Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial

Gregory M. Matoesian

In this article I examine the applied relevance of trial talk for rape shield legislation and attempts to evaluate the impact of such legal reforms. Using linguistic data from the Kennedy Smith rape trial, I argue that attempts to progressively implement rape shield have thus far failed and that research evaluating its impact has been more or less misguided because reformers and researchers have consistently failed to scrutinize empirically the interactional object to which rape shield legislation is applied: the language of evidence in testimony. Looking at the social construction of rape's legal facticity, I propose new methods of interpreting and evaluating legal reforms based on an understanding of language use and the performance of knowledge in context.

In the early 1970s the social problem of rape first emerged as a full-blown research agenda for scholarly analysis and then ignited a powerful social movement propelling sweeping changes throughout the legal system (Matthews 1994; Frohmann & Mertz 1994). Feminist researchers empirically and theoretically distinguished rape, along with male violence against women more generally, as a major mechanism explaining the social exploitation of women, and saw it functioning simultaneously as a primary mode of domination creating and perpetuating the patriarchal social order (Russell 1975; Scully 1990). In the legal system, proponents of rape reform targeted the legal system as both the vehicle and object of massive policy change because of its role in legitimating sexual violence against women (Berger 1977; Marsh, Geist, & Caplan 1982). Together, both feminist research and social movements merged into the legal realm of rape reform, so that by 1974 the state of Michigan passed the first comprehensive

Research for this article was supported by the University of Illinois at Chicago Campus Research Board, the UIC Office of Social Science Research, and the UIC Institute for the Humanities. I owe a very special debt of gratitude to Lisa Frohmann for numerous conversations dealing with this topic and to Roy Black for letting me take up his holiday. I also thank Wayne Kerstetter, Mindie Lazarus-Black, and the several anonymous reviewers for their detailed comments and advice. Address correspondence to Gregory M. Matoesian, Department of Criminal Justice (m/c141), University of Illinois–Chicago, 1007 West Harrison St., Chicago, IL 60607-7140.

Law & Society Review, Volume 29, Number 4 (1995)

rape reform statute. By the 1990s all the states as well as the federal government had passed similar legislation designed to criminalize and delegitimize rape.

Under the new criminal codes, rape was legally redefined in several key respects (Marsh et al. 1982; Spohn & Horney 1992; Goldberg-Ambrose 1992). First, the new law initiated a gender-neutral degree structure to reflect the level of seriousness of the assault. Second, it replaced the resistance and consent standards (which tended to focus on the victim's behavior) with the amount of force and coercion employed by the defendant. Third, it abolished the corroboration requirement, which had placed an almost impossible burden of proof on the prosecution since rape most typically occurs outside the purview of other witnesses. Fourth, and perhaps most important, the new statutes included strict yet limited evidentiary rules which severely limited the admissibility of the victim's sexual history during the trial proceedings. Curtailing the presentation of the victim's sexual history placed a constraint on the degradation ceremony that not only humiliated the victim in court but also had a chilling effect on reporting, prosecution, and conviction of rape cases. These provisions are often referred to as rape shield measures.

In this article I examine the rape shield statutes. Using data from the Kennedy Smith rape trial,[1] 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—the procedures of talk in sequential context—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] At about 4 A.M. on 30 March 1991, William Kennedy Smith (age 30)—the nephew of Senator Edward Kennedy, the late President John F. Kennedy, and the late Senator Bobby Kennedy—was alleged to have raped Patty Bowman (age 29)—the stepdaughter of a wealthy industrialist—at the Kennedy estate after the two met at a trendy nightclub in Palm Beach, Florida. The trial took place from late November to early December 1991. On 11 December 1991 the jury found Kennedy Smith not guilty of rape after just 77 minutes of deliberation.

Rape Shield Legislation

Rape shield statutes embody the most important, visible, and perhaps legally controversial component of 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 (Marsh et al. 1982; Bohmer 1991; Spohn & Horney 1991, 1992:20–28; Allison & Wrightsman 1993). 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 (Spohn & Horney 1991, 1992; Horney & Spohn 1991; Goldberg-Ambrose 1992; Estrich 1992; Berger, Searles, & Neuman 1988; Holmstrom & Burgess 1983).

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 built-in 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 (Bohmer 1991; Spohn & Horney 1991, 1992:166; Estrich 1992). 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 (Estrich 1992). (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 (see Estrich 1992; Spohn & Horney 1992 for several other environments).

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 (Spohn & Horney 1991, 1992; Bachman & Paternoster 1993; Estrich 1992). Researchers like Spohn and Horny (1992), Goldberg-Ambrose (1992), and others (Marsh et al. 1982) 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 (Marsh et al. 1982; Spohn & Horney 1991; Bohmer 1991:329). 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 (Frohmann 1991, 1992), and perhaps most important, the resilient relevance of sexual history evidence (Spohn & Horney 1991).

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 (Goldberg-Ambrose 1992; Berger et al. 1988; Largen 1988; Bohmer 1991; Estrich 1987; Adler 1987). 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.

