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TASLITZ'S PROPOSAL FOR THE USE OF FEMINIST EVIDENCE LAW IN THE COURTROOM

By Harvey Gee[1]

RAPE AND THE CULTURE OF THE COURTROOM[2]
By Andrew E. Taslitz
New York University Press, 1999

Make no mistake, ANDREW TASLITZ'S new book, RAPE AND THE CULTURE OF THE COURTROOM, is centered on feminism. He opens his strong critique of how rape cases are handled in court, by explaining that:

> Women are disempowered, their voices silenced, patriarchal tales validated, rape legalized. Jurors' decisions end up based on distorted, incomplete information in a courtroom market that ignores externalities (costs not borne fully by the parties creating them) such as heightened gender inequality, impaired dignity, and wounded trust and reciprocity between the state and those its is obligated to protect.[3]

Beyond the introduction, readers will find a fascinating volume written by Howard law professor Andrew Taslitz. Taslitz, a former prosecutor in Philadelphia, knows his subject well. In a brisk 210 pages, he synthesizes his extensive knowledge of criminal law, evidence, and professional responsibility to make a case for judicial reform in rape trials.

RAPE AND THE CULTURE OF THE COURTROOM is neatly divided into three sections. Part I examines how cultural narratives about gender and sexual violence shape trial outcomes. Part II discusses lawyer's language in the courtroom. Part II offers feminist law as an alternative. I recommend the book because its an accomplishment in moving beyond rape myths to enlighten the American conventional wisdom about the nature of sexuality and its relation to charges of rape.

1*LL.M, George Washington University National Law Center (1999); J.D. St. Mary's University School of Law (1998); B.A. California State University Sonoma (1992).

2 ANDREW E. TASLTIZ, RAPE AND THE CULTURE OF THE COURTROOM (1999).

3 *Id.* at 11.

Taslitz's thesis is straightforward: The present system of handling rape trials, controlled by the parties, can be feminist rather than adversarial to ensure fairer trials. A feminist approach can respect dignity while taking account of storied reasoning and the roles of context and power.[4]

Taslitz advocates that the terms of the courtroom linguistic exchange must be altered to accommodate more equitably the female narrative style.[5] This argument rests primarily on an analysis of two infamous rape trials which ended in convictions: the Mike Tyson and Glen Ridge rape cases. These cases demonstrate how cultural narratives undermine justice for rape victims. Taslitz believes that although both cases were divergent in their facts and circumstances, they both share an ability to illustrate the intense pain and humiliation these dynamic cause for victims, even in successful prosecutions.

To begin, the theme of animal sexuality ran rampant during the trial. Washington was portrayed as being young and attractive, while Tyson was characterized as the quintessential black stud. According to Tazlitz, "Tyson, rather than seek to overcome white cultural images of black men, sought, instead [chose] to magnify them."[6] In the Tyson case, there were several factors working in the boxer's favor, and the most important was that the victim, Desiree Washington, was a black woman, which helped to invoke the theme of overpowering female lust. On the other hand, "Tyson, as a black male, might be viewed as a beast . . . in the white stories such beasts attack only white women. [However,] [t]hat the beasts do to black women those women like anyway."[7]

Next, the extraordinary power of cultural rape narratives was demonstrated in the sensational case of the gang rape of a mentally retarded seventeen-year old girl.[8] The

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[4] *See id.* at 11.
[5] *See id.* at 11.
[6] *Id.*
[7] *Id.* at 51.
[8] *See id.* at 56.

jurors believed that Betty Harris did not consent to some of the sexual acts, while some of the other acts, the juror concluded, were consented to.[9]

The defense's theme was that Betty was a seductress, thrilled to be invited to participate in the sexual escapades, and all the while leading the boys along. The defense arguments for the most part, hit home. According to the defense strategy, only when the boys became caught up in the excitement of the moment, starting to use large and painful implements, did the incident cross the line from consent to bullying, from seduction to rape.[10] At the conclusion of the trial, all four defendants were convicted of conspiracy to commit aggravated sexual assault and aggravated sexual conduct, but they were acquitted of forced fallatio, fellatio by a mentally defective person, improper touching of Betty's breasts, and forced masturbation.[11]

