

2000

## Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy

Eleanor W. Myers

Edward D. Ohlbaum

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Eleanor W. Myers and Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 Fordham L. Rev. 1055 (2000).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss3/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# DISCREDITING THE TRUTHFUL WITNESS: DEMONSTRATING THE REALITY OF ADVERSARY ADVOCACY

*Eleanor W. Myers\**  
*Edward D. Ohlbaum\*\**

## INTRODUCTION

Law students, and most of their teachers, support, even champion, the principle that the criminal defense lawyer is obligated to challenge the state's case and to demand that every element of every charge be proven beyond a reasonable doubt. At the same time, they accept that "adversary advocacy"<sup>1</sup> is not without limitation. For example, a zealous defender is not permitted to suborn perjury or argue false evidence. Disagreement arises, however, when the defense lawyer undertakes to cross-examine a truthful prosecution witness first to show, and later to argue, that the witness is lying. Whether it is ethically permissible to suggest that a truthful witness is lying during cross-examination has been famously characterized as one of the "three hardest questions."<sup>2</sup> This question is the subject of fascinating commentary and thoughtful debate in professional literature.<sup>3</sup>

---

\* Associate Professor, Temple University Beasley School of Law. Thanks to collaborator and long-time friend Eddie Ohlbaum, colleagues Jim Shellenberger, and John Drost, lawyers John Myers and Bill Bowe, and members of the Law School family, Mary Beth Wilson, Mary Lowenstein, Dashika Wellington, and Lois Moses, all of whom gave life to this exercise. Thanks also to Temple Law School for research support.

\*\* Professor of Law and Director of Trial Advocacy & Clinical Legal Education, Temple University Beasley School of Law. Thanks to Louis M. Natali, Jr., my compatriot in early teaching demonstrations of this issue, and to Eleanor Myers, my colleague and conscience who labored to improve, refine, and produce it in our classes and on these pages.

1. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1019 (1990) [hereinafter Luban, *Partisanship*].

2. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1469 (1966) [hereinafter Freedman, *Three Hardest Questions*].

3. See, e.g., Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 43-49 (1975) [hereinafter Freedman, *Adversary System*]; Monroe H. Freedman, *Understanding Lawyers' Ethics* 161-71 (1990) [hereinafter Freedman, *Lawyers' Ethics*]; David Luban, *Lawyers and Justice: An Ethical Study* 150-53 (1988) [hereinafter Luban, *Lawyers and Justice*]; Stephen Ellmann, *Lawyering for Justice in*

Nevertheless, many students do not appreciate the difficulty of this problem. We have found that a dramatic courtroom demonstration provides a realistic context for ethical reflection, which facilitates deeper appreciation of the issues.

Presented with the question of how to cross-examine a truthful witness, students generally react in three ways. One group believes that the rules and the adversary system require unbridled partisanship by the defense lawyer. These students are confident that the system will ferret out the truth and produce a just result. They do not appreciate that an attorney's obligation to a client could be ethically constrained by knowledge of the truth or of a client's guilt. The second group believes there are clear differences between challenging the state's case by shooting holes in the evidence and by offering a wholly new defense based on false inferences. The third group of students does not understand why a guilty defendant deserves any defense whatsoever, since any defense attempts to obscure the truth. Members of this group throw up their hands claiming they could never be defense lawyers. Absent from these reactions is any consideration of the impact of the witness's veracity on defense counsel's behavior. Nor do the students consider whether the crime or subject matter of the testimony should have any bearing on the lawyer's decisions on interrogation.

This exercise is designed to present the following four issues: (1) Is there ethical discretion in the decision whether to discredit a witness whom the lawyer knows to be truthful, and if so, how is this discretion exercised? (2) Should there be a limit on counsel's closing argument with respect to this type of examination? (3) Is the crime or subject matter of the examination relevant to answering the first two questions? (4) If unrestricted partisanship is appropriate in these circumstances, thereby creating a false impression for the jury, is that partisanship different from putting a defendant on the stand to lie?

## I. OVERVIEW OF THE CLASS

We teach this class after exploring various dilemmas of advocacy, including coaching witnesses, destroying documents, disrupting a deposition and other discovery tactics, and offering false evidence.

---

*a Flawed Democracy*, 90 Colum. L. Rev. 116, 155-56 (1990) (book review); Freedman, *Three Hardest Questions*, *supra* note 2, at 1474-75; Luban, *Partisanship*, *supra* note 1, at 1026-35; John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 Geo. J. Legal Ethics 339, 343-46 (1987); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 Geo. J. Legal Ethics 689, 689 (1987) [hereinafter Subin, *Further Reflections*]; Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Geo. J. Legal Ethics 125, 136-43 (1987) [hereinafter Subin, *Different Mission*]. See generally Randy Bellows, *Notes of a Public Defender*, in *The Social Responsibilities of Lawyers: Case Studies* 69 (Philip B. Heymann & Lance Liebman eds., 1988).

Students are familiar with Model Rules 3.3<sup>4</sup> and 3.4<sup>5</sup> and key cases including *Nix v. Whiteside*.<sup>6</sup> Thus, they have evaluated and balanced partisanship, confidentiality, and truth in other litigation settings. Most students are comfortable with Model Rule 3.3 requiring a lawyer to take reasonable remedial measures, including telling the judge or opposing counsel, if she has offered false evidence, even if it means disclosing confidential information.<sup>7</sup> In fact, students are pleased to have a bright-line rule to follow.

This exercise is designed to explore the precarious terrain faced by the criminal defense lawyer who knows the defendant is guilty. It challenges students to consider whether that knowledge ethically or morally ought to affect the conduct of the defense lawyer and, at its best, leads students to a deeper understanding of the competing values underlying the advocacy system. "This is no peripheral theme in professional responsibility. [It is a] difficult issue which touches upon the very nature of our criminal justice system, the role of the attorney in that system, the relationship of the individual to the state, and the Constitution."<sup>8</sup>

This exercise illustrates the policy questions presented in the much-cited Subin-Mitchell debates<sup>9</sup> and the Luban-Ellmann exchanges.<sup>10</sup> Excerpts from these discussions are included in the leading legal ethics casebooks.<sup>11</sup> Indeed, many of those texts contain provocative questions which explore the ground we cover in this exercise. Our experience is that the simulated courtroom scene, with a lawyer realistically challenging a complainant, enlivens the hypothetical and provokes deeper and more passionate student engagement than is accomplished by readings alone.

After setting the stage by reviewing the preceding classes and pertinent ethics rules, we begin with a short story to illustrate the terror of being charged with a crime and its devastating effects on the accused and his family. A personal account may permit those students initially unable to empathize with a defendant to entertain

---

4. Model Rules of Prof'l Conduct R. 3.3 (1983) [hereinafter Model Rules].

5. *Id.* R. 3.4.

6. 475 U.S. 157 (1986).

7. Model Rules, *supra* note 4, at R. 3.3.

8. Mitchell, *supra* note 3, at 339.

9. *Id.* at 343-46; Subin, *Different Mission*, *supra* note 3, at 136-43; Subin, *Further Reflections*, *supra* note 3, at 689.

