DOI: 10.1400/293172

The relevance of trial talk for rape shield legislation (with a postscript)[1]

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In this article I examine the rape shield statutes[2]. Using data from the Kennedy Smith rape trial[3], I explore how rape shield statutes apply to and function through the language of evidence in testimony. My objective is to show how the social organization of talk mediates between legal statutes and trial practice. I thus aim to demonstrate how law, language, and society work together during the rape trial to severely constrain the applicational intent of the shield statutes. I further argue that while feminist researchers and proponents of rape reform have employed trial talk as an unexplicated and taken-for-granted resource in pursuit of legal change, they have consistently neglected the study of this talk and the emergent moral inferences constituted through it as topics of serious consideration in their own right. This neglect, as I will show, has policy implications for both the implementation and evaluation of legal reform.

1. Rape Shield Legislation

Rape shield statutes embody the most important, visible, and perhaps legally controversial component of USA rape law reform, since they may conflict with the defendant's right to due process. As part of a broader package of reforms, including changes in corroboration requirements, definitional elements, and consent/resistance standards, they were specifically designed to prohibit attorneys from impeaching credibility or proving consent by introducing the victim's sexual history, reputation, and similar forms of extralegal evidence during the trial examination[4]. By removing this trauma-generating factor during the trial, proponents of rape reform anticipated that significant instrumental effects would ripple through the legal system: that victims would more readily report, that the state would more willingly prosecute, and that juries would be more

likely to convict suspected rapists than they had before the implementation of reform. But despite being unprecedented in recent legal history, these sweeping changes in the law stimulated few if any of the projected effects, though still prompting some unknown degree of symbolic change. Such an ironic outcome left feminists and rape reformers groping for answers about the ability of the law to propel significant social change in the first place[5].

Why has rape shield been so difficult to implement? Why have the anticipated effects failed to materialize? And, despite so much legal reform and political mobilization, why has the rape trial been so stubbornly resistant to statutory change? At one level, a methodological one, we should keep in mind two builtin statutory exceptions to the exclusionary power of rape shield.

(1) It is not generally relevant to all rape cases but applies primarily to only acquaintance, date, or "pick-up" incidents, such as the Kennedy Smith case; only in trials involving this form of assailant/victim relationship will the defense attempt to prove consent and impeach credibility by introducing sexual history evidence[6]. By contrast, other rape trials vary markedly in defense strategy depending on the relationship between the victim and assailant. Trials in which the victim and assailant were strangers at the time of the rape incident, for example, most typically employ the evidentiary issues of identity, memory, and extrinsic force and use scientific and technical information of various sorts, such as DNA testing, rather than raising the issue of consent. In these cases, sexual history evidence possesses minimal probative value to determine credibility or consent and thus is considered more or less irrelevant to the historical issues in the case[7]. (2) Rape shield does not automatically prohibit defense attorneys from introducing evidence pertaining to the victim's sexual history, first, in those cases where it is necessary to prove the source of semen, pregnancy, or disease; and, second, in those cases in which the victim and defendant have had a prior relationship. Nor does it automatically prohibit defense attorneys from mobilizing evidence of such a relationship as indicia of consent, even though strictly limiting the evidence to sexual activities between just those two participants. In both of these restricted environments, then, such evidence may be admitted if the judge rules, in an in camera hearing, that the probative value of sexual history evidence outweighs its prejudicial impact[8].

Beyond these exceptions, however, the most definitive research on rape law reform to date, research measuring the before and after effects of reform, has found the impact of statutory change "limited" at best;

reform in general and rape shield in particular have had only a minimal impact on increasing rape reporting, prosecution, and convictions and on reducing the victim's degrading experience on the witness stand, especially in date and acquaintance cases like that involving Kennedy Smith[9] attribute these disappointing results to several mitigating factors.

First, rape shield conflicts with the informal norms and behaviors of the courtroom work group, specifically with judicial discretionary practices governing the admissibility of highly prejudicial characterological evidence and with judicial interpretations about the application of shield to specific cases[10]. In a rather pragmatic way, shield is circumvented because prosecutors, judges, and defense attorneys have their own organizational agendas, issues, and concerns, which include, among other things, the efficient processing of cases, the "downstream" preoccupation with convictability[11], and perhaps most important, the resilient relevance of sexual history evidence.

A second problem is that jurors possess a stultifying penchant for entertaining traditional stereotypes about the nature of male/female sexual relations and for incorporating this inaccurate extralegal evidence in their deliberations. In addition, they often fail to comply with the new statutes, despite evidentiary restrictions and judicial instructions excluding the use of this evidence[12]. They are especially prone to hold and uphold conservative attitudes about rape, rapists, and victims, and these misconceptions seriously thwart the ability of legal reformers to transform the law and implement the shield statutes[13].

2. The Applied Relevance of Courtroom Language-in-Interaction

Research on rape reform has failed to elicit any data on more fundamental questions: to what object does rape shield apply and through what mechanism does it operate? How does this unknown and taken-for-granted black box mechanism function? Although researchers and proponents of reform have proceeded as if this question has somehow or somewhere been posed and their answers consecrated as fact, they have, more accurately, left the "what" and "how" unexamined in the rush to apply political goals and realize their application. These issues are not subsidiary, secondary, or tangential in import to political and applied issues but are primary to a critical understanding, both theoretical and applied, of the social construction of rape as a legal fact during the trial proceedings. In this article I show why researchers cannot answer "why" without also

considering "what" and "how". Focusing on the micro-linguistic properties of the trial process-on the black box mechanism encapsulated within it and the verbal incarnation of sexual history evidence in words, sentences, and utterances-allows us to examine the social organization of trial talk through which legal reforms are implemented and legal outputs generated.

