14 of 17 DOCUMENTS

The New Yorker

September 1, 2003

SECTION: FACT; Annals Of Law; Pg. 40

LENGTH: 4146 words

HEADLINE: THE CONSENT DEFENSE;
Rape laws may have changed, but questions about the accuser are often the same.

BYLINE: JEFFREY TOOBIN

BODY:

Kobe Bryant's defense team made its public debut with a show of force. The initial court appearance for Bryant, the Los Angeles Lakers star guard who is charged with felony sexual assault, was scheduled for four o'clock on August 6th, in the Eagle County, Colorado, courthouse. At about a quarter to the hour, three county prosecutors, led by the thirty-four-year-old district attorney, Mark Hurlbert, took their places at the counsel table. While the government lawyers fidgeted in awkward silence, Bryant's caravan of three Suburbans was streaking into town from the Eagle Vail airport, where a jet reportedly belonging to the Upper Deck trading-card company, whose products Bryant endorses, had delivered him moments earlier. Bryant and his two lawyers, Hal Haddon and Pamela Mackey, silenced the courtroom with their arrival at 3:59 p.m. Judge Frederick Gannett took the bench a minute later.

Gannett, who is forty-nine, comes from a newspaper family-of writers, not owners. Both of his paternal grandparents wrote for New York dailies, including the *Times* and the *Herald Tribune*. His family (pronounced *Gann*-ett) migrated west, and Frederick became, in turn, a deputy sheriff, a prosecutor, a defense lawyer, and, thirteen years ago, a county-court judge. With a thick beard, boots, and mismatched clothes-"Every day is a dress-down day for me," the judge told me later-Gannett looks as much a part of the high-desert country as the pinon and juniper that grow on the hill next to the courthouse. (A lumberyard borders the other side.) The judge's familial roots in journalism were apparent in his approach to public access in the Bryant case. He welcomes cameras in his courtroom, and has told his staff to make sure reporters see everything the law allows. Last Thursday, the judge, in response to a request from the news media, authorized the public release of some, but not all, of the underlying investigative documents in the case.

At the defense table, Haddon sat on the outside, leaning back precariously toward the wall. A rumpled, sixty-two-year-old veteran of the courtroom and politics (he managed Gary Hart's campaign for President in 1988), Haddon looked almost amused at the spectacle. There were sixty-eight seats in the courthouse, and all were taken, including twenty-one press seats, which had been assigned, after heavy lobbying, several days in advance for a hearing that everyone knew would be brief and routine. Curious courthouse staffers filled the jury box. Mackey, who is forty-seven years old and as fastidious as her partner is casual, sat on the inside, next to the lectern. It seemed that Bryant and his lawyers hadn't yet got to know each other very well, for they shared little eye contact, no smiles, and almost no conversation. Still, Mackey knew how to send a subliminal message: every time she said something to Bryant, and on the one occasion that he rose to answer a question from the judge, Mackey placed her hand on his back or on his arm. Women lawyers almost always touch their clients, especially if they are charged with violent crimes. *See*, the gesture says, *he's not scary at all.*

Bryant had a right to a preliminary hearing-in which the government lays out its case, in summary form-within thirty days, but, as often happens in Colorado, the defense agreed to a short delay, and the judge set the prelim for October 9th. Bryant, asked if he objected, stood up and said, "No, sir"-his only public utterance of the day. At the request of Haddon and Mackey, Judge Gannett also ordered the sheriff of a neighboring county to conduct an investigation of news leaks in the case. This was a way of throwing the prosecution on the defensive from the outset. Government lawyers and investigators will have to answer questions, search their phone records, and reconstruct their conversations with reporters-all potentially unnerving tasks that will take time away from building the case against Bryant. The proceedings took just seven minutes, but it was a good day for the defense. When the hearing was over, Mackey again reached out for Bryant's suit, which was made of a luscious ivory wool, and steered him toward the exit. The Upper Deck jet left Colorado about an hour after it had arrived.