10. Luban, *Lawyers and Justice*, *supra* note 3, at 150-53; Ellmann, *supra* note 3, at 155-56; Luban, *Partisanship*, *supra* note 1, at 1019.

11. *See, e.g.*, Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 419-24 (5th ed. 1998); Geoffrey C. Hazard et al., *The Law and Ethics of Lawyering* 437-38 (3d ed. 1999); Deborah L. Rhode & David Luban, *Legal Ethics* 279-305 (2d ed. 1995); Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice of Law* 256-73 (1995).

the possibility of representing a "guilty" man.<sup>12</sup> It is also an opportunity to provide vivid, concrete examples of state power.

## II. DESCRIPTION OF THE DEMONSTRATION EXERCISE

The demonstration consists of an examination of the complainant and a jury argument in a rape prosecution—specifically, a demonstration of a model direct examination, comparative cross-examinations, and the closing arguments which follow from those examinations. The exercise can also include a segment examining the ethical questions facing the prosecutor in preparing a witness to testify.

We chose a rape case for several reasons. First, a rape trial presents an opportunity for demonstrating the impact of a variety of defenses, including outright denial, misidentification, and consent. In addition, it is a crime with emotional and political dimensions that have been explored in scholarly and popular literature. Finally, because of the particular vulnerability of rape victims, both statutes and case law recognize special rules which govern prosecutions for sexual assault.<sup>13</sup>

The exercise requires three participants: two experienced trial lawyers serving as counsel for the defense and prosecution, and a woman to play the role of the rape victim. We designed the exercise for a seventy-five minute Professional Responsibility class, although it readily expands to fill a two-hour class. We have also used portions of it in Criminal Law, Evidence, and Trial Advocacy classes.

We have not encountered problems finding players for the three roles in this exercise. The lawyers' parts are relatively straightforward. An experienced prosecutor and defense lawyer may

---

12. Once, when asked whether anyone in class knew someone who had been charged with a crime, a student answered that her brother was charged with arson of the family home. She described the horror and devastation caused by his crime, but said the family wanted the best defense for him that money could buy. They believed that conviction and incarceration would not help him or the family.

13. For example, most jurisdictions have enacted a rape shield law or rule, which bars the admission of otherwise relevant evidence of the complainant's sexual history, except in specifically defined contexts, such as an earlier relationship with the defendant in a case where the defendant argues consent. *See* Fed. R. Evid. 412(b)(1)(B). Moreover, the rules governing the admissibility of a defendant's criminal sexual history have been relaxed. *See* Fed. R. Evid. 413-415. Additionally, a variety of jurisdictions recognize a "tender years" exception to the hearsay rule, which applies to statements by child victims in sexual assault cases. *E.g.*, Cal. Evid. Code § 1226 (1998); 42 Pa. Cons. Stat. Ann. § 5985.1 (West 1993); *see also* Idaho v. Wright, 497 U.S. 805, 813-25 (1990). Some jurisdictions also permit the independent admissibility of a complainant's "prompt complaint" of the assault as against a hearsay objection. *E.g.*, Commonwealth v. Snoké, 580 A.2d 295, 298 (Pa. 1990); John W. Story, McCormick on Evidence § 272.1 (5th ed. 1999). In an effort to protect child-victims of sexual abuse, many states have adopted procedures that permit the child to testify through closed-circuit television. *E.g.*, N.Y. Crim. Proc. Law §§ 65.00-65.30 (McKinney 1992); *see* Maryland v. Craig, 497 U.S. 836, 845-50 (1990) (upholding closed-circuit television procedure over Sixth Amendment objection).

competently perform the assignment with minimal preparation. Care should be taken in selecting a woman to play the role of the victim, a role that is both difficult and emotional. We strongly recommend no one in the class play the role of the victim. We have found some students in our trial advocacy program who are interested in the experience of testifying in a courtroom and have volunteered to play the part. We have also found willing students who are amateur or semi-professional actors.

A modified trial file including a witness prep session, direct examination, cross-examination, and closing arguments are attached as Appendix A. Also included are examinations and arguments, printed in bold type, which are controversial or cross ethical boundaries. During the exercise and discussion period, we ask our demonstrators to use the problem language to assist in exploring appropriate ethical limits.

In the case, Daniel Avery is charged with the rape of Mary Beth Faulkner. The students are told they represent Mr. Avery and, in a confidential attorney-client conversation, Avery confirmed Ms. Faulkner's account of the attack, provided details that only the rapist would know, and admitted raping Ms. Faulkner. The demonstration contrasts a "standard" and non-controversial cross-examination regarding identification of the defendant with a "standard" more controversial cross-examination regarding consent.

### *A. Identification Defense*

The evening of the rape, Ms. Faulkner attended a party with her boyfriend Fred, where she had a few marijuana cigarettes and several drinks. Dan Avery was also at the party but did not speak with Ms. Faulkner. After the party Ms. Faulkner and Fred returned to her apartment, consumed a few more drinks and some more marijuana and then argued about whether Fred would spend the night. Fred left, leaving the door open and Ms. Faulkner crying. Mr. Avery knocked at the door. The lights were dim. Ms. Faulkner invited Avery in, believing it was Fred. Avery forced her to cover her eyes, pinned her to the sofa, raped her, and left.

After a brief explanation of the facts, we introduce the players. Next, we appoint the class to be lawyers for the defendant, who has admitted the rape. One of us assumes the role of the judge, convenes court, and directs the prosecutor to conduct a direct examination of the victim.<sup>14</sup> The defense's cross-examination on identification immediately follows the direct examination.

---

14. See App. A.

1. Excerpt From The Cross-Examination of the "Truthful" Assault Victim

(All answers are "yes." Ms. Faulkner may offer appropriate elaboration and explanation.)

Q: "At the time of the assault you did not know who the man was?"

Q: You did not recognize him?

Q: As far as you knew, you had never seen him before?

Q: Before you were assaulted, you had been drinking?

Q: You had also taken some drugs?

Q: And were feeling dizzy?

Q: I'd like to ask you some questions about how much you had to drink and the amount of drugs you took. Earlier that evening, you and your boyfriend went to a fraternity party?

Q: And then you and he went back to your apartment?

Q: At the party you had 3-4 glasses of punch, spiked with alcohol?

Q: And when you got home, you drank some more?

Q: 2-3 screwdrivers, a drink of orange juice and vodka?

Q: So, you had between 5-7 mixed drinks before you were attacked?

Q: In addition to drinking, you also had taken some drugs?

Q: You smoked marijuana?

Q: At the party, you had 1-2 sticks of marijuana?

Q: And another stick or joint at home?

Q: So you had between 2-3 joints of marijuana in addition to 5-7 drinks?

Q: You felt high?

Q: Dizzy?

Q: I have some questions about how you were feeling after your boyfriend left. When you both got back to your apartment, you were planning to spend the evening together?

Q: Music was playing on your stereo?

Q: The lights were off?

Q: While you were both on the couch, you had an argument?

Q: He left?

Q: You were upset?

Q: Crying?

Q: Then a man came into the room?

