123, 127 (Neb. 1987).

\textsuperscript{219} See id.

\textsuperscript{220} Id. This improper basis is often “an emotional one,” but not always. Order to Show Cause Plaintiff’s Response to Order to Show Cause, supra note 90, at 18.

\textsuperscript{221} 493 N.W.2d 329 (Neb. 1992).

\textsuperscript{222} Id. at 331-32.

\textsuperscript{223} Id. at 332.

\textsuperscript{224} Id.

\textsuperscript{225} Id.

\textsuperscript{226} Id.

\textsuperscript{227} Walker, 493 N.W.2d at 332.

\textsuperscript{228} Id. at 335.

\textsuperscript{229} Id.

\textsuperscript{230} Id.
Supreme Court thought “that the defendant’s jury was fully capable of understanding the difference between a pretest interview and an actual polygraph test.” The court felt that any confusion would be avoided by requiring “the State [to] inform the jury that no polygraph test was given to [the defendant].” The court affirmed the verdict.

In State v. Iromuanya, two University of Nebraska soccer players held a party at their house. At the party, some shot glasses belonging to one of the hosts disappeared and the defendant was accused of stealing them. A fight ensued and the defendant pulled a gun. He fired a shot, striking two people, including the host, resulting in her death. At trial, the victim’s mother identified photos of the victim and testified about her achievements. The defendant was convicted on all charges.

On appeal, the defendant argued that the mother’s testimony was unfairly prejudicial and irrelevant. The Nebraska Supreme Court examined the mother’s testimony on identification. The court allowed the additional identification testimony because it “was brief and occurred on the first day of a 9-day trial in which she was the third of 29 witnesses.” The court, however, noted that a family member’s emotional reaction was a factor to “be considered in this analysis.” The court determined that no abuse of discretion had occurred because the jurors received instructions before trial and before deliberations “that they should not permit sympathy or prejudice to influence their verdict.”

The testimony regarding the host’s athletic and academic achievements was then evaluated. The defendant claimed that it was

\(^{231}\) Id. at 336.
\(^{232}\) Id.
\(^{233}\) Id. The Court also dealt with two other issues on appeal: a motion to suppress and a mistrial motion. After denying the motion to suppress the defendant’s statements, the Court determined that the record reflected that the statements were given voluntarily and no abuse of discretion was shown by the trial court in denying the mistrial. Id. at 334, 336.

\(^{234}\) 719 N.W.2d 263 (Neb. 2006), cert. denied 127 S. Ct. 1129 (U.S. 2007) (mem.).
\(^{235}\) Id. at 273.
\(^{236}\) Id. at 273-74.
\(^{237}\) Id. at 275-76.
\(^{238}\) Id. at 276.
\(^{239}\) Id. at 282-85.
\(^{240}\) Iromuanya, 710 N.W.2d at 277.
\(^{241}\) Id. at 280, 282-85.
\(^{242}\) Id. at 282-83. The defendant had no objection to photographic identification or physician identification. Id. at 282.

\(^{243}\) Id. at 282.
\(^{244}\) Id.
\(^{245}\) Id. at 283.
\(^{246}\) Id.
irrelevant and only “create[d] bias and prejudice and had no relationship to ... guilt or innocence.” The Nebraska Supreme Court held that this testimony should not have been allowed because it was irrelevant, but that the error was harmless. The case’s main issue revolved around whether the defendant had intended “to kill Jenkins,” and the prosecution introduced an abundance of other evidence to prove that point. The court agreed that the jury could sympathize with the victim, but noted that almost any “innocent victim of a homicide” could elicit jury sympathy. Additionally, the trial court had instructed the jury that “sympathy or prejudice” should not “influence their verdict.” Without contrary evidence, the court must “presume ... that a jury followed the instructions given in arriving at its verdict.”

In *Seeber v. Howlette*, a civil case, the defendant rear-ended the plaintiff’s car. The plaintiff saw Dr. Kratochil on his attorney’s suggestion. After learning that he had sustained a soft tissue injury, the plaintiff sued the defendant. The defendant wanted an independent medical examination and approached Dr. Kratochil. The defendant, upon learning that Dr. Kratochil had already examined the plaintiff, requested the doctor’s records. The plaintiff quashed the defendant’s subpoena and filed a motion to prevent Dr. Kratochil from being a trial witness. The trial court ruled that Dr. Kratochil could testify, but that he could not mention who had retained him first.