Bryant's advantages only begin with a seasoned legal team. His Lakers salary alone is fourteen million dollars a year; the entire annual budget of the district attorney's office is $1.8 million (plus a special grant of a hundred and five thousand it received from the county, to fund the Bryant case). He is bound to be helped by his good reputation and seemingly pristine public image. What's more, the case, involving two people who know each other, comes under the broad rubric of acquaintance rape, which has historically been tougher to prove than cases involving strangers.

In the past generation, the laws of rape have been transformed. Feminists, with the assistance of the burgeoning victims'-rights movement, have swept away most of the legal impediments to rape convictions-among them the degrading cross-examinations of complaining witnesses. But the Bryant case illustrates the paradox of the laws of sexual assault: no laws have changed more while remaining, in many respects, the same.

For centuries, the law regarded women as less than trustworthy witnesses, especially when it came to rape. For a man to be proved guilty, a woman could not be the sole witness to her own rape, so there were unique barriers to conviction, such as requirements of corroborating evidence. The most important justification for this treatment of rape came from Lord Chief Justice Matthew Hale, a seventeenth-century English jurist, who said, "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." Hale made this statement in the late sixteen-hundreds, and three centuries later judges in many American courtrooms were still quoting it almost verbatim in their instructions to juries in rape cases.

Faced with these legal hurdles, many prosecutors more or less ignored the crime. In 1969, for example, police in New York City made 1,085 arrests for rape, and only eighteen men were convicted. "When I started doing these cases, in the early seventies, we had to prove three elements of the crime by independent evidence, corroborating the word of the victim," Linda Fairstein, who recently stepped down as the longtime head of the Sex Crimes Prosecution Unit in the Manhattan District Attorney's office, told me. "Someone besides the victim had to identify the attacker, going to or leaving the scene. Next, we had to have independent proof of the sexual nature of the attack-this was before most hospitals had evidence-collection kits to collect seminal fluids. And we had to show 'force'-bruises. So if a woman sensibly submitted to a threat or a knife or a gun, we couldn't make the case if the weapon wasn't recovered."

In addition to corroboration, prosecutors had to establish the virtue of the victim; women were required not merely to survive rape but also to actively resist it. According to an opinion by New York's highest court, in 1918, "Rape is not committed unless the woman oppose the man to the utmost limit of her power." This was still the law a half century later. Defense attorneys were allowed to pummel victims with questions about their sexual history. These attacks were nominally justified as inquiries into the victims' credibility, but in fact they often amounted to morality trials themselves-and served as powerful disincentives for victims to come forward.

The women's movement of the nineteen-seventies made the reform of rape laws one of its top priorities-and it became one of its signal achievements. Susan Brownmiller's study "Against Our Will," published in 1975, brought the subject to a wide audience for the first time, and the book both reflected and spurred changes in the laws. "Things were changing as I was writing," Brownmiller recalls. First to go were the corroboration requirements. "The law doesn't require victims of other crimes-of assaults, of robberies-to be corroborated, so neither should rape," Fairstein says. "Once you have a credible victim, what she gets is her day in court. It doesn't give rape victims an advantage; it just puts them on an even footing with victims of other crimes." This was a revolutionary notion. An editorial in the *Times* in 1972 had asserted that a system in which "any man could be convicted of rape solely on the unsupported charge of any woman is . . . abhorrent." But by the mid-seventies most corroboration requirements were gone.

During this time, states also jettisoned the requirement that women resist their attackers, and, most notably, they passed rape-shield laws, which sought to prevent victims from being compelled to recount their sexual histories on the witness stand. "This was very much a part of the feminist movement, because the treatment of rape victims in court was so incredibly egregious and humiliating," Vivian Berger, a professor at Columbia Law School, says.