Q: He walked right over to you?

Q: You continued to cry?

Q: He put his hands around your neck?

Q: He told you to close your eyes or he would kill you?

Q: You believed him?

Q: You closed your eyes?

Q: When the man finished you felt him get up?

Q: You heard him walk away and leave the room?

Q: Then you opened your eyes?

Q: You called the police?

Q: When you first talked to a police officer, he asked you to describe the man who assaulted you in as much detail as you could?

Q: You knew that the description you gave would help the police catch this guy?

Q: So you tried to do your best in describing what this man looked like?

Q: And the only description you gave was that he was a white male, approximately 5'9"-5'11"?

DEFENSE COUNSEL: No further questions."

\* \* \*

The facts provide rich material for cross-examination of the victim on her ability to see and accurately identify the defendant. The cross focuses on the dim lighting in the room, the victim's fear and agitation, her reduced perception because of her consumption of alcohol and drugs, her blurred vision due to tears, and her very general description of her attacker. After the defense lawyer completes the cross-examination, we ask a series of questions:

*1. What is the purpose of this cross-examination?*

The students readily understand that the cross-examination is designed to introduce doubt in the jurors' minds about whether the defendant is the perpetrator.

*2. Is this cross-examination appropriate? Why?*

Most students feel the cross-examination is appropriate. They understand that in an adversary system it is the duty of the defense lawyer to challenge all elements of the prosecution's case. When prodded, some students justify the criminal defense function as validating loyalty, confidentiality, dignity, and autonomy. It also serves as a check on governmental power.<sup>15</sup>

---

15. Professor Luban states:

The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ante*, our political and civil liberties are jeopardized.

Luban, *Lawyers and Justice*, *supra* note 3, at 60.



3. *How is challenging the complainant's truthful account by creating doubt about the defendant's identity (when you know he was there) any different from putting the defendant on the stand to deny he was there?*

This is the central question of the exercise. Professor Monroe H. Freedman and John Mitchell contend that a defendant may not be disadvantaged by his confidential disclosures to his lawyer.<sup>16</sup> Accordingly, the lawyer is bound to challenge the prosecution's account and to argue strenuously for acquittal using all the available facts. Professor Freedman argues that to restrain cross-examination in this situation would penalize the defendant for confiding in his lawyer and deny him "his constitutional right to effective assistance of counsel."<sup>17</sup> Mitchell argues that the goal of criminal defense is not to seek the truth, but to serve as a screen in a system which ensures that no defendant is criminally punished unless convicted by proof beyond a reasonable doubt. The criminal defense lawyer, together with other protections, helps ensure that the innocent are not wrongly convicted and that state intrusion into an individual's life will be limited, thus acting as a check on governmental power.<sup>18</sup>

Professor Harry I. Subin advocates a more limited role for defense counsel, who know, beyond a reasonable doubt, the victim is telling the truth.<sup>19</sup> He argues, in such situations, the lawyer should be limited to a monitoring role "to assure that a conviction is based on an adequate amount of competent and admissible evidence."<sup>20</sup> He goes on to state:

Unless we abandon completely the notion that verdicts should be based upon the truth, we must accept the fact that there may simply be no version of the facts favorable to the defense worthy of assertion in a court. In such cases, the role of the defense attorney

---

16. Freedman, *Adversary System*, *supra* note 3, at 44-49; Mitchell, *supra* note 3, at 349-57. Professor Freedman states:

[T]he system requires the attorney to know everything that the client knows that is relevant to the case. In order to enable the lawyer to obtain that information, the system provides for an obligation of confidentiality, designed to protect the client from being prejudiced by disclosures to the attorney. In addition, the attorney is required to impress upon the client the obligation of confidentiality in order to induce the client to confide freely and fully.

Freedman, *Adversary System*, *supra* note 3, at 48.

17. Freedman, *Adversary System*, *supra* note 3, at 49.

18. Mitchell, *supra* note 3, at 340-43 ("'[F]actual' guilt or innocence, or what Professor Subin would call 'truth,' is not the principle [sic] issue in the system. Our concern is with the legitimate use of the prosecutor's power as embodied in the concept of 'legal guilt.'").

19. Subin, *Different Mission*, *supra* note 3, at 128. Professor Subin suggests that presenting a false defense can consist of both cross-examination to cast doubt on the testimony of a truthful witness and closing argument based on that examination. *Id.* at 126-27.

20. *Id.* at 146-47.

should be limited to assuring that the state adduces sufficient legally competent evidence to sustain its burden of proof.<sup>21</sup>

Professor Subin's argument appeals to students. But they, like he, have difficulty translating this position into practice. Indeed, Mitchell's criticism of Subin's position powerfully demonstrates that distinctions between testing the prosecution's proof and suggesting a false story based on undisputed facts are largely unworkable.<sup>22</sup> If a student champions a monitoring role for defense counsel, we ask the student to deliver a portion of a closing argument that "monitors" the prosecution's case on identification, but does not suggest a false story.

Constructing an effective closing argument under these conditions is difficult, maybe impossible. Although advocates may neither offer nor argue evidence they know to be false,<sup>23</sup> persuasive closing arguments rely upon inferences. "The lawyer's skill is to weave stories that are false out of statements that are true."<sup>24</sup> Is there a meaningful distinction between arguing that the victim's identification of the defendant is wrong (offering a false story) and arguing that the evidence does not prove the defendant is the rapist (testing the prosecutor's case)? Both arguments rest on inferences from "true" facts. Both arguments present the jury with a "false" story. Indeed, Subin modified his argument in response to Mitchell's criticism that his proposal was unworkable.<sup>25</sup> This modification allows a defense lawyer to argue carefully worded alternative inferences or explanations, which the lawyer knows are not true, for the purpose of "assisting the jury to measure the weight of the evidence."<sup>26</sup> Ultimately, however, the distinction between arguing that the evidence does not prove that the defendant is the rapist and that Mary Beth Faulkner's identification should be rejected as unreliable seems to be a matter of rhetoric and not substance.

We then ask defense counsel to present a closing argument that we believe is unremarkable; that is, we believe all parties to the scholarly debates, as well as trial advocates, would find it unobjectionable.<sup>27</sup>

## 2. Excerpt from the Defense's Closing Argument

"In determining whether the State has convinced you beyond a reasonable doubt that it was Dan Avery who assaulted Mary Beth

---

21. *Id.* at 146 (footnote omitted).

22. Mitchell, *supra* note 3, at 354-57.

23. Model Rules, *supra* note 4, at R. 3.3; see generally *Nix v. Whiteside*, 475 U.S. 157 (1986).

24. John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 Pace L. Rev. 93, 94 (1999).

25. Subin, *Further Reflections*, *supra* note 3, at 689-90.

26. *Id.* at 690.

27. See, e.g., Subin, *Different Mission*, *supra* note 3, at 126.

Faulkner, consider her identification testimony with respect to three points:

1. How much she drank and how many drugs she took.
2. How dark was the room where she was assaulted.
3. How general was the description she was able to give.