During the plaintiff’s cross-examination, Dr. Kratochil stated that he performed exams for various parties, but that his practice was mostly “weighted in favor of the defendants.” The plaintiff also questioned Dr.
Kratochil about his relationship with the defendant’s law firm. On redirect, Dr. Kratochil stated “that he had not been initially retained to examine [the plaintiff] by [the defendant’s] counsel, but, rather, by the [plaintiff’s] attorney.” Plaintiff’s counsel objected to this testimony. After the verdict, the plaintiff appealed.

On appeal, the plaintiff argued that the testimony had been unfairly prejudicial. The Nebraska Supreme Court determined that Dr. Kratochil’s exam had been highly probative because he was “the only orthopedic surgeon who evaluated [the plaintiff’s] injuries.” Thus, the Nebraska Supreme Court had to determine whether the retention information was “prejudicial because it can create the impression that the party originally hiring the expert was suppressing evidence.” The court determined that no abuse of discretion occurred by allowing the testimony because the plaintiff “created an inference that Kratochil’s conservative medical opinions concerning [the plaintiff’s] injury were influenced by the fact that he had been retained to testify . . . by the law firm representing [the defendant].” In this case, the trial court tried “to dispel the false inference by that portion of the cross-examination.” The Nebraska Supreme Court affirmed the judgment.

i. Safi’s Language Order Evaluated under Rule 403

In Safi, the defense filed a motion in limine based on rule 403. To evaluate this motion under rule 403, the charge leveled against Safi must be considered. The prosecution charged Safi with first-degree sexual assault. For a conviction, the prosecution must prove that Safi sexually penetrated Bowen “without [her] consent.” The prosecution must also show that Safi “knew or should have known that [Bowen] was mentally or physically incapable of resisting or appraising the nature of . . .

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263 id.
264 id.
265 id.
266 id.
268 id.
269 id. at 451.
270 id.
271 id. at 451-52.
272 id. at 452.
273 Mahin, supra note 64, at 2.
Safi admitted that they had sex, but claimed that it was consensual. Thus, the prosecution’s entire case turns on whether Bowen was a conscious and consenting party, which she denies.

Bowen’s testimony, especially her choice of words, is relevant evidence. Her word choice is “rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.” This case turns on the issue of consent. By using the word “rape,” she definitively establishes her position that she was not a willing participant. No one else was present at the time of the incident between Safi and Bowen. Thus, her classification of the incident is material and probative to proving first-degree sexual assault.

At the first trial, Bowen complied with the order and testified that Safi “was inside of me and on top of me.” Her word choice does not definitively tell the jury that she did not consent or that she considered the incident rape. Although she could testify that she was unconscious, no one can corroborate this claim because no one else was at Safi’s apartment at the time of the incident. Thus, the jury will evaluate her credibility by her demeanor and her testimony. If she uses the defense’s “neutral terms” of sex or intercourse, she will send the impression to the jury that she is “choosing to use the word, ‘sex.’" Bowen could not explain her word choice at trial, which means that the jurors could believe that “[s]he didn’t feel it was harmful. After all, she called it sex.”

Thus, the jury may see her testimony, particularly her seeming willingness to use “sex,” a word

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275 Id. Under Nebraska law, “without consent” has an extensive definition with several manifestations. A victim has not consented if “the victim expressed a lack of consent through conduct,” “the victim need only resist, either verbally or physically, so as to make the victim’s refusal to consent genuine and real and so as to reasonably make known to the actor the victim’s refusal to consent,” and “a victim need not resist verbally or physically where it would be useless or futile to do so.” Neb. Rev. Stat. § 28-318(8) (Supp. 2006). In this case, Ms. Bowen contends that she was unconscious, which means that she could not consent, and as a result, Safi would know that she could not make a decision on any sexual actions. Massey, supra note 63, at 1.

276 Massey, supra note 63, at 1.
277 Id.; Mabin, supra note 64, at 1.
280 Mabin, supra note 64, at 2; Mabin, supra note 65, at 1.
281 See Neb. Rev. Stat. § 28-319(1)(a) (“Any person who subjects another ... to sexual penetration without the consent of the victim ...”).
282 Massey, supra note 63, at 1.
283 Mabin, supra note 64, at 2.
284 Id. at 1.
285 Id. at 2.
that many people associate with a consensual act, as less credible.\textsuperscript{286}

As established earlier, not all relevant evidence is admissible.\textsuperscript{287} If her testimony’s prejudicial value outweighs its probative value, then a judge could exclude it. In this case, the judge restricted the format of Bowen’s testimony.\textsuperscript{288} If the prosecution chose to appeal the order, would an appellate court consider the order an abuse of discretion? Under Nebraska law, appellate courts would likely defer to the trial judge’s order because the trial judge is closest to all the facts and an abuse of discretion standard governs.\textsuperscript{289} The prosecutor, however, could advance several arguments for reversal.