Taslitz reports that Betty's testimony, painted a picture of a confused, frightened child who merely wanted acceptance, and who wanted to say no. However, "[H]er testimony also contained some significant inconsistencies and changes; she hesitated, displayed a confused understanding of what the trial was all about, and seemed to agree easily to whatever she was led to say on cross-examination."[12] Interestingly, he points out that aspects of the verdicts made very little sense. Taslitz responds to the jurors belief that Betty did not consent to the insertion of objects such as a bat and a broom stick into her vagina, yet simultaneously believing that the sucking of Betty's breast and masturbation were consensual by rhetorically asking, "Does it really make sense to believe that Betty would engage in acts to which 'no human being would submit' and then happily engage in fondling and masturbation?"[13]

The later half of RAPE AND THE CULTURE OF THE COURTROOM, and in the chapters I think are the most interesting, Taslitz attempts to lay the groundwork for

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[9] *See id.*
[10] *See id.* at 57.
[11] *See id.*
[12] *Id.* at 56.
[13] *Id.*

readers to understand how lawyers use linguistic tools such as interruptions, silence, diction, and aggressive questioning in court by reviewing the use of these tools men use to maintain the preexisting unequal distribution of social power they have over women. In great detail, the author shows why and how these tactics actually work, and its impact on race and class. In the process, Taslitz explores the biological, social origins of these language tactics.

Talitz uses the famous William Kennedy Smith trial as an example wherein rape victims can be dominated by the language of the lawyers. He highlights how the defense counsel, by his power to raise and enforce select topics, led the victim, Patricia Bowman to accept counsel's critical assumption: that how long Bowman kept her panties on was relevant to whether she consented. Talitz suggests that "[D]efense counsel importantly stressed only Bowman's keeping her panties on. Counsel did not contest Bowman's claimed feeling of 'dirtiness.' If she felt dirty but did not remove her panties, counsel suggested, then the locus of the dirtiness could not have been the physical acts of penetration and ejaculation. The locus of filth lay elsewhere in Bowman's guilt about having impersonal, consensual sex with a man she had just met."[14]

Here, Taslitz describes two important points that defense counsel was able to make. First, defense counsel chose a particularly subtle series of questions to impugn Bowman's character. Tazlitz asserts that defense counsel implied that, "[T]he absence of pantyhose, an item of clothing 'guarding' the female genitalia, bespoke a woman of deep sexual craving, a craving so urgent that she ended a man's home late at night knowing that her child would be waiting in her own home."[15] The defense emphasized Bowman's willingness to enter Smith's house at 3:00 a.m., and effectively countered Bowman's protest that she was only interested in the house, by stressing that Bowman did not remember how her pantyhose was removed.[16] Defense counsel's strong suggestion was

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[14] *Id.* at 83.
[15] *Id.* at 84.
[16] *See id.*

very effective since he pointed out the inconsistencies between Bowman's explanation and the fact that she was supposed to rise in a few ours to care for her young child.[17]

The second effective point that defense counsel made was that Bowman's memory lapse seemed especially convenient, given her "clear expression of sexual desire."[18] Having described a kiss between her and Smith as a "short, sweet little kiss," Bowman was made to appear as woman eager to repeat such a romantic experience. Taslitz explains that the power of the defense counsel to define relevance includes the standard claim that the victim's promiscuous character made it more likely that she consented.[19] In Taslitz's view, "[T]he key was counsel's effort not simply to paint Bowman as desirous of Smith, but rather, to do so by assailing her character, portraying her as a bad mother and a woman so sexually experienced that she can grade and critique with precision the quality of kisses."[20]

Taslitz identifies the reality that our present adverserialism in criminal trials is modeled after male "ways of speaking" in everyday life--which works to mute the female voice in everyday life, and at trials. He suggests that the inability to engage with cultural narratives and macho adverserialism explains rape-law reform's failure.[21] The primary mechanisms by which rape jurors determine credibility are unchanged. Consequently, unjustified acquittals mount.[22]

Taslitz responds by advocating for a feminist alternative to re-envision the adversary system which to promote fairer rape trials.[23] While Taslitz refers to these alternatives as "modest changes," and that these are "meant to provide a workable agenda for legislative change," I believe that they instead should be considered radical. As a

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[17] *See id.*
[18] *Id.* at 84.
[19] *See id.*
[20] *Id.*
[21] *See id.* at 154.
[22] *See id.*
[23] *See id.* at 101.

practical matter, the recommendations offered will not survive legislative debate, nor are the theories likely to be embraced by litigators.

RAPE AND THE CULTURE OF THE COURTROOM provides a serious study of language use, sexual violence, gender identity. The volume is most useful for feminist legal scholars who are willing to take a Critical Race Theory approaches to interpreting the law, however, "real world" attorneys and mainstream law students will unlikely be persuaded that the present culture of the courtroom needs to be changed at all.