"Let's turn to our first point, Ms. Faulkner's drunken, drugged, and dizzy condition. Ms. Faulkner and her boyfriend had been drinking and smoking marijuana at a fraternity party earlier that evening and continued to party back at her apartment. By the time her boyfriend left her on the couch, she'd had between 5-7 drinks of alcohol and had shared 2-3 sticks of marijuana. She was drunk and she was dizzy and in no condition to identify anyone.

"Two, when Ms. Faulkner and her boyfriend returned to her apartment, they had intended to spend the night together. They were on the couch. The stereo was on and the lights were off. Regardless of the glare of the street lamps, Ms. Faulkner was assaulted on a couch in a dark room with no lights.

"Three, after her attacker left, Ms. Faulkner called the police. The officer who responded asked her to describe the man in as much detail as she could remember. She knew that the police were relying upon her description to find the man. And yet the only description she gave, the only one she could give, was white male, 5'9"-5'11", a description which fits half the male population of the western world."

\* \* \*

We ask the class whether this closing creates a false impression for the jury. We suggest that testing the prosecution's evidence by arguing reasonable doubt necessarily invites the jury to consider alternative explanations from disputed and undisputed facts. Is the argument "according to the evidence one cannot conclude that the defendant was there?" much different from the argument "the defendant was not there?" Stated another way, in order to test the prosecutor's case, defense counsel may be obligated to create a false impression. In a case where identification is an issue, a defense attorney may suggest the ever popular SODDI defense: "some other dude did it." Here, of course, we know that is simply not true.

There are ethical limits, nevertheless, on defense counsel. In particular, counsel may not present facts she knows are false. For example, defense counsel may not argue, "Mary Beth Faulkner could not describe Dan Avery because she did not see Dan Avery because Dan Avery was not there." This distinction, however subtle, highlights the difference between an appropriate challenge to the prosecution's case and inappropriate misrepresentation. Reminding the jury that Mary Beth Faulkner was not in a condition to identify the defendant is a fair inference from the admissible evidence. Stating, however, that "in her condition she couldn't see the man who

attacked her, let alone identify him," or that "it was too dark to see," may be more controversial.

The class is usually satisfied that a carefully crafted cross-examination and closing argument urging acquittal based on the victim's inability to identify the defendant, where there are facts to support such argument, are ethically permissible even though the lawyer knows the victim's identification was correct. Moreover, the students recognize that such an argument may be very effective. When students are asked to assume the role of the jury after closing argument, a clear majority of them vote to find the defendant not guilty, even though they were told at the beginning of the class that the defendant admitted his guilt.

### B. *Consent Defense*

Having discussed the ethical behavior of the defense lawyer regarding the misidentification defense, we tell the class that this defense is not available in this case. The facts have changed and the prosecutor has DNA evidence that conclusively establishes that the defendant was in the apartment and had sex with Ms. Faulkner. We ask whether we may offer a consent defense when we know that the victim did not consent. We invite discussion on this question based on the readings prior to the demonstration. We revisit the Subin-Mitchell debate and discuss whether the cross-examination of a truthful witness regarding consent creates a false story as Subin maintains,<sup>28</sup> or fits within the legitimate boundaries of testing the prosecution's case as Mitchell asserts.

Professor Luban argues that the justification for unbridled partisanship in other contexts, "the protection of individuals against institutions that pose chronic threats to their well-being,"<sup>29</sup> gives way in rape cases where, he says, there is an equally compelling concern about the perpetuation of male violence against women. In rape cases, he argues, it is not morally justified to create doubt about consent when the lawyer knows the victim did not consent. To do so, he contends, further victimizes women, contributes to damaging stereotypes and myths that perpetuate violence against women, and deters women from reporting rapes. We question Professor Luban's position on two fronts. First, his position deprives a defendant of his constitutional right to effective assistance of counsel, which most agree includes a defense which does not misstate the evidence. Second, Professor Luban's position that "rape is different" because of society's history of patriarchy might be equally applied to other crimes where a powerful institution continues to "pose chronic threats to

---

28. *See id.*, at 150.

29. Luban, *Partisanship*, *supra* note 1, at 1028.

[individual] well-being.”<sup>30</sup> In this respect, there may be no difference between cross-examining the female victim in a rape case and complainants who are victimized because they are black, gay, foreign, or mentally ill or those who have blown whistles on powerful corporations.

1. Excerpt From The Cross-Examination of the “Truthful” Rape Victim

(All answers are “yes” except where otherwise specifically noted. Ms. Faulkner may offer appropriate elaboration and explanation.)<sup>31</sup>

Q: “When you told my client to “come in” to your apartment, you were alone?

Q: Lying down on the couch?

Q: And you were feeling high?

Q: Because you had been partying?

Q: You had been drinking?

Q: And using drugs?

Q: I’d like to ask you some questions about what you had been doing before Dan knocked on your door. Earlier that evening, you and your boyfriend, Fred, went to a fraternity party?

Q: And then you and he went back to your apartment?

Q: At the party you had 3-4 glasses of punch, spiked with alcohol?

Q: And when you got home, you had 2-3 more drinks—screwdrivers, a drink of orange juice and vodka?

Q: So, you had between 5-7 mixed drinks when you told my client to come in?

Q: In addition to drinking, you smoked 1-2 sticks of marijuana at the party and another stick or joint at home.

Q: So you had between 2-3 joints of marijuana in addition to 5-7 drinks?

Q: You turned on your stereo?

Q: Turned the lights off in the living room?

Q: Your roommate was away so you had the apartment to yourself?

Q: You expected Fred to stay overnight?

Q: You hoped to spend the night with him?

OBJECTION: Relevance.

RESPONSE: Goes to her state of mind. It demonstrates her

---

30. *Id.* at 1029.

<sup>31</sup> We use **bold** type in the appendix for those questions and statements which are controversial and some of which, we believe, cross the line from fair argument to improper misrepresentation.

disappointment when he left and her greeting of my client.

COURT: Over-ruled.

Q: But Fred told you he had other plans and left, didn't he?

Q: You believed he was going to spend time with someone else?

Q: Did you accuse him of seeing someone else?

Q: You were angry with him?

Q: Weren't you also jealous?

Q: You figured that if he could see someone else, so could you?

A: No.

Q: Sometime later, you heard a knock on the door?

Q: You called out, "it's open"?

Q: You told the jury that you thought it was Fred?

Q: But you knew that it wasn't Fred at the door, because you knew Fred would have walked in without waiting for an answer, correct?

A: No.

Q: After you told him the door was open, Dan Avery walked in?

**Q: You recognized him from the fraternity party?**

A: No.

**Q: Do you remember speaking with him at the party?**

A: No.

**Q: Didn't you dance with him at the party and give him your address?**

A: No.

Q: When you heard the knock on the door, didn't you say, "the door is open?"

Q: When Dan walked in, you were wearing the same black nightgown you had on when Fred was there?

Q: When you saw Dan, you didn't get up to change or put on different clothing?

Q: In fact at no time did you leave the room to get dressed?

Q: You told us that he said "this looks like *my* night after all"?

**Q: But didn't he say, "this looks like *our* night after all"?**

A: No.