First, the prosecution could argue that the order denies a just result and hinders Nebraska’s right to a fair trial.\textsuperscript{290} Under the language order, the prosecution and its witnesses cannot use language that indicates Bowen’s non-consent. The prosecution tried, but failed to keep the defense from using the terms “sex” and “intercourse” in its own motion in limine.\textsuperscript{291} By denying the prosecution’s motion, the trial court handicapped the prosecution’s witnesses. The trial court, however, allowed the defense to continue to use terms like “sex” and “intercourse,” “forc[ing] the jury to hear only terminology that implies erotic consensual activity, a curious situation that ...no doubt confound[ed] the jury given the nature of the charges.”\textsuperscript{292}

Despite the defense’s contention that “[t]ries are competing narratives of what happened,”\textsuperscript{293} the order prevented the development of a complete competing narrative for the prosecution. The order forced the prosecution to use only words that were acceptable to the defense. This defense-acceptable usage clearly risked giving the jury a false

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{286} Rape is defined as an act of “forcing of sexual intercourse on someone” as well as “abduction or seizure.” \textit{RANDOM HOUSE AMERICAN DICTIONARY} 224 (2d ed. 1995). However, sex is defined as “sexual intercourse.” \textit{Id.} at 248. Unlike the entry for “rape,” the definition of “sex” does not indicate any lack of consent in its meaning.
\item \textsuperscript{287} See Neb. Rev. Stat. § 27-403.
\item \textsuperscript{288} See Acknowledgement of Court’s Order, supra note 78, at 1-2.
\item \textsuperscript{290} Hayes v. Missouri, 120 U.S. 68, 70 (1887); State v. Jacob, 574 N.W.2d 117, 135 (Neb. 1998).
\item \textsuperscript{291} See Mot. in Limine: Re: Prejudicial Terms, supra note 74, at 1. The judge denied the prosecution’s motion because “then there would be no words left to describe the sex act at all.” Dahlia Lithwick, Gag Order: A Nebraska Judge Bans the Word Rape from his Courtroom, \textit{SLATE}, June 20, 2007, at 1, http://www.slate.com/id/2168758/.
\item \textsuperscript{292} Mot. for Reconsideration of the Court’s Language Order at 6, Nebraska v. Safi, No. CR 05-087 (D. Lancaster July 11, 2007).
\item \textsuperscript{293} Mabin, supra note 64, at 1.
\end{itemize}
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impression. The jury could become conditioned to perceive the incident as sex, not rape, and thus would be more likely to acquit Safi. The jury, therefore, could conclude that the incident was not rape because the prosecution and Bowen refused to classify the incident as rape. If the jury is unsure about how to classify the incident based on word choices made at trial, then Safi could be acquitted.

Second, the order is untenable. Although the judge allowed the parties to use “the phrase ‘sexual assault,’” he also prohibited the terms “victim,” “sexual assault kit,” and “sexual assault nurse.” Nebraska’s own statutes use the words “victim” and “sexual assault.” The addition of “kit” and “nurse” to the phrase “sexual assault” does not transform the new phrase into something incredibly prejudicial. In fact, the addition of “kit” and “nurse” might reduce the prejudice by changing the phrase into an object and a job instead of an act. Additionally, the state’s legislature allowed the use of the phrases “sexual assault” and “victim.” These terms cannot be unfairly prejudicial if the legislature voluntarily uses them in the state’s statutes. If the state legislature authorizes their use, then the parties should be allowed to use them at trial.

Third, these words are not unfairly prejudicial. In fact, the Nebraska Supreme Court maintains that merely using specific words does not in itself amount to prejudicial error. Words are less inflammatory than other items used at trial. Courts do not always ban photographs from a homicide investigation, and prosecutors regularly use them to influence the jury. If juries can look at grisly homicide pictures without allowing their emotions to affect their deliberations, then they likely will not be “inflamed by the word ‘rape.’”