With this perspective in mind we can specify how rape shield is intended to be applied more clearly: Rape shield represents statutory efforts to restrict testimony dealing with the victim's sexual history during courtroom examination (both cross and direct). These restrictions remove unduly prejudicial sexual history evidence from testimony and the jury box, reduce the victim's trauma of being in court, and thereby generate increases in reporting, prosecution, and convictions. In addition to the positive impact of such instrumental changes, proponents of rape law reform predicted that the measures would lead to complementary symbolic changes in the public's traditional stereotypes about rape, rapists, and victims[14].

The reigning and constraining assumption underlying this structuralist imagery is that statutory change, via limited strictures on extremely gross evidentiary standards, automatically shapes the processual logic and trajectory of courtroom talk. As a consequence, shield restructures the asymmetrical relationship between witnesses and attorneys during the adversarial trial proceedings, especially that between victims and defense attorneys during cross-examination. And by transforming the imbalance of power, the law attempts to limit the defense attorney's opportunity to subject the victim to extralegal attacks on her character and credibility and to refocus the rape adjudication process toward the relevant probative evidence of force, injury, and (non)consent.

Through legislative input to the legal system, then, the special exclusionary rule of shield attempts to transform the interactional texture of evidence-in-testimony by limiting portions of the topic or content of talk. But the rub is this: Reformers designed shield in an attempt to transform the topic/content of talk without considering the micro-linguistic procedures through which these topics are collaboratively generated and processually sustained in the trial context. They attempted to redress the imbalance of power in the attorney/witness relationship without taking account of the interactional procedures of language use that structure that system and create knowledge of our sexually gendered identities, the sexual scripts governing male/female interactions, in the context of trial talk. According to the imagery employed by proponents of rape reform, the procedures of talk represent an epiphenomenal reflex of statutory

change, a passive secondary variable, which, since they are independently influenced by the statutes governing evidence, is derived from political structure. Since the interactional order of language use was viewed as possessing no sui generis dynamic of its own or even any capability to influence the law, the reformers believed the statutory changes affecting language use would simply harness the passive vehicle of interactional language to implement the sweeping legal changes they proposed.

But the social organization of talk is not simply a passive vehicle for the imposition of exogenous legal attributes, such as statutes, evidence, and case precedent on the one hand, or of cultural categories involving sex, sexual access, and sexual violence on the other. Rather, the social organization of talk actively and reciprocally molds, shapes, and organizes legal and cultural variables into communicative modes of institutionalized relevance. It constitutes the interactional medium through which evidence, statutes, and our gendered identities are forged into legal significance for the trial proceedings. And it represents the primary mechanism for creating and negotiating legal realities such as credibility, character, and inconsistency; for ascribing blame and allocating responsibility; and for constructing truth and knowledge about force, (non)consent, and sexual history. As we will see in the ensuing sections, the social organization of talk contingently tailors specific elements of patriarchal culture to fit legal standards of evidential relevance. And as it does so, such talk generates a systematic interaction between law and society in crucial moments in the trial proceedings.

The formidable impact of language use in court depicted here departs quite dramatically from the reductionist view presumed by proponents of rape reform. Far from being just independently influenced by, and a derivative reflex of, statutory change, the dynamic features of institutional talk regulate the attorney/witness system of interaction and punctuate the pace and rhythm of evidence in testimony during the trial proceedings. And while we might wish to respond, for example, that the realm of legal evidence is separate from language use, we should not lose sight of the fact that the vast bulk of evidence is not introduced through physical objects, through what the law calls "real" evidence, but comes packaged in verbal or written form – through language use. Even real evidence relies on language use to animate its legal significance for the particular case under adjudication. We might wish to respond further, for example, that the crucial issues in the trial really revolve around which particular piece of evidence is admitted into testimony, what sort of probative force it possesses, or the degree of weight it carries. Such decisions, however,

are not made automatically but are produced through persuasive discourse strategies in either written or verbal form-through language use in the evidentiary hearing and trial[15]. Trying to sidestep the relevance of language use in court to reach an autonomous realm of evidence merely raises the further question of just how the legal status of that evidence is achieved, how raw data are transformed into legal significance-through courtroom talk in the first instance.

Given the import of trial talk and its application to the social construction of rape as a legal fact (not as an aspect of subjectivity), I find it quite ironic that proponents of rape reform have never empirically analyzed the micro-organization of language use in the trial process-the very object to which rape shield is directly applied-either in the two decades since reform or in the years preceding reform. That proponents of rape reform have so consistently neglected these interactional processes appears even more remarkable given that shield was designed to limit the abuses of courtroom talk. Instead, they have merely invoked the phrases "blaming the victim" or "rape of the second kind" as if their mere incantation delivered some magical explanatory punch or possessed some sort of empirical significance and have consistently referred to a fictitious example from Berger[16] rather than engage in comparative empirical analysis. Yet aside from their emotional impact, glib pronouncements and anecdotal impressions about blaming the victim reveal nothing about the application of rape shield to the moment-to-moment production of real-time courtroom talk-to the language of evidence in testimony-and demonstrate nothing about how this conceptual designation is interactively constituted during the trial proceedings.