**Q: And whatever you remember him saying, didn't he say it after you and he smoked marijuana?**

A: No.

Q: There were two joints in the ashtray?

Q: And two open beers?

Q: When he undressed you, you didn't ask him to stop did you?

A: I was scared he would kill me.

Q: In fact, at no time did you ask him to stop?

A: I was petrified.

Q: And when he was inside you, you didn't scream out?

A: I told you, I was scared what he would do to me.

Q: But you didn't tell him to stop, did you?

A: No, because of what I thought he would do.

DEFENSE COUNSEL: No further questions."

\* \* \*

The cross-examination on consent is a moment of high drama and emotion. It is not the brutal cross-examination described by Professor Luban,<sup>32</sup> yet, it is painful to watch. The victim is embarrassed, humiliated, trapped, and powerless.

After the demonstration, we ask the same questions that we asked about the "identification" cross-examination:

1. What is the purpose of this cross-examination?
2. Is it appropriate? Why?
3. How is arguing "consent" different from putting the defendant on the stand to say that he did not force the witness to have sex (which you know is false)?

Many students in the class say the same policies that support a vigorous defense on identification operate here too. Professor Freedman contends that defendants must not be penalized or compromised for confiding in their lawyers. Knowledge of the truth, therefore, may not affect the lawyer's zeal. Similarly, John Mitchell argues that the defense function is designed to assure that no one is convicted without the requisite amount of evidence and that testing the prosecution's case against alternative inferences is at the heart of it.

Here, the cross-examination is designed to test Ms. Faulkner's credibility, specifically, her denial that she consented to having sexual relations with Daniel Avery. Questioning the provocative way Ms. Faulkner was dressed and her intake of alcohol and drugs are used neither to condemn her character nor to conjure up a stereotype of a promiscuous and vengeful victim (although these elements may nevertheless affect the jury). Rather the cross-examination suggests that the victim was angry with her boyfriend, willing to get back at him with another man, and non-resistant to the defendant's advances. It implies a motive for consent and is designed to raise doubt about whether Mr. Avery forced Ms. Faulkner to engage in sexual relations against her will.

An acquittal results when the prosecution fails to prove absence of consent beyond a reasonable doubt. Therefore, any competent cross-examination will necessarily offer the possibility of consent, a fact which counsel knows is false. According to all theories, including Professor Luban's, the defense lawyer may ask the victim whether she

---

32. Luban, *Partisanship*, *supra* note 1, at 1026-35.

consented. That question alone invites the jury to consider a defense based on a false scenario.

Some students argue that constructing a “consent” defense stretches the facts more than an “identification” defense and crosses Professor Subin’s line from testing the prosecution’s case to fabricating a false scenario. Other students identify strongly with the victim and, like Professor Luban, want to advocate that rape is different. If no student speaks out on this point, it is helpful to ask the victim how she felt during the cross-examination. Even though she is playing a role, her experience provides powerful support for Professor Luban’s position.

After eliciting competing views on the permissibility of the cross-examination, we demonstrate the closing argument. We have suggested an argument that we, along with most attorneys, consider appropriate. We contrast the closing with alternative formulations (in bold type), which we believe fall outside the appropriate boundary.

## 2. Excerpt From The Defense’s Closing Argument

“In determining whether the State has convinced you beyond a reasonable doubt that the sexual activity between Dan Avery and Mary Beth Faulkner was not consensual, consider the behavior of Ms. Faulkner in three respects which did not change from the time Dan was told to enter, until he was asked to leave:

1. She was high and lonely.
2. She was angry with her boyfriend and wanted to get back at him.
3. She never, ever said no.

“Let’s turn to our first point, Ms. Faulkner was high and lonely. Mary Beth and her boyfriend, Fred, had been drinking and smoking marijuana at a fraternity party earlier that evening. After 5-7 drinks of alcohol and 2-3 sticks of marijuana, she was high, very high. And after Fred left her, she was sad and lonely.

“Two, Mary Beth Faulkner was angry with Fred and wanted to get back at him. When she and Fred returned to her apartment, she put on her negligee, turned on the stereo, turned off the lights, and positioned herself on the couch. She had expected Fred to spend the night with her, but Fred told her that he had other plans and that they did not include her. She was angry, very angry. She had both the motive and the mind to get back at him. Did she think that if he made other plans, she would do the same; that if he could be with someone else, so could she? **If Fred intended to look to someone else, that’s what she would do. And that’s what she did.**

“Three, from the time that Dan Avery entered the apartment until he left, Mary Beth Faulkner never said, “no” or “don’t” or “stop.” Never. Not when he approached. Not when he kissed her. Not when



he undressed her. Not when he was inside her. At no time did she pull away or push him away. And when he finished, she asked him to leave and he did. Is that the behavior of a rapist and his victim? **Of course not. It's the behavior of two young people who agreed to have sexual relations.**

"The prosecution tells you that Mary Beth had never seen Dan Avery before he walked in to her apartment to rape her. But they were at the same fraternity party. She tells you that she did not speak to him. But if she didn't, how would he know where she lived? And now that we've considered her behavior, let's look at his: Why did he knock on the door and wait for her response, which could have been to lock the door or call the police? Why didn't he barge right in? Are those the actions of a rapist? **Of course not; because there was no rape.**

"After the police came to the apartment, they found two open bottles of beer and two sticks of marijuana. Ms. Faulkner tells you that she had the drugs and the drink with Fred, not with Dan. She partied with Fred and after drinking and smoking with her, then Fred left. What a curious time for him to leave? **Isn't it more likely that Fred dropped her off, left her alone, and then she heard Dan's knock on the door? She never asked Dan to leave because she didn't want him to leave. She never asked Dan to stop because she didn't want him to stop.** Are you willing to brand Dan Avery a rapist based on the story of Mary Beth Faulkner?

"After the prosecutor gets through talking to you, the Judge will instruct you on the law of sexual assault. She will tell you that to convict Daniel Avery of rape, the prosecution must prove to you beyond any reasonable doubt that Mary Beth Faulkner did not consent to have sexual intercourse with him. Are you prepared to say that there are no reasons to doubt Mary Beth's story, that he forced her to have sex, that she did not consent? **Isn't it more likely that there was no threat, no force, no rape?"**

\* \* \*

After the closing argument, it is useful to ask the class whether their views on the consent defense have been altered or confirmed by this demonstration. Most reiterate prior conclusions with renewed vigor. The script provides additional opportunities to contrast a standard closing argument with more controversial statements. Again, the students will appreciate that the differences between them are subtle.

### *C. Concluding Message to the Class*

It is important to bring the class to a close by moderating some of the emotion generated. We conclude with the following five points:

1. Professor Freedman, who argues forcefully for unlimited zeal on

behalf of criminal defendants, understands the potential effects of his position:

There is only one difference in practical effect between presenting the defendant's perjured alibi . . . and impeaching the truthful prosecutrix. . . . In both cases, the lawyer participates in misleading the finder of fact. In the case of the perjured witness, however, the attorney asks only non leading questions, while in the case of impeachment, the lawyer takes an active, aggressive role, using professional training and skills . . . in a one-on-one attack upon the client's victim. The lawyer thereby personally and directly adds to the suffering of the prosecutrix, [and] her family. . . . [U]nder the euphemism of 'testing the truth of the prosecution's case', the lawyer communicates, to the jury and to the community, the most vicious of lies.<sup>33</sup>

Advocating for unrestricted partisanship in these circumstances entails an extreme cost.