The victories were complicated, however, by another shadow from the American past: race. In the South, black men had been lynched or otherwise abused because of charges of rape made by white women which turned out to be false. "In the fifties and sixties, a lot of liberals in the legal world didn't want to make getting rape convictions easier, because they thought that would just mean that there would be more unjust convictions of black men," Berger says. Memories of the Scottsboro Boys and hundreds of others hurt the drive to reform rape laws. "Rape for a long time marked the fatal crossroads where racial discrimination and capital punishment encountered each other most dramatically," Berger wrote in an influential article in the *Columbia Law Review* in 1977. Of the four hundred and fifty-five men executed for rape in the United States between 1930 and the beginning of 1976, four hundred and five were black-and almost all were charged with attacking white women.

But an unlikely alliance made in the roiling politics of the nineteen-seventies ultimately overrode any concerns about racial fairness. Liberal feminists made common cause with the victims'-rights movement, which was a largely conservative force advocating law and order and opposing the perceived excesses of the Supreme Court under Chief Justice Earl Warren. "There was a huge backlash against the so-called handcuffing of the police, and it was very easy for the rape reformers to make alliances," Stephen J. Schulhofer, a professor of law at New York University, says. "The minute these reforms were put on the table, legislatures gobbled them up, and courts embraced them very enthusiastically." In 1977, the Supreme Court prohibited the use of the death penalty in rape cases, lessening the stakes for unjust convictions, but all debate over rape laws, even today, continues to take place at the tense intersection between sex and race.

Much remains unknown about the events of June 30th at the Lodge & Spa at Cordillera, near Vail, but certain facts appear to be undisputed. Bryant, who is twenty-four years old and African-American, was going to have outpatient knee surgery at a nearby clinic the following day. At some point that evening, Bryant's accuser, who is nineteen, white, and an employee of the hotel, went to Bryant's room. There they had sexual relations-an assault, according to police and prosecutors, or a consensual encounter, according to Bryant and his lawyers. Even though Bryant's trial may not take place for several months, it already seems clear that the case will come down to a single issue: whether the government can prove that the sex was not consensual.

Some of the early feminist reformers raised questions about the consent defense. "People started looking at sex

between people who have different amounts of power, whether it's doctors and patients or teachers and students, and they raised the question of whether there could ever be valid consent in those circumstances," Robin L. West, a professor at Georgetown University Law Center, told me. Some states went so far as to try to abolish the consent defense altogether, and instead to define the crime solely in terms of forcible compulsion. "The question was supposed to be how much force the defendant used, not what the victim did or didn't do," Schulhofer, whose book "Unwanted Sex" is a study of rape laws, says. "The hope was that by looking only at the defendant you would get away from the focus on the victim's character and behavior-how she was dressed, what she said-and on to what the defendant did. That was well motivated. But force is an elusive idea. A lot of activity between a man and a woman that is perfectly innocuous under circumstances of consent-picking her up, taking off her clothes, putting her on the bed-looks completely different without consent. It could be the most romantic thing in the world, or it could be rape. So courts are inevitably drawn back to consent."

Indeed, consent has become the most frequent defense in trials for adult, acquaintance sexual assault. (In recent years, many states, including Colorado, have abandoned the term "rape" in favor of "sexual assault," as part of the effort to treat the crime more like other offenses.) "Because of DNA, defendants can no longer claim that the sex didn't take place," says Anne Munch, a former prosecutor who is the director of Ending Violence Against Women, a project run by the Colorado District Attorney's Council. "So consent is the defense almost all the time."

Colorado has taken special steps to restrict the consent defense. According to the state law, consent "means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. . . . Submission under the influence of fear shall not constitute consent." So consent means not merely acquiescence but also an affirmative decision to engage in a sexual encounter. As Munch puts it, "We have a fabulous definition of consent." (It is implicit in laws like the one in Colorado that consent can be withdrawn in the course of a sexual encounter, but Illinois has made that point explicit, with a new law asserting that anyone can withdraw consent and thus turn a consensual encounter into an assault.)