If concerns persist about the chance of prejudice, then the defense retains several options. The defendant can testify to his version of events and hope that the jury finds his version more credible than the prosecution’s. The defense can also request a jury instruction regarding the

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294 See Seeber v. Howlette, 586 N.W.2d 445, 451-52 (Neb. 1998). The plaintiff tried to create a false impression, and the court allowed the information about who initially retained the doctor to be disclosed. Id.

295 See Mabin, supra note 64, at 2 ("It’s very difficult to explain why jurors feel the way they do. . . . The point is, language is so passively absorbed they don’t even know it.").

296 Id. at 1. ("They’ll (jurors) think I’m choosing to use the word, ‘sex.’").

297 Attorney Appeals, supra note 96, at 1; see Acknowledgment of Court’s Order, supra note 77, at 1.


299 State v. Walker, 493 N.W.2d 329, 335 (Neb. 1992). The use of the word polygraph by a witness did not amount to unfair prejudice. Id. at 335-36.

300 Mabin, supra note 64, at 3.
words used at trial to avoid an emotionally charged verdict.\textsuperscript{301} Jury instructions will remind jurors of their purpose as well as inform them that both sides have a stake in the case’s result.\textsuperscript{302} The defense could also undermine the complainant’s credibility by using her testimony and previous statements regarding the incident.\textsuperscript{303} These options are more than adequate tools for the defendant to lessen the chance of unfair prejudice from use of the words at issue in this case.

Additionally, the order actually violates rule 403.\textsuperscript{304} The objective of the rule is to avoid misleading the jury or confusing the jury. As noted above, this order will give the jury a false impression and mislead them to believe that Bowen did not consider the incident rape because she was unable to call it that.

Finally, this order will cause confusion for the jury. Lay people, jurors and witnesses alike, do not use sterilized, clinical language in their everyday experiences.\textsuperscript{305} If jurors are required to listen to sterilized language, they may not relate to the witness, or they may not find Bowen’s story credible because it lacks emotion, which implies that the incident “was not upsetting.”\textsuperscript{306} Additionally, jurors come from a variety of backgrounds and education levels. Some jurors may not entirely understand what the witness is testifying about with the sterilized language. Sterilized language could “change [the] meaning” of the testimony, which may also cause jury confusion.\textsuperscript{307} Using the word “sex” to describe the incident could imply consent, which could cause the jury to wonder why Safi is on trial if this incident was consensual. Rather than preventing confusion, the order only further misleads the jury. The order should be overturned.

\textsuperscript{301} Id.; see State v. Iromuanya, 719 N.W.2d 263, 283 (Neb. 2006), cert. denied sub nom. Iromuanya v. Nebraska, 127 S. Ct. 1129 (U.S. 2007) (mem.).

\textsuperscript{302} See Iromuanya, 719 N.W.2d at 284. The defense could also request that Bowen testify first to ensure that the defense could present evidence and witnesses that contradicted her testimony. See id. at 282.

\textsuperscript{303} See Mabin, supra note 95, at 2. Safi’s defense attorney notes that Bowen used the phrases “having sex” and “non-consensual sexual intercourse” rather than rape to describe the incident to the police. Id.


\textsuperscript{305} See Order to Show Cause Plaintiff’s Response, supra note 90, at 21 (noting that people will not say, “He placed his hands around my neck and applied pressure,” but will say, “He was choking me.”).

\textsuperscript{306} Id. at 22.

\textsuperscript{307} Mabin, supra note 64, at 3.
VII. HOW LANGUAGE ORDERS REGRESS WOMEN’S RIGHTS

This order sets women’s rights back to the colonial era. Rape is an underreported crime. Rape shield laws and changes in attitudes have helped, but even with these improvements, women still have to surmount a mountain of hurdles to get to trial. Their complaints must be founded by the police, the district attorneys need to believe that their cases are winnable, and the complainants must present believable, consistent stories to jurors and spectators. These hurdles alone hamper even the most persistent complainant.

Under restrictive language orders, a woman cannot freely convey her version of these tragic incidents. She must struggle to find the appropriate words to communicate her story. This struggle is similar to what colonial women endured in expressing their rape stories. Colonial women had to “spin” their stories to focus more on the attack’s violence rather than the “sex.” They used euphemisms for rape like “carnal knowledge” or “the ‘use’ of a woman against her will” because colonial society considered “sexual language an inappropriate medium through which to report a rape.” Today’s society still struggles with women’s issues and often avoids frank discussions of sexuality, victim’s rights, and rape.