3. The Patriarchal Logic of Sexual Rationality

Consider the following conversational extracts taken from the Kennedy Smith trial.

Example 1. Opening Statements by Defense Attorney (DA) Roy Black

> DA: She goes into the house. She goes to the kitchen area and makes a call to her friend Ann Mercer, who is an acquaintance. That's the first time they have ever gone out together was that night. She doesn't call anyone in her family, the police, any relative,

but she calls Ann Mercer and says, "I've been raped. Come and pick me up."

Example 2. Cross-Examination of Ann Mercer (AM) by Defense Attorney (DA) Black

1	DA:	Your friend says that she was raped. Is that right?
2	AM:	Yes
3	DA:	But what she tells you is that she wants her shoes. Is that correct?
4	AM:	Yes
5	DA:	Several times she was worried about her shoes?

In these examples, the victim's claim of having been raped is inconsistent with the network of activities that took place during the aftermath of the alleged incident. First, she called an "acquaintance" rather than the police or a relative, perhaps making a thinly veiled parallel allusion to the fact that the victim not only called "acquaintances" when the seriousness of the incident demands a call to someone close but that she had sex with acquaintances also, instead of with someone in an intimate relationship. Second, she exhibited a preoccupation with a portion of her wardrobe-her shoes (instead of leaving the Kennedy estate immediately, which would have exhibited a more serious concern for her own safety)-an action that works to stabilize an interpretation of the incident as more akin to a "bad time" for the victim than a crime of rape. More technically, note in example 2 how the procedures of language use generate certain inferences that create a sense of inconsistency or doubt in the victim's account. In this segment, defense attorney Black deploys a contrast device with a post-posed contrast intensifier ("Several times she was worried about her shoes?") to package and accentuate the anomalous or ironic texture conveyed in the blame attribution against the victim via her friend Ann Mercer: "Your friend says that she was raped. Is that right?" "But what she tells you is that she wants her shoes. Is that correct?" Contrast sets possess a fused logiconormative structure: If A then B, but where the latter is disjunctive with or does not follow the former, a conventionalized two-part linguistic device typically, though not invariably, marked overtly with the coordinating conduction "but" preface in the second proposition[17].

In contrast to such attempts to impeach the victim's general character and credibility after the alleged rape, the following data extracts demonstrate other attempts to impeach prior to the incident, specifically through covert sexual history inferences and related characterological descriptions.

Example 3. Cross-Examination of Patty Bowman (V) by Defense Attorney (DA) Black

DA: You had an engrossing conversation?
V: Yes sir.
DA: You didn't have to be involved in the rest of the bar scene?
V: Yes sir.
DA: You had found somebody that you had connected with?
V: Yes sir.
DA: You were happy to have found that?
V: It was nice.
DA: You were no longer-, in fact you were with him almost exclusively?
V: I don't know.

Example 4. Cross-Examination of Bowman (V) by Defense Attorney (DA) Black

DA: And you were interested in him as a person?
V: He seemed like a nice person.
DA: Interested enough to give him a ride home?
V: I saw no problem with giving him a ride home...
DA: You were interested enough that you were hoping that he would ask for your phone number?
V: That was later.
DA: Interested enough that when he said to come into the house you went into the house with him?
V: It wasn't necessarily an interest with William. It was an interest in the house.
DA: Interested enough that at sometime during that period of time you took off your pantyhose?
V: I still don't know how my pantyhose came off.

Example 5. Cross-Examination of Bowman (V) by Defense Attorney (DA) Black

DA: Yesterday you told us that when you arrived in the parking lot in the car you kissed Will. Is that correct?
V: I testified that when we arrived at the estate, he gave me a goodnight peck.
DA: That's all it was?
V: Yes sir.
DA: Nothing of any-, nothing more than that?
V: No.
DA: Did you describe this to Detective Rigolo as a sweet little kiss?
V: I said a short sweet little kiss...

Example 6. Cross-Examination of Bowman (V) Defense Attorney (DA) Black

1	DA:	You told us yesterday that Will invites you into the house.
2		Is that correct?
3	V:	Yes sir.
4	DA:	You want to see the house?
5	V:	Yes sir.
6	DA:	'Cause you want to see what it looked liked?
7	V:	It's a landmark home. It had some interest.
8	DA:	Even though it was late, you wanted to see the house?
9	V:	I was uncomfortable about that...
10	DA:	So even though it was early in the morning, you wanted
11		to see the house?
12	V:	It didn't appear to pose any problems for Mr. Smith.
13	DA:	My question is even though it was early in the morning,
14		you wanted to see the house?
15	V:	Yes.
16	DA:	All right. Even though you were concerned, for example,
17		about your child, you still wanted to see the house?
18	V:	Yes.
19	DA:	Even though you had to get up early in the next morning
20		to take care of her, you still wanted to see the house?
21	V:	I wasn't planning on spending any extended amount of time in the home...

In examples 3-6, the victim engaged in a myriad of activities with the defendant prior to the incident which, on the face of it, appeared more congruous with a male and a female in an incipient relationship or, perhaps at the very least, an "interest" in an incipient relationship, than with a crime of rape. They had an "engrossing" conversation at the nightclub and thereby "connected"; she had abandoned the friends with whom she had arrived and was with him "exclusively" for the duration of the evening; she had given him a ride home, shared a kiss with him, and then accompanied him into the house-his house-even though it was very late in the evening, even though she was ever mindful of having to tend to her chronically ill infant early the next morning.