Sex-crimes prosecutors recognize the importance of these changes in the legal definition of consent, but they also recognize the practical realities of trying rape cases. It's not rape until a jury says it is, and jurors tend to act on their own preconceptions, regardless of how they are instructed on the law. "When you look at studies of how juries actually decide cases," Munch says, "the things that they get hung up on are questions like 'Was there resistance?' or 'Did the victim engage in risky behavior?' or 'Was there drinking or some other kind of promiscuous behavior?' Our efforts in Colorado have been to get people to look at sex offenders and how they operate, and not at the victim's behavior. But the victim's behavior is still very relevant to jurors."

Lawyers who try rape cases consider one group of jurors to be especially strict in their view of the conduct of women victims. "I avoid jurors who are older women, because they are judgmental, because they say, 'I would never put myself in that position,' " says Mary Keenan, a veteran sex-crimes prosecutor who is now the district attorney of Boulder County, Colorado. "The younger generations are great, but not upper boomers on up. They are tough jurors for us. Men see right through the crap. Men make very good jurors in sex-assault cases." The most exhaustive study of jury behavior remains Harry Kalven, Jr., and Hans Zeisel's "The American Jury," published in 1966. Even when consent is the only issue before a jury, the authors write, a jury "closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part."

As with the consent defense, changes in the law of corroboration and resistance may have had a smaller impact than first appeared. Judges no longer dismiss cases if a victim lacks corroboration, but juries often don't convict in those circumstances, either. "Do you know that juries want corroboration?" Linda Fairstein says. "Absolutely. Nobody likes the he-said-she-said cases. It's in the detail and the nuance. I loved cases that took place in hotels. You have computerized locks. You have room-service records, minibar receipts, whether people were calling the front desk about a commotion in the room. Those were all ways we could corroborate a victim. I had one case that got blown apart because we found out that one of the pornographic movies was shown in the room, which is what ultimately got her to change her story and admit that the sex was consensual." Similarly, although the law no longer requires that victims

resist, juries often demand it. "Most of the time, rapists don't have to use physical force or violence," Keenan says. "The predominant reaction of victims is to freeze, not do anything at all, rather than fight back. The term is 'dissociation.' They kind of leave their own bodies to get through the attack. But we know how juries think. We are relieved when there is a bruise that we can show to the jury."

Even rape-shield laws, which were supposed to protect rape victims from degrading questions about their sexual history, have had unintended consequences. Colorado's shield law, passed in 1975, is fairly typical of the genre, stating that an accuser's sexual history "shall be presumed to be irrelevant." According to Keenan, "Rape shield only protects against prior sexual acts being disclosed. It doesn't protect against private investigators going after the rest of your personal life. The system is still hell on victims. Nothing in their life is private from investigators."

This, evidently, is what is happening in the Bryant case. Private investigators for his defense team have been scouring Eagle and the vicinity for information about the accuser. Two months before the incident with Bryant, the woman, a student at the University of Northern Colorado, was reportedly rushed to a local hospital after she apparently took an overdose of pills. Under the shield law, if the defense wanted to introduce anything relating to the accuser's sexual history, Bryant's lawyers would have to make a written motion to do so at least thirty days before the trial. But since mental-health history is not covered by the shield law, the defense could raise the issue in front of the jury, with no warning.

A trial judge will not necessarily find the accuser's apparent overdose relevant to her credibility and thus admissible. But the defense in the 1991 William Kennedy Smith case, in Palm Beach, showed the value of this kind of evidence, admissible or not, in a high-profile case. Smith's lawyer, Roy Black, argued that the accuser in that case had a "psychological disorder" that led her to make false charges against Smith. Black said he had "strong and compelling evidence" that the woman, who later publicly identified herself as Patricia Bowman, was mentally unstable. He sought permission to examine "all relevant records of psychological or psychiatric treatment" that she might have received. In the end, the judge in the case, Mary E. Lupo, declined to let the jury hear evidence of Bowman's psychiatric history, but the controversy over her background received wide attention in the news media, which was freely available to potential jurors. Smith was acquitted.