2. Nevertheless, most lawyers find such partisanship fully justified and defend the practice on moral grounds. Randy Bellows concedes that "[i]t is an axiom of criminal defense practice that you represent your guilty clients as zealously as you do your innocent ones . . . . One of the awkward truths about being a public defender is that you are in that practice of representing people who are, indeed, guilty as charged."<sup>34</sup> The criminal defense function is justified as a vindication of fundamental values. Among those values are personal dignity, freedom from governmental tyranny, and the prevention of injustice. These values are significant. In a society without a vigorous and independent defense function, no one is safe.

3. The ethics rules and professional mores allow an advocate discretion on how to exercise zeal. Many of those decisions are tactical or strategic. Sometimes, the tactical choice will coincide with what is ethically comfortable for the lawyer. For example, it would not be a good strategy to cross-examine Ms. Faulkner aggressively, "to make her look like a whore,"<sup>35</sup> in Professor Luban's words, because of her vulnerability, the jury's inherent sympathy, and the circumstances of the crime. An aggressive cross-examination of a truth teller has the potential to backfire. If a defense lawyer oversteps her bounds, improperly coaches or leads a witness, overstates a proposition, or misrepresents the facts, the prosecutor may argue that the conduct is a reflection of the attorney's desperation. In that situation, tactical considerations may well lead to an ethically comfortable choice for the defense lawyer. There will be other times, however, when a tactical advantage can be gained only by engaging in actions that cause the lawyer moral pain, such as discrediting a

33. Freedman, *Adversary System*, *supra* note 3, at 45.

34. Bellows, *supra* note 3, at 74.

35. Luban, *Lawyers and Justice*, *supra* note 3, at 150.

truthful and honorable police officer, or, as in this case, disguising a brutal and violent crime.

4. In exercising the discretion inherent in legal practice, counsel should use thoughtful, deliberate, and careful judgment in selecting from the available choices. Harsh actions should be taken only when an advocate is satisfied that they are justified by countervailing moral values.

5. Many argue that the justifications for vigorous partisanship that we have developed in this class do not provide support for that behavior in other contexts. Relatively unfettered zeal in defense of a criminal defendant is justified by compelling reasons. The values supporting criminal defense, however, do not operate in private civil cases, where there is no threat of government overreaching and personal liberty is not at risk.

### III. OBSERVATIONS AND TEACHING TIPS

One of the exciting aspects of this class is that students have an opportunity to observe lawyers at work doing a good job. In Professional Responsibility classes there are many opportunities to see attorney misconduct in cases, hypothetical situations, movies, and videotapes. This is an opportunity to model competent representation. In addition, it is a chance to see experienced lawyers ponder hard questions and, perhaps, disagree, illustrating that ethical discretion really does exist and that lawyers really do engage in ethical deliberation.

It is extremely important to the success of this exercise that the role players keep their demonstrations short. Each demonstration should take no more than several minutes. Longer demonstrations lose their emotional power and invite questions on trial tactics, which may distract the class from the important moral issues.

The role players add much to the class discussion. Experienced lawyers have valuable insights to offer, as does the victim. Students will be eager to ask the participants questions. They may also request to see additional parts of the trial not originally scripted. The prosecutor may be asked to give a sample closing, rebuttal argument, or a redirect examination. You should warn your volunteers to be ready to add to the script. You should also be sure that the lawyers refrain from commenting until after the class has engaged in discussion and that they phrase their comments as suggestions. The students, eager for direction, will hear the lawyers' opinions as definitive answers.

In response to concern by one of our role players that this exercise presents a one-sided view that only defense lawyers face difficult ethical questions, we designed an addition to the exercise. This addition, which should be presented at the beginning of the class, has

the prosecutor preparing Ms. Faulkner for her testimony.<sup>36</sup> In response to Ms. Faulkner's tentative identification of the defendant, the prosecutor strongly encourages her to state her identification more positively. While repeating that she does not want Ms. Faulkner to lie, she also instructs her to say definitively, "That's the man," or she will not secure a conviction. This instruction is designed to cross the line, and to explore questions of encouraging the witness to testify falsely,<sup>37</sup> and the special obligations of the prosecutor.<sup>38</sup> This demonstration can be added to this exercise, particularly if there is no course time devoted specifically to the responsibilities of the prosecutor.

### CONCLUSION

There is a rich literature exploring the ethical dimensions of defense counsel's responsibilities with respect to truthful witnesses. Despite exposure to this thoughtful and probing discussion, many students do not appreciate the implications of the dilemma. This class explores the question whether a criminal defense lawyer has ethical discretion in conducting the cross-examination of a truthful witness. Our answer is "Yes." This exercise provides a dramatic demonstration of the choices. Furthermore, counsel's knowledge of the truth imposes ethical limits on defense counsel's closing arguments. While the limits are subtle, they have substance. Exploring these limits gives students a meaningful opportunity to consider the trial lawyer's difficult position as a zealous advocate within a justice seeking system.

### Appendix A

#### PROSECUTION PREPARATION OF THE RAPE VICTIM<sup>39</sup>

##### *Can You Be More Certain in Your ID of the Defendant?*

During our last conversation, you told me that you were pretty sure that the defendant was the man who assaulted you. I know when you said that, you were trying to be very careful with your words—perhaps, even too careful. You may not have been fair to yourself. You may

---

36. See App. A.

37. Model Rules, *supra* note 4, at R. 3.4(b).

38. *Id.* R. 3.8.

39. We use **bold** type in the appendix for those questions and statements which are controversial and some of which, we believe, cross the line from fair argument to improper misrepresentation.

not have been expressing what you truly know. **Based on my experience in these types of cases, if that is what you say to the jury, this defendant will be found not guilty. A jury will not convict unless it hears you say, "that's the man." Now I don't want you to lie, but unless you are certain and confident in your identification of the defendant as the rapist, the jury will let him go. Do you understand that?**

Was the defendant the man who raped you?

Are you sure that he is the man?

Will you say so in court?

In the courtroom, will you be able to point to the defendant and tell the jury you are sure that he is the man who raped you?

Why will you be able to say that?

### *Can You Show More Emotion?*

I'm know that you're trying very hard to put this horrible experience behind you. I know you need to do that and I'm proud of you for doing so. And I see that you've been able to talk about it without showing a lot of the emotions that I'm sure you still feel. **But in court, it's important that you don't hold back. Feel free to be emotional. Feel free to let your emotions take over. If you are emotional, and start to cry, for example, the jury will feel more sympathetic to what you are saying. Will you be able to do that?**

### *Can You Wear More Appropriate Clothing?*

When we go to court, we don't want to create the wrong impression and have the jury think that you are not taking this case seriously because of the way you dress. In other words, no beach clothing. Do you own a dark suit or dress? Please wear it.