Note in particular how defense attorney Black generates this skepticism about the victim's version of events through the skilled exercise of conversational procedures. In lines 3-14 of example 4 and lines 13-22 of example 6, a type of linguistic foregrounding occurs through the repetition of sequential structure-a poetic or stylistic property of language use designed to emphasize and dramatize referential content. These sequential list structures unify and organize otherwise disparate particulars of evidence into a coherent, gestalt like pattern of persuasive parallelism (through the repetitive frames "interested enough"

and "even though" + "you wanted to see the house") and interact with contrast structures to hyperaccentuate the inconsistency or irony in the victim's account. Here it appears that both list structures derive from (in a very subtle way) grammatically unmarked contrasts (without the coordinating conjunction "but" marker we witnessed in example 2): "You were interested in him as a person" (example 4 line 1) and "'Cause you wanted to see what it looked like" (example 6 line 6). Note further the delicately engineered design of each list member (lines 3, 5, 8, & 12 in example 4 and lines 13, 16, & 19 in example 6). The internal structure of each of these list questions exhibits an unmarked or underlying contrast set organization. For example, on line 8 in example 4, the DÀs question ("Interested enough that when he said come into the house, you went into the house with him?" appears to possess an underlying ironic structure of: You weren't interested in him, but you went into the house with him?: and on line 13 in example 6, his question ("My question is even though it was early in the morning, you wanted to see the house?") incorporates an underlying ironic structure of: It was late in the evening, but you wanted to see the house? Together, these poetic features of courtroom talk, either singly or in improvisational combinations of various sorts, strengthen, accentuate, and amplify the sense of irony in a particular witness's version of events-a micro-cumulation of reasonable doubt, indeed a micro-technique of symbolic power.

Even more powerfully, while the above properties of talk might appear to be generating the simple existence of a generic incipient relationship between the victim and defendant and/or generic norms pertaining to their behavior, the relationship being constructed in the trial context could be more accurately defined as an incipient sexual relationship, a relationship often though not invariably constituted through subtle sexual history and related characterological inferences about the victim. There is no way to derive a "short sweet little kiss" (example 5) from a man you just met "in a bar (see example 15 line 12). There is no way to derive an innocent "interest in the house" (example 4) by taking off your pantyhose. And there is simply no way to be "in volved" with just the defendant other than sexually, as if she had picked him up for specifically that purpose, especially given that, as a consequence, she "didn't have to be involved in the rest of the bar scene" and was thus "with him almost exclusively" (example 3). While the victim could certainly resist blame imputations of this type of questioning (which she indeed does), the issue most surely being raised in the minds of the jurors is what sort of woman-other than a sexually experienced one-would engage in such activities.

Still more theoretically and powerfully, in the rape trial the incipient sexual relationship and rules of behavior are not generic or astructural standards governing the coequal sexual preferences of males and females. Rather, they represent what I refer to as the patriarchal logic of sexual rationality: that is, arbitrary male standards-the all-or-nothing, impersonal, and penetration-oriented normative preferences of sexuality-governing the interpretation of sexual desire, sexual access, and sexual interaction as these creatively unfold through the production of trial talk[18]. In the specific and narrow sense in which I am deploying this concept and following de Lauretis and Smart[19], the patriarchal logic of sexual rationality functions as a technology of gender – an interactional process for constructing fixed gender identities – which, during the rape trial process, specifies and produces a much broader range of gender-relevant actions than mere sexual preference, including a constellation of normatively accountable details relevant before, during, and after the alleged incident: how victims should feel (including their emotional and mental state), what they should say, what they should do, and when and with whom they should do it. Let me hasten to emphasize that as a general empirical issue the extent of sexual divergence between males and females is quite tangential to my purposes here. Rather, I am focusing on the manner in which the rape trial works to create and recreate these sexually gendered meanings as a form of legal knowledge to accomplish covertly and strategically particular interactional tasks in context: a sectarian, epistemological method for generating knowledge of inconsistency concerning the victim's account. Following West & Zimmerman[20], I propose that the rape trial represents one site where we "do" gender within the moral interpretive order of patriarchy and the epistemological practices of the legal regime. To be sure, the rape trial indeed determines issues of consent, force, and sexual history but contingently mobilizes-rather than merely reflects-these conceptions within the patriarchal logic of sexual rationality.

4. Evaluation Impact Research

Like the proponents of rape reform in their understanding (or lack of understanding) of the micro-linguistic details of evidence in testimony, policy impact analysts have proceeded di rectly to the evaluation stage of rape reform, which, for the most part, correlates the relationship between input and output variables in an effort to determine the causal efficacy of rape shield statutes in particular and other components of rape reform

more generally. Researchers conducting studies that measure the before and after implementation effects of statutory reform have found that its instrumental impact on the legal system has been minimal at best and that rape shield in particular has had only a meager influence on improving the victim's harrowing experience during the trial or fostering any of the other residual effects mentioned previously. As the authors of the most comprehensive and sophisticated study to date state, "the ability of rape reform legislation to produce instrumental change is limited. In most of the jurisdictions we studied, the reforms had no impact"[21].