This language order also affects complainants’ credibility. By struggling to find the right words, Bowen “had to pause…and think, re-navigate [how to say what happened].” This act of pausing is very likely to negatively effect the credibility of women with juries. Sterilized language is very likely to impair the complainant’s credibility because it “is not reflective of the highly emotional way people normally experience violent victimization.” Given the restrictions on word order and language choice, the jury might view Bowen as acting “out of character” for a rape victim, and may conclude that the incident had not been “upsetting” to her. Similarly, colonial women were forced to use non-sexual words because colonial society perceived women’s normal sexual activity as sinful. Colonial women who conformed to societal norms had their stories taken seriously and were respected by the authorities. But, if

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309 Walker, supra note 29, at 5, 7.
310 Mabin, Banned Words Debated in Sexual Assault Case, supra note 64, at 2.
311 See Order to Show Cause Plaintiff’s Response, supra note 90, at 22.
312 Id.
313 Id.
314 See Walker, supra note 29, at 5.
women used sexual language to describe the attack, then the courts would often view these women as willing participants, negatively impacting their credibility. Word choice affects credibility in any era.

Finally, the Safi order forces modern-day women, like colonial women, to leave the decision of how to precede with rape claims to others. The order allows patriarchal values to dictate how rape claims should be presented to society, as represented by a jury. The order proves that Matthew Hale’s eighteenth century statement regarding rape charges persists today.\footnote{See Dayton, supra note 6, at 247 (“It must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”).} Colonial women in puritan New England were forced to wait until male authority figures decided whether to pursue rape complaints brought to their attention.\footnote{Block, supra note 28, at 121-22; Dripps, supra note 12, at 1782.} Although today’s women are not constantly at the mercy of male authority figures, they remain at the mercy of patriarchal values regarding women and rape that persist in the judicial system.\footnote{See supra text accompanying notes 56 and 59.} Female victims of rape are forced to comply with these patriarchal values in the phrasing of their testimony about the incident. The Safi order allows Bowen to testify and pursue her claim, which may not have been possible in colonial America, but, the order undercuts her case significantly by subtly eroding Bowen’s credibility with jurors who are also likely to hold patriarchal values.\footnote{See Mot. for Reconsideration, supra note 293, at 6; Mabin, Banned Words Debated in Sexual Assault Case, supra note 64, at 2.} If trial judges continue to handicap complainants by sustaining Safi-like language order, women will face yet another hurdle in their pursuit of justice.

VIII. Conclusion

The Safi language order may impact every future rape case in the United States. Women already struggle with the decision of whether to report a rape because of the lengthy ordeal that will follow. Their lives will be exposed during the investigation and trial. Yet, even with the strength to pursue their claims, women still may not receive justice because of acquittals resulting from orders that limit prosecution witnesses to sterilized language in describing incidents that are anything but sterile. These orders serve to further handicap complainants pursuing rape charges. Under such orders, complainants are unable to freely testify as to how they perceived the incident, which could ultimately undercut their cases during jury
deliberations.

The Safi order also further perpetuates patriarchal values by bending over backwards to prevent defendants from being convicted of “false rape charges” made by “vindictive women.”319 Defendants have a right to a fair trial, but they should not “have a lock on the narrative language used.”320 Witnesses are not barred from using language like “assaulted” or “murdered” at other criminal trials, so why should rape trials be subject to a different set of rules?321

The Safi order stems from society’s patriarchal values and perceptions of women’s roles in society. It forces women to revert to colonial tactics of “spinning” their stories to ensure credibility. By spinning their stories to comply with these orders, the women’s credibility is negatively affected because they are not acting as normal criminal victims should act in the jury’s eyes.322 While patriarchal values may not hold all the “keys to the courthouse” today, these values can control the keys to the jury room and to a conviction in a rape case.323

Bowen’s civil complaint may prevent orders, such as the one in her case, from propagating and expanding to the point where prosecutors view rape cases as pointless to prosecute because no words would remain to describe accurately and adequately the alleged rape incident.324 Should these orders proliferate, they could discourage women from reporting rapes, which would only harm society by allowing people to get away with heinous crimes. These orders effectively gag and sterilize women’s authentic voices and personal stories. In modern America, women should not be forced to suffer in “silence.”

319 See Torrey, supra note 37, at 1015.
320 Lithwick, supra note 292, at 2.
321 See supra text accompanying note 109
322 See Mot. for Recons., supra note 293, at 7.
323 BLOCK, supra note 28, at 125.
324 Lithwick, supra note 292, at 1.