

claimed them to be. Let us assume exactly what happened happened.

If the complaining witness behaved in this fashion with the defendant, would you call this provocative, in the sense that this provoked a rape? Is that the word you would use to describe it? That is what troubles me, the language that is used by Judge Souter here.

Now, this may be language suggesting—this may be conduct that—

The CHAIRMAN. Excuse me, I am confused. May I ask a question of both of you?

Ms. HOLTZMAN. Yes.

The CHAIRMAN. Is the issue whether or not the conduct provoked a rape or the conduct went to the credibility of the assertion that it was consent or rape?

Senator SPECTER. The latter.

Ms. HOLTZMAN. No, no, no. The question of prejudice goes to the—

The CHAIRMAN. I do not know, that is why I am asking.

Ms. HOLTZMAN. The question of the prejudice goes to the credibility, because if you can show that a woman is not "chaste," you have a chance of affecting the jury's view of her credibility.

The CHAIRMAN. Well, that—

Ms. HOLTZMAN. What troubles me is the fact that Judge Souter characterized her behavior, in his words, as sexually provocative, provocative meaning provoking something. Does that mean provoking the rape? Does that mean the victim is to blame?

The CHAIRMAN. No; I—

Ms. HOLTZMAN. That is what troubles me about this.

The CHAIRMAN. I understand. I am not sure I disagree with you. I did not realize that he was using the word in that way. I did not know how he was using the word, whether he was using it that it provoked a rape, or whether or not it was provocative and, therefore, went to the question of the credibility of the witness of the woman alleging to have been raped, as to whether or not she consented or she was raped, not whether or not it justified any action whatsoever on the part of the man.

Ms. HOLTZMAN. He does not parse it that way, but there is no reason to think that it would not affect—and that is one of the reasons for the rape shield law, that it would not affect the jury's view of her credibility. In fact, as we quoted this judge in 1835, that a chaste woman is more likely to be believable, less likely to have given consent, and that is the problem and that is the problem of prejudice of using this evidence, and that is why there is a very careful balancing test that we urge on judges, and I do not see any real realization in this opinion of the care that is required and that is balancing test and that is my concern.

The CHAIRMAN. I apologize for the interruption.

Ms. NEUBORNE. Could I add a comment to that?

Senator SPECTER. You may, but let me finish this exchange with Comptroller Holtzman.

He does specifically put this in the context of consent and that is in the very first paragraph, at the conclusion, where the judge talks about the defense of consent. With all due respect, Ms. Holtzman, I think you are not on the central issue, when you talk about