But some researchers rightly observe that evaluating rape reform is far from being unproblematic, primarily because of the ambiguity surrounding the relevant variables that should be measured as indicators of change[22]. Just as proponents of rape reform have encountered significant problems implementing reforms like shield, so too have evaluation researchers provoked serious ambiguities when measuring it, since the medium through which it operates has properties that have never been empirically explicated. Spohn and Horney[23], for example, explicitly recognize the trial process as the focal object to which shield applies. But they then go on to measure the impact of shield indirectly, first, through attitude surveys of judges, prosecutors, and defense attorneys to a set of hypothetical cases in which the likelihood of sexual history evidence would be admitted in court, and, second, through the residual outputs of statutory reform-statistics on reports, prosecutions, and convictions. And they further go on to explain without empirical documentation that the limited impact of rape reform in general and shield in particular is due, in large part, to the discretionary power of the courtroom workgroup: a tightly knit network of social relationships whose day-to-day working interests and organizational exigencies relating to case processing may diverge substantially from idealistic notions of administering justice. Virtually all the evaluation research on rape reform employs this type of analytic logic.

But such approaches to evaluating rape shield inherit a welter of interrelated difficulties, of which I mention only a few here.

1.For dealing with decisions to prosecute or plea bargain, neither the prosecution in particular nor the courtroom work group more generally receive any direct input from rape shield. As I have mentioned, shield applies directly only to the trial system, to extremely limited aspects of the admissibility of evidence, even though there are still residual or "spillover" effects to other legal subsystems, as prosecutors and defense attorneys plot their case processing trajectories on future interpretations of admissible

trial evidence[24]. Even if the courtroom work group (or a part of it) enters into decisions about the admissibility of sexual history evidence during the formal trial proceedings, several serious problems surface concerning the ubiquitous empirical adequacy of this explanatory framework. First, while the work group concept may have some limited explanatory power among the organizational network of judge, prosecutor, and public defender (since a degree of mutual interdependence is required among legal participants informally processing cases through cooperative plea bargaining), its empirical and conceptual adequacy figures much less prominently-if at all-in true adversarial conflict situations like the Kennedy Smith trial. Second, why would the prosecuting attorney cooperate with the defense attorney and judge to admit sexual history evidence in adversarial trial contexts, when such a strategy would seriously imperil any chance of gaining a conviction during the trial? And, third, although the prosecuting attorney's office is indeed often preoccupied with the case characteristics leading to a conviction (such as corroboration of the victim's account or consistency in the victim's and suspect's statement and with efficient case processing), this is not always the case. On numerous occasions prosecutors engage in "risk-taking" behavior and file what Frohmann[25] calls "hard" (to win) cases for a complex array of reasons, such as gaining trial experience, punishing a defendant with an especially degenerate moral character, and achieving idealistic notions of administering "justice". Although rape reformers and evaluation researchers hypothesize about the routine operation of the courtroom work group and its detrimental effects on rape reform, Frohmann's empirical findings illuminate the delicate interpretive work and locally contextured decision making processes of the prosecuting attorney's office when filing rape cases. She demonstrates how prosecutorial routines are neither so routine nor so invariably compromising. They are situated accomplishments, even among the courtroom regulars who share a common commitment in disposing cases. Thus, even though the evaluation research focus may indeed reveal a limited though often misleading glimpse of the operation of the court room work group, it still yields precious little empirical data on the application of exclusionary constraints to sexual history evidence. Accomplishing such a task ultimately would compel re searchers to analyze language use in the trial as the key variable.

2. Applied policy research rather automatically presumes that the impact of shield should be gauged in terms of its putative effects on convictions, reports, and prosecutions. It elevates the status of these variables to a position of analytic prominence while simultaneously disregarding

the distinct possibility that the primary (or even sole) effects of shield could be channeled into a much more micro-dynamic context, inhering largely in the social construction of evidence in testimony. Arguably, if the effects of shield are, to some extent, confined to this much more interactional environment, then evaluation research must proceed on a trial-to-trial-even moment-to-moment-basis, examining the dynamic process of applying and undermining shield as it unfolds during the trial.

3. If shield only constrains overt sexual history references and not the more subtle descriptions emanating from the patriarchal logic of sexual rationality, then it is worth entertaining the likelihood that the limited effects being exerted on exogenous variables result not from the specific legal design of rape shield but from the covert inferences woven into the dominational meanings of patriarchal descriptive practice. And, as we have seen, these sexual history inferences emerge from the local micro-construction of knowledge during the trial and fall beyond the circumscribed threshold of the shield statutes.

4. Evaluation researchers might well consider the further possibility that, within its extremely bounded domain of application, shield has been modestly successful, blocking the derivation of inferences regarding overt sexual history reference. For when researchers operationalize residual factors as indicators of shield, they might well be homing in on the wrong indicator to measure, and are most likely measuring not the effects of shield-not explicit sexual history reference-but the more subtle yet powerful inferences of the patriarchal logic of sexual rationality embodied in our cultural-legal descriptive practices. Shield indeed possesses chronic and perhaps even irremediable problems not because it fails to cover the moral linguistic ground for which it was statutorily designed, but because it is unrealistically being called on to block the interactionally emergent derivation of covert inferences emanating from the patriarchal logic of sexual rationality. And it was not designed to cover so much mundane cultural ground.