### EXCERPT FROM THE DIRECT-EXAMINATION OF THE "TRUTHFUL" ASSAULT VICTIM

Q: Ms. Faulkner, please take us back inside your apartment at about 11 p.m. and tell us what happened to you.

Q: Do you see the man in court today who raped you?

PROSECUTOR: May the record show that Ms. Faulkner pointed to and identified the defendant, Daniel Avery, as the man who raped her?

JUDGE: Yes.

Q: About a half hour before the defendant arrived, were you alone in your apartment?

Q: What were you and Fred doing?

Q: About how much did you have to drink and smoke?

Q: What was the effect on you?

Q: Tell us why Fred left.

Q: How did that make you feel?

Q: What first drew your attention to the defendant?

Q: Why did you say, "come in," without asking who was at the door?

Q: When the defendant walked in, where were you looking?

Q: What light was in the living room?

Q: How far were you able to see?

Q: Where did the defendant walk?

Q: When the defendant walked up to you where were you facing?

Q: Did you recognize him?

Q: Where did he put his hands?

Q: What did he tell you to do?

Q: When he told you to close your eyes, how close was his face to your face?

Q: I'm going to walk towards you and I want you to tell me to stop when my face is as close to yours as Daniel Avery's face was when you saw and heard him tell you to close your eyes.

M. B. FAULKNER: Stop.

PROSECUTOR: May the record reflect that my face is about 6 inches away?

DEFENSE COUNSEL: No objection.

JUDGE: Yes.

Q: Did you close your eyes?

Q: Please tell us exactly what he did.

Q: Did you tell him he could do any of that?

Q: Did you want him to do that?

Q: Did you try to get away from him or resist in any other way?

Q: When he finished, what did he say to you?

Q: How did you respond?

Q: When did you report what the defendant had done?

Q: How has this rape affected your life?

PROSECUTOR: No further questions.

#### EXCERPT FROM THE CROSS-EXAMINATION OF THE "TRUTHFUL" ASSAULT VICTIM

##### *IDENTIFICATION DEFENSE*

(All answers are "yes." Ms. Faulkner may offer appropriate elaboration and explanation)

Q: At the time of the assault you did not know who the man was?

Q: You did not recognize him?

Q: As far as you knew, you had never seen him before?

Q: Before you were assaulted, you had been drinking?

Q: You had also taken some drugs?

Q: And were feeling dizzy?

Q: I'd like to ask you some questions about how much you had to drink and the amount of drugs you took. Earlier that evening, you and your boyfriend went to a fraternity party?

Q: And then you and he went back to your apartment?

Q: At the party you had 3-4 glasses of punch, spiked with alcohol?

Q: And when you got home, you drank some more?

Q: 2-3 screwdrivers, a drink of orange juice and vodka?

Q: So, you had between 5-7 mixed drinks before you were attacked?

Q: In addition to drinking, you also had taken some drugs?

Q: You smoked marijuana?

Q: At the party, you had 1-2 sticks of marijuana?

Q: And another stick or joint at home?

Q: So you had between 2-3 joints of marijuana in addition to 5-7 drinks?

Q: You felt high?

Q: Dizzy?

Q: I have some questions about how you were feeling after your boyfriend left. When you both got back to your apartment, you were planning to spend the evening together?

Q: Music was playing on your stereo?

Q: The lights were off?

Q: While you were both on the couch, you had an argument?

Q: He left?

Q: You were upset?

Q: Crying?

Q: Then a man came into the room?

Q: Walked right over to you?

Q: You continued to cry?

Q: He put his hands around your neck?

Q: He told you to close your eyes or he would kill you?

Q: You believed him?

Q: You closed your eyes?

Q: When the man finished you felt him get up?

Q: Then you heard him walk away and leave the room?

Q: Then you opened your eyes?

Q: You called the police?

Q: When you first talked to a police officer, he asked you to describe the man who assaulted you in as much detail as you could?

Q: You knew that the description you gave would help the police

catch this guy?

Q: So you tried to do your best in describing what this man looked like?

Q: And the only description you gave was that he was a white male, approximately 5'9"-5'11"?

#### DEFENSE'S CLOSING ARGUMENT

##### *IDENTIFICATION DEFENSE*

"In this country we tell our people something important. If you have charges to bring, an accusation to make, come to court where a jury will bring its experience and common sense to weigh the evidence and apply the law. But how do we protect people from mistakes? From unfair accusations? **The kind of accusations we've seen here today.** The law has a way. It's called the burden of proof. It's our demand as citizens that these accusations be proven beyond a reasonable doubt. That means you don't have to guess, or speculate, or consider mere possibility. You don't have to say where there's smoke, there's fire. If the State cannot prove that there are no reasons to doubt, the jury will keep its promise and do what the law requires. Members of the jury, in this case the law requires you to find Dan Avery not guilty.

"In determining whether the State has convinced you beyond a reasonable doubt that it was Dan Avery who assaulted Mary Beth Faulkner, consider her identification testimony with respect to three points:

1. How much she drank and how many drugs she took.
2. How dark was the room where she was assaulted.
3. How general was the description she was able to give.

"Let's turn to our first point—Ms. Faulkner's drunken, drugged, and dizzy condition. Ms. Faulkner and her boyfriend had been drinking and smoking marijuana at a fraternity party earlier that evening and continued to party back at her apartment. By the time her boyfriend left her on the couch, she had finished between 5-7 drinks of alcohol and had shared 2-3 sticks of marijuana. She was drunk and she was dizzy and in no condition to identify anyone. **In her condition, she couldn't see the man who attacked her, let alone identify him.**

"Two, when Ms. Faulkner and her boyfriend returned to her apartment, they had intended to spend the night together. They were on the couch. The stereo was on and the lights were off. Regardless of the glare of the street lamps, Ms. Faulkner was assaulted on a couch in a dark room with no lights. **Members of the jury, it was too dark to see, let alone identify anyone.**

"Three, after her attacker left, Ms. Faulkner called the police. The officer who responded asked her to describe the man in as much detail



as she could remember. She knew that the police were relying upon her description to find the man. And yet the only description she gave, the only one she could give, was white male, 5'9"-5'11", a description which fits half the male population of the western world. **Mary Beth Faulkner could not describe Dan Avery because she did not see Dan Avery because Dan Avery was not there.**

"After the prosecutor gets through talking to you, the Judge will instruct you on the law and provide you with a definition of reasonable doubt. She will tell you that a reasonable doubt is the kind of doubt that can cause a person to hesitate or refrain from acting when considering a matter of the highest importance in life. Let me give you an example.

"Let's say that your child is sick and you take the child to your doctor, a doctor whom you know and trust. And the doctor examines your child and has your child tested. The doctor returns to you and says that your child was seen by a surgeon who says that your child has a tumor and that unless there is an immediate operation, the child will die—clearly a matter of the highest importance. Do you say to the Doctor, "Go ahead, operate, I'm satisfied beyond a reasonable doubt." Or do you say, "I will not agree to the operation. There are too many reasons to doubt. I need more." It would depend. Upon what? Upon the doctor's evidence, on whether you could trust the surgeon, on what the tests showed, on how convincing was the information.