Colorado law gives Bryant's lawyers even more options. Not only can they try to obtain and introduce evidence of the accuser's mental-health history; another provision of the law allows them to ask the judge to order a psychiatric examination of the alleged victim to determine her legal competency to stand as a witness. "In order to get the judge to order an exam, the defense will have to show there is a reasonable probability that an examination will produce relevant evidence about her competency, and that will be fought vigorously by the district attorney," David Lugert, a defense attorney in Eagle who recently stepped down as the deputy D.A., says. All of these pretrial maneuvers about psychiatric history will be played out in public, so it seems likely that prospective jurors in the Bryant case will be familiar with the accuser's personal history well before the judge in the case decides whether it is admissible.

By the time the hearing began on August 6th, television news crews had built eight wooden camera platforms on a vacant lot across from the courthouse. By the next day, it was clear that demand for space was growing. For the preliminary hearing in October, the adjacent lumberyard was entertaining offers on its unobstructed view of the courthouse. In truth, there wasn't much more for reporters to do in Eagle, because investigators and defense lawyers were remaining silent about the nature of the evidence against Bryant. In the dusty media tent city that had sprung up behind the camera platforms, there was heavy traffic in rumors about other witnesses (if any), the accuser's injuries (if any), and her background (relevant or not). The law might allow a he-said-she-said rape case, but no one could believe that a prosecutor might actually bring one.

As a practical matter, then, the Bryant case may be shaping up as a very traditional rape trial-where the prosecution has to prove that the victim resisted, that her story is corroborated, and that her character is all but unblemished. Racial issues may play a large role as well, especially if Bryant himself has anything to say about it. On the weekend before his initial appearance before Judge Gannett, Bryant was named favorite male sports figure before a cheering crowd at the

Fox network's 2003 Teen Choice Awards, in Los Angeles. Though he had never before taken any sort of political stand in public, Bryant wore a Muhammad Ali T-shirt to the event and, in his remarks to the audience, paraphrased Martin Luther King, Jr., saying, "An injustice anywhere is an injustice everywhere." Fox edited the comment out of the broadcast, which took place on August 6th. (To be sure, Bryant has not fully mastered the art of pretrial public relations. The following week, he went shopping with his wife in a T-shirt that said "forced.")

Bryant's case already echoes the enduring public divisions over the O. J. Simpson murder case. According to a *USA Today*/CNN/Gallup poll taken just before Bryant's appearance in court, whites are evenly divided on the case, with forty per cent believing that the charges against him are probably true and forty-one per cent believing they are probably untrue. Blacks reject the charges as probably untrue by a margin of sixty-eight per cent to twenty-four per cent. Bryant's lawyer Hal Haddon is unlikely to miss the historical significance of these feelings. Among friends, Haddon is known for his passion for the book "To Kill a Mockingbird," the story of a lawyer who defends a black man unjustly accused of raping a white woman. Haddon and his wife have two basset hounds, one named Atticus, after Atticus Finch, the hero of the story, and the other named Scout, after Finch's daughter.

Haddon may also use the recent past to turn the racial issue to his advantage. In a class-action lawsuit filed by the American Civil Liberties Union, a federal judge in 1996 ordered the Eagle County sheriff to cease using "racist" pretexts to stop motorists. The county ultimately disposed of the matter by paying the plaintiffs eight hundred thousand dollars, one of the largest settlements ever in a racial-profiling case. The sheriff from that period is gone, but the taint from the case lingers in and perhaps beyond the county's very small black population-a hundred and forty-two out of 41,659 people, or .03 per cent. (Hispanics, on the other hand, make up 23.2 per cent of the county.) Bryant's lawyers will likely raise the spectre of unfair treatment no matter where the case is tried, but if the defense wins a change of venue to a county with more blacks, the racial issue may loom even larger.

Still, the central issue will remain consent, and in this Eagle County offers hope to Kobe Bryant. "They tend to be good prosecution jurors around here," David Lugert, the former local prosecutor, says. "People around here get up at the crack of dawn to feed their horses, and there's a big sense of individual responsibility." Then he added, "The defense will be able to say that she has to take responsibility for her decisions, too. That would be a good argument in this area."

LOAD-DATE: September 2, 2003