5. Finally, while it may be interesting to interview courtroom participants to determine their attitudes about admitting various forms of hypothetical evidence, such an approach ignores the fact that meanings arise from the context of social interaction and inaccurately presumes that decontextualized meanings resemble the improvisational complexity of real-time courtroom performance. Such an approach reifies attitudes as something statically or objectively "out there" and ignores their more dynamic status as a product of trial interaction, a micro-social organization of talk which shapes and molds the interpretation of evidence on a

moment-to-moment basis. It is not clear, therefore, what (if any) bearing indirect variables like judicial attitudes toward hypothesized evidential scenarios have on the direct interactional practices to which shield is applied and what sort of explanatory proof these attitude surveys yield about the efficacy of shield as it unfolds in the context of trial performance.

In sum, since shield is directly applied to the language of evidence in testimony, I question the ability of researchers to evaluate the impact of rape reform without considering the underlying constitutive properties of trial talk: the putative target of legal change and the instrument propelling both direct and residual outputs to law and society. Both reformers and evaluators have neglected the black box linguistic territory to which shield is designed to apply in an immediate and direct way and through which its outputs are generated. While statistical analysis of pre and post reforms is indeed useful, as is an analysis of judicial attitudes, it is quite another story to determine whether either can yield significant findings on rape shield, because researchers have never critically raised the empirical issue of whether the linguistic object to which shield is applied responds positively to the influence of statutory variables sufficiently to activate significant legal and social change. In contrast to the explanations proposed thus far on the limits of rape shield, I argue that it is not so much that shield is circumvented or undermined by the informal norms of the courtroom work group or by the traditional attitudes of judges, prosecutors, and attorneys, or even by the zealous defense attorney who flaunts the rules of evidence through innuendo at every opportunity. Rather, I argue that the flexible and improvisational design properties of talk shape and mold the presentation and interpretation of evidence.

Postscript

Rape reform

Over the past twenty years or so a number of scholars have proposed significant ways to reform the rape trial process not only in the U.S. but also in England, Wales, New Zealand and other countries that employ the adversary system of justice. In this "postscript", I cover the most prominent (and interrelated) proposal for reform: pre-recorded questions and a neutral translator for cross-examination, opening statement and closing argument.

Pre-recorded questions and neutral translator

In her study of rape trials in England and Wales, Olivia Smith[26] advocates the use of pre-recorded questions during cross-examination of the victim, primarily because of the manipulative and aggressive cross-examination by defense attorneys. Attorneys would "submit their cross-examination questions in advance" for inspection and translation of "misleading stereotypes," "overly manipulative or intrusive questions," and leading (instead of open-ended) questions[27]. Similarly, Anne Cossins[28] in her study of sexual assault trials in England, Wales, and Australia proposes a "pre-trial hearing" where the defense would submit their questions in advance to a "specialist examiner" or intermediary who would determine their appropriateness for a "trauma-informed" system of justice. Opening statement and closing argument would also be "vetted" to prohibit inappropriate attacks on the complainant's behavior before, during and after the assault. The pre-recording would elicit the best evidence and vetting would eliminate "complex leading questions" and maximize the use of open-ended questions. While Smith and Cossins propose pre-recorded questions, Taslitz[29] advocates a neutral intermediary to translate the defense attorney's questions during cross-examination into "less abusive forms" and to remove obscure, vague, and ambiguous language, thus reducing the victim's trauma of being raped a second time on the witness stand.

However, several relevant issues emerge when considering such reforms – and not merely logistical ones.

1. Good attorneys do not write their questions (or opening and closing narratives) out in advance[30]. They build their next question off of the witness's answer, a much more improvisational than static conception of how attorney's actually operate in the trial.

2. As Matoesian and Gilbert[31] have noted in some detail, questions and narratives consist of much more than speech. Co-speech gestures and other forms of embodied conduct impart considerable information in the attorney's speech, information often unavailable from the verbal modality alone. In their forthcoming book they show (Chapter 2) how the witness employs embodied stance to critically evaluate the prosecuting attorney's questions, and how (in Chapter 6) the attorney enacts characters to increase the vividness of legal performance and thus persuade the jury. How would such embodied conduct be "prepared in advance" or "translated?"

3. In Matoesian and Gilbert[32] they show that the most bullying, aggressive, and improper questioning – not to mention unethical – in the

entire trial involved the prosecuting attorney's cross-examination of the defendant. The prosecuting attorney, not the defense attorney, engaged in egregious and unethical violations of trial procedure and evidence when attacking the defendant.

4. How would disputes about the translation or vetting of questions/narratives be handled and who would make decisions about the specialist examiner's translations? This is no small matter, for the scholars making recommendations for change use vernacular and value-laden glosses when describing the defense attorney's use of language, such as "aggressive," "bullying," "whacking the complainant," "manipulative," "intrusive," "repetitive," "discourteous," "humiliating," and so on[33]. It is not transparent what such terms look like in the concrete details of real-time courtroom discourse, and who will decide if such classifications apply in a particular instance.

5. This relates to another problematic issue. Because of courtroom constraints on the questioning of witnesses, accusations typically consist of an incremental and progressive build-up of facts, leading up to the main point or accusation. Moreover, questioning in court, like everyday contexts, is inferential. Where does the translation or vetting begin and end? Such logistical items are not tangential to reform but inhere in the nature of communicative practices, and reformers rarely if ever provide such concrete details for their recommendations.