"So you meet with the surgeon. He tells you that he saw the tumor clearly, even though it was only briefly in a dark room. He says that he got a good look at it but can only describe it as white and medium sized. And that the five drinks and two joints that he had earlier had nothing to do with his ability to recognize it.

"Do you have the operation? Are you going to put the scalpel in his hand and tell him to cut your child?"

"Members of the jury, in this country, the jury has the last word. In this courtroom, the last two words."

#### EXCERPT FROM THE CROSS-EXAMINATION OF THE "TRUTHFUL" RAPE VICTIM

##### *CONSENT DEFENSE*

(All answers are "yes" except where otherwise specifically noted.  
Ms. Faulkner may offer appropriate elaboration and explanation)

Q: "When you told my client to "come in" to your apartment, you were alone?"

Q: Lying down on the couch?

Q: And you were feeling high?

Q: Because you had been partying?

Q: You had been drinking?

Q: And using drugs?

Q: I'd like to ask you some questions about what you had been doing before Dan knocked on your door. Earlier that evening, you and your boyfriend, Fred, went to a fraternity party?

Q: And then you and he went back to your apartment?

Q: At the party you had 3-4 glasses of punch, spiked with alcohol?

Q: And when you got home, you had 2-3 more drinks—screwdrivers, a drink of orange juice and vodka?

Q: So, you had between 5-7 mixed drinks when you told my client to come in?

Q: In addition to drinking, you smoked 1-2 sticks of marijuana at the party and another stick or joint at home?

Q: So you had between 2-3 joints of marijuana in addition to 5-7 drinks?

Q: You turned on your stereo?

Q: Turned the lights off in the living room?

Q: Your roommate was away so you had the apartment to yourself?

Q: You expected Fred to stay overnight?

Q: You hoped to spend the night with him?

OBJECTION: Relevance.

RESPONSE: Goes to her state of mind. It demonstrates her disappointment when he left and her greeting of my client.

COURT: Over-ruled.

Q: But Fred told you he had other plans and left, didn't he?

Q: You believed he was going to spend time with someone else?

Q: Did you accuse him of seeing someone else?

Q: You were angry with him?

Q: Weren't you also jealous?

Q: You figured that if he could see someone else, so could you?

A: No.

Q: Sometime later, you heard a knock on the door?

Q: You called out, "it's open"?

Q: You told the jury that you thought it was Fred?

Q: But you knew that it wasn't Fred at the door, because you knew Fred would have walked in without waiting for an answer, correct?

A: No.

Q: After you told him the door was open, Dan Avery walked in?

Q: You recognized him from the fraternity party?

A: No.

Q: Do you remember speaking with him at the party?

A: No.

**Q: Didn't you dance with him at the party and give him your address?**

A: No.

Q: When you heard the knock on the door, didn't you say, "the door is open?"

A: No.

Q: When Dan walked in, you were wearing the same black nightgown you had on when Fred was there?

Q: When you saw Dan, you didn't get up to change or put on different clothing?

Q: In fact at no time did you leave the room to get dressed?

Q: You told us that he said "this looks like *my* night after all"?

**Q: But didn't he say, "this looks like *our* night after all"?**

A: No.

**Q: And whatever you remember him saying, didn't he say it after you and he smoked marijuana?**

A: No.

Q: There were two joints in the ashtray?

Q: And two open beers?

Q: When he undressed you, you didn't ask him to stop did you?

A: I was scared he would kill me.

Q: In fact, at no time did you ask him to stop?

A: I was petrified.

Q: And when he was inside you, you didn't scream out?

A: I told you, I was scared of what he would do to me.

Q: But you didn't tell him to stop, did you?

A: No, because of what I thought he would do.

DEFENSE COUNSEL: No further questions.

#### DEFENSE'S CLOSING ARGUMENT

##### *CONSENT DEFENSE*

"In determining whether the State has convinced you beyond a reasonable doubt that the sexual activity between Dan Avery and Mary Beth Faulkner was not consensual, consider the behavior of Ms. Faulkner in three respects which did not change from the time Dan was told to enter, until he was asked to leave:

1. She was high and lonely.
2. She was angry with her boyfriend and wanted to get back at him.
3. She never, ever said no.

"Let's turn to our first point—Ms. Faulkner was high and lonely. Mary Beth and her boyfriend, Fred, had been drinking and smoking marijuana at a fraternity party earlier that evening. After 5-7 drinks

of alcohol and 2-3 sticks of marijuana, she was high, very high. And after Fred left her, she was lonely.

“Two, Mary Beth Faulkner was angry with Fred and wanted to get back at him. When she and Fred returned to her apartment, she put on her negligee, turned on the stereo, turned off the lights, and positioned herself on the couch. She had expected Fred to spend the night with her, but Fred told her that he had other plans and that they did not include her. She was angry—very angry. She had both the motive and the mind to get back at him. Did she think that if he made other plans, she would do the same; that if he could be with someone else, so could she? **If Fred intended to look to someone else, that’s what she would do. And that’s what she did.**

“Three, from the time that Dan Avery entered the apartment until he left, Mary Beth Faulkner never said, “no” or “don’t” or “stop.” Never. Not when he approached. Not when he kissed her. Not when he undressed her. Not when he was inside her. At no time did she pull away or push him away. And when he finished and she asked him to leave the apartment, he did so. Is that the behavior of a rapist and his victim? **Of course not. It’s the behavior of two young people who agreed to have sexual relations.**

“The prosecution tells you that Mary Beth had never seen Dan Avery before he walked in to her apartment to rape her. But they were at the same fraternity party. She tells you that she did not speak to him at the party. But if she didn’t, how would he know where she lived? And now that we’ve considered her behavior, let’s look at his: Why did he knock on the door and wait for her response—which could have been locking the door or calling the police? Why didn’t he barge right in? Are those the actions of a rapist? **Of course not; because there was no rape.**

“After the police came to the apartment, they found two open bottles of beer and two sticks of marijuana. Ms. Faulkner tells you that she had the drugs and the drink with Fred, not with Dan. She partied with Fred and after drinking and smoking with her, then Fred left. What a curious time for him to leave? **Isn’t it more likely that Fred dropped her off, left her alone, and then she heard Dan’s knock on the door? She never asked Dan to leave because she didn’t want him to leave. She never asked Dan to stop because she didn’t want him to stop.** Are you willing to brand Dan Avery a rapist based on the story of Mary Beth Faulkner?

“After the prosecutor gets through talking to you, the Judge will instruct you on the law of sexual assault. She will tell you that to convict Daniel Avery of rape, the prosecution must prove to you beyond any reasonable doubt that Mary Beth Faulkner did not consent to have sexual intercourse with him. Are you prepared to say that there are no reasons to doubt Mary Beth’s story—that he forced her to have sex—that she did not consent? **Isn’t it more likely that**

**there was no threat, no force, no rape?**

“Members of the jury, in this country, the jury has the last word. In this courtroom, the last two words.”