6. And related to the above points, without knowing what is "aggressive" or "manipulative" or "repetitive" and so on (vague notions at best), it is not clear what would be specific candidates for translation or vetting and when and where this would occur in the sequence. If reformers wish to make claims about language use and multimodal conduct (such as gestures) in the rape trial (or any trial for that matter), which is what questions (or opening statements or closing arguments) actually are, then the unit of analysis must be language and multimodal conduct: words, utterances, gestures etc. To merely assert that this or that utterance is aggressive or manipulative or intrusive or irrelevant or repetitive is to employ vernacular glosses that can be "read off" of *a priori* advocacy assumptions about what happens in the rape trial. That is to say, reformers like Smith make the rape trial, not discursive practice, the unit of analysis. For example, a key feature – indeed the hallmark – of the poetic function in discursive practice is multimodal repetition.

Thus by making the rape trial as their unit of analysis, reformers base their recommendations on explicit and quite selective cross-examination segments of the victim only[34]. That is, they make selective use of data to

prove selective advocacy assumptions, a priori assumptions about the rape trial and then select excerpts to "prove" those assumptions. And that gives us a narrow and quite misleading view of what happens in the trial. Put another way, we never see any analysis of the data but are merely shown data selectively to prove a priori assumptions about the rape trial in general and cross-examination of the victim in particular, as if the data merely "speaks" for itself. By contrast, Matoesian and Gilbert[35] have examined features of the rape trial in microscopic, multimodal detail. Rather than using speech and multimodal conduct as an unexplicated resource they turn it into a topic in its own right. For example, in their forthcoming study they demonstrate how courtroom examination is not a question-answer pair, but an objection mediated question-answer event). In so doing, they challenge the "question-centric" model of socio-legal discourse in court and demonstrated how answerers can recalibrate questions put forward by the attorney and how witnesses – the rape victim – may employ factive verbs that presuppose the truth of the embedded clause even under negation (i.e., after a defense attorney's question the victim responds with "you mean when he raped me?").

7. Such recommendations for reform trade on the assumption that the credibility of the victim represents the key variable in the rape trial, and proposals for reform should reduce the harrowing degradation ceremony the victim endures during cross-examination. In fact, the reformers mentioned above focus exclusively on the credibility of the victim as the most crucial variable for redressing the injustices of the trial. However, Matoesian and Gilbert show the credibility of the attorney not the victim or other witnesses may be the most crucial variable when prosecuting rape cases in particular and adversary trials more generally. As they demonstrate in their forthcoming study, the credibility of the prosecuting attorney comes under scrutiny and evaluation, perhaps more than anyone else in the case.

8. Smith and Cossins[36] argue against the use of leading questions during cross-examination of the victim, and instead advocate open-ended questions that do not limit the victim's voice. However, as Matoesian and Gilbert[37] demonstrated in multimodal detail, defense attorneys find that in such cases the witness will quite frequently put their "foot in their mouth" as it were and impart damaging information to the prosecution case. As Roy Black mentioned in an interview with Matoesian[38] the victim's taped statements to the police "sounded like a session between a psychiatrist and patient more than a police officer and a witness to a crime." And those recordings were played in the trial, much to the dismay of the prosecution.

9. And last, Taslitz recommends the use of a neutral translator because defense cross-examination uses obscure, vague, ambiguous, and convoluted language to "trick" the victim. However, Matoesian[39] found some years ago that cross-examination, on occasion, was just the opposite. It was very concise, direct, and factual. Indeed, the trial practice known as detailing-to-death trades on those very premises. In any event, the translator will not be a linguistic magician, no matter how well trained, so the translation will never be objective but rather another branch in the tree of moral-inferential work, as is inevitably the case.

Note

[1] This article is a reworking of G. MATOESIAN *Language, Law and Society: Policy Implication of the Kennedy Smith Rape Trial*, in «Law & Society Review», vol. 29, n. 4, 1995. The postscript is original (note by the editor).

[2] The Rape Shield Law is a legislation which prevents a defendant in a rape trial from raising evidence about the victim's prior sexual conduct, including opinion evidence or reputation evidence. It has been passed by the USA Federal Government and 48 States as a means of limiting cross-examination regarding a complaining witness's sexual past (note by the editor).

[3] About Kennedy Smith Trial, see the article by S. MARIANO in this issue (note by the editor).

[4] J. MARSH, A. GEIST, N. CAPLAN, *Rape and the Limits of Law Reform*, Auburn House, Boston 1982; C. SPOHN, J. HORNEY, *Rape Law Reform: A Grassroots Revolution and Its Impact,* Plenum, New York 1992.

[5] C. SPOHN, J. HORNEY, *'The Law's the Law, but Fair Is Fair': Rape Shield Laws and Officials'Assessments of Sexual History Evidence*, in «Criminology», vol. 29, n. 1, 1991 p. 137; J. HORNEY, C. SPOHN, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions, in* «Law & Society», vol. 25, *Rev.* 1991, p. 173; C. GOLDBERG-AMBROSE, *Unfinished Business in Rape Reform,* in «Journal of Social Issues», vol. 25, 1991, p 173; S. ESTRICH, *Palm Beach Stories,* in «Law and Philosophy», vol. 11, 1992, p. 5; R. BERGER, P. SEARLES, W. L. NEUMAN *The Dimensions of Rape Reform Legislation*, «Law & Society», vol. 22, *Rev.* 1988, p. 329.

[6] C. SPOHN, J. HORNEY, *'The Law's the Law, but Fair Is Fair'*, cit; S. ESTRICH *op. cit.*

[7] S. ESTRICH, *op. cit.*

[8] See S. ESTRICH, *op. cit.*; C. SPOHN, J. HORNEY *Rape Law Reform*, cit., for several other environments.

[9] C. SPOHN, J. HORNEY, *Rape Law Reform*, cit.; S. ESTRICH, *op. cit.*, C. GOLDBERG-AMBROSE,1992, *op. cit.*, and J. MARSH et al, *op. cit.*

[10] *Ibidem*; C. SPOHN, J. HORNEY *'The Law's the Law, but Fair Is Fair',* cit.

[11] L. FROHMANN, *Discrediting Victims'Allegations of Sexual Assault*, in «Social Problems», vol. 38, n. 2, 1991, p. 213; L. FROHMANN, *Screening Sexual Assault*

Cases: Prosecutorial Decisions to File or Reject Rape Complaints, Ph.D. diss., U.C.L.A. (Sociology), 1992.

[12] C. GOLDBERG-AMBROSE, *op. cit*.; R. BERGER *et al*., *op. cit*.; S. ESTRICH, *Real Rape*, Harvard Univ. Press, Cambridge 1987; S. ADLER, *Rape on Trial*, Routledge & Kegan Paul, London 1987.

[13] For the Italian debate see I. BOIANO, *Femminismo e processo penale. Come può cambiare il discorso giuridico sulla violenza maschile contro le donne*, (prefaz. T. PITCH and T. MANENTE), Ediesse, Roma 2015.

[14] J. MARSH et al., *op. cit*.; C. SPOHN, J. HORNEY, *op. cit*.

[15] J. M. ATKINSON, P. DREW, *Order in Court*, Humanity Press, London 1979.

[16] V. BERGER, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, in «Columbia Law Review», vol. 1, 1977.

[17] D. SMITH, *K Is Mentally Ill*, in «Sociology», vol. 12, 1978, p. 23; J. M. ATKINSON, *Our Master's Voices*, Methuen, London 1984; G. MATOESIAN, *Reproducing Rape: Domination through Talk in the Courtroom*, Univ. of Chicago Press, Chicago 1993.

[18] D. RUSSELL, *Sexual Exploitation*, Sage Publications, Beverly Hills, CA 1984; L. RUBIN, *Intimate Strangers*, Basic Books, New York 1983; N. CHODOROW, *The Reproduction of Mothering*, Univ. of California Press, Berkeley 1978.

[19] T. DE LAURETIS, *Technologies of Gender,* Indiana Univ. Press, Bloomington 1987; C. SMART, *The Woman of Legal Discourse*, in «Social & Legal Studies», vol. 1, n. 1, 1992, p. 29.

[20] C. WEST, D. ZIMMERMAN, *Doing Gender,* in «Gender & Society», vol. 1, n. 2, 1987, p. 125.

[21] C. GOLDBERG-AMBROSE, *op. cit*.

[22] C. SPOHN, J. HORNEY, *'The Law's the Law but Fair Is Fair',* cit.; J. HORNEY, C. SPOHN, *op. cit*.

[23] C. SPOHN, J. HORNEY, *'The Law's the Law but Fair Is Fair',* cit.; J. HORNEY, C. SPOHN, *op. cit*.

[24] L. FROHMANN, *Discrediting Victims'Allegations,* cit.; L. FROHMANN, *Screening Sexual Assault Cases*, cit.; C. SPOHN & HORNEY, *Rape Law Reform*, cit.

[25] L. FROHMANN, *Screening Sexual Assault Cases,* cit., pp. 117-40.

[26] O. SMITH, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths*, Palgrave-Macmillan, New York 2018, p. 166.

[27] O. SMITH, *op. cit*, p. 183.

[28] A. COSSINS, *Closing the Justice Gap for Adult and Child Sexual Assault*, Palgrave Macmillan, London 2020, p. 587 and pp. 599-615.

[29] A. TASLITZ, *Rape and the Culture of the Courtroom,* New York University Press, New York 1999.

[30] Roy Black personal communication; see G. MATOESIAN, *Law and the Language of Identity*, Oxford University Press, Oxford 2001.

[31] G. MATOESIAN, K. GILBERT, *Multimodal Conduct in the Law*, Cambridge University Press, Cambridge 2018; G. MATOESIAN, K. GILBERT, *Practicing Linguistics without a License: Multimodal Oratory in Legal Performance*, De Gruyter Mouton, Berlin forthcoming.

[32] G. MATOESIAN, K. GILBERT, *Practicing Linguistics without a License*, cit.

[33] See E. CRAIG, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, McGill-Queen's University Press, Montreal 2021, for numerous examples.

[34] And these explicit segments, such as those found in E. CRAIG, *op. cit.*, do little more than appeal to the prurient interest: see G. MATOESIAN, L. TAYLOR, *Academic exploitation of the sexually abused: The third time a woman is raped*, paper presented at the American Society of Criminology Meetings, 1983, Denver, for a critique of this type of research.

[35] G. MATOESIAN, K. GILBERT, *Multimodal Conduct in the Law,* cit.; G. MATOESIAN, K. GILBERT, *Practicing Linguistics without a License*, cit.

[36] O. SMITH, *op. cit.*, p. 183; A. COSSINS, *op. cit.*, p. 607.

[37] G. MATOESIAN, K. GILBERT, *Multimodal Conduct in the Law*, cit.

[38] See G. MATOESIAN, *Law and the Language of Identity*, cit., p. 21; G. MATOESIAN, K. GILBERT, *Multimodal Conduct in the Law,* cit., p. 204.

[39] G. MATOESIAN, *Law and the Language of Identity,* cit.