And third, evaluation researchers have discovered significant degrees of variation among the states regarding the restrictive power of the statutes to shield sexual history evidence from the jury and have found varying statutory provisions regulating the admissibility of evidence (Spohn & Horney 1991). For instance, some states (such as Texas and Georgia) implemented weak or permissive shield laws in which some sexual history references were potentially relevant to the facts at issue in a case and likely to be admitted into evidence. By contrast, other states (such as Michigan and Illinois) implemented strong or restrictive laws that prohibited virtually all sexual history evidence and constrained judicial discretion to limited circumstances, admitting such evidence primarily in cases of a prior relationship between the victim and defendant or to indicate the source of semen, disease, or pregnancy. Other states enacted statutes between these two extremes (Spohn & Horney 1992). Hence, because of the variation in the statutory specifications among the different states, shield laws differ in their power to screen sexual history evidence from trial proceedings.

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 (Patton 1980:60). 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 (Marsh et al. 1982; Spohn & Horney 1992).

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.[2] Since the interactional order of language use

[2] See, e.g., the various proposals by Berger 1977, Heiman 1987, Largen 1988, LeGrand 1977, Cobb & Schauer 1977, Temkin 1986, and Adler 1987:164. This is not to say that proponents of rape reform were not interested in the role of talk in the courtroom. Nor is it to say that they failed to appreciate its power. Rather, it is to stress that

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 (Rembar 1980:324-25). 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 strate-

their interest had been to employ talk as an unexplicated resource for ushering in proposals for legal reform, merely presuming that trial talk would somehow be harnessed by statutory reform, while never investigating the social organization of talk as a topic in its own right (see for exceptions the works of Drew 1985, 1990, 1992; Matoesian 1993).

gies in either written or verbal form—through language use in the evidentiary hearing and trial (Atkinson & Drew 1979). 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 (1977) rather than engage in comparative empirical analysis (Brereton 1993).[3] 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.

The Systemic Limits of Rape Shield

This is not to say that rape shield is irrelevant or even ineffective. Nor is it to say that it should be abandoned as a political/legal strategy. It is to stress, however, that its relevance may be superseded through the features of talk in its socially organized context. Shield constrains specific elements of evidential interaction in the trial—at least potentially—but only at maximally overt levels of sexual history reference. It cannot effectively block or even modulate the derivation of *sexual history inferences* emanating from ordinary descriptive practices at more implicit or covert levels, first because these inferences are encoded symbolically within our cultural and legal descriptive practices, and second because these descriptive practices fall under the scope of evidentiary rules governing trial testimony more generally, rules

[3] See, e.g., Holmstrom & Burgess 1983; Largen 1985; Swift 1985; Temkin 1986; Allison & Wrightsman 1993:173; Adler 1987; Bourque 1989.

inhabiting a much lower threshold standard of relevance than specific exclusionary rules such as shield (Goldberg-Ambrose 1992:180). In the testimonial environment of mundane descriptive practice—the environment where the overwhelming bulk of testimony occurs—shield encounters serious difficulties in restricting the presentation and interpretation of symbolically gendered sexual evidence. This interactional environment of evidence in testimony, thus interpreted, constitutes a systemic limitation of rape shield at the boundaries of covert descriptive inference. And it is precisely these inferences that activate and instantiate dominational resources as sources of structural constraint and opportunity in the trial proceedings, often leaving precious little space to negotiate effective resistance.

Let me illustrate this argument with a case (*Stephens v. Miller* 1994). The U.S. Court of Appeals for the Seventh Circuit ruled on 6 January 1994 that the petitioner, Lonnie K. Stephens, who was convicted of rape, was not denied his constitutional right to testify. The ruling upheld an Indiana trial court's decision to exclude a portion of the defendant's testimony. Specifically, it did not permit Stephens to repeat his words—allegedly made to the victim during an act of consensual sexual intercourse—verbatim for the jury: "that another person had told Stephens that the victim preferred the 'doggy' fashion position for sexual intercourse and that she enjoyed 'switching' partners." The court only permitted Stephens to mention that he had said "something" that made the victim angry, which therefore motivated her to fabricate the charge against him. Despite its exculpatory impact (since it would be prima facie evidence of a motive to fabricate), the "raw" testimony was excluded because it clearly violated the state's rape shield statute—the state's interest in protecting the victim from this type of humiliating degradation ceremony—and because its exclusion was a minor imposition on the petitioner's constitutional right to testify.

Just as noteworthy, the defense attorney in the Kennedy Smith trial, Roy Black,[4] claimed in a recent in-depth interview I conducted with him that Judge Lupo excluded all the explicit sexual history evidence he sought to introduce during the trial, even though according to him it would have been "an explosive part of the proceedings" because "there were things in her [the victim's] background that were . . . a difference between a nuclear bomb and a stick of TNT."

Although trial and appellate courts will not, of course, always rule that the state's interests outweigh the defendant's right to

[4] In the Kennedy Smith trial, the participants include the following: William Kennedy Smith is the defendant; Patty Bowman is the rape victim; Roy Black is Smith's defense attorney; Moira Lasch is the prosecuting attorney; Judge Lupo is the trial judge; and Ann Mercer is the friend who picked the victim up at the Kennedy estate after the alleged rape incident.

testify, it is apparent nevertheless that this type of explicit sexual history evidence is *potentially* excludable through rape shield.

The Patriarchal Logic of Sexual Rationality

On the other hand, sexual history and related character evidence at the inferential or covert level of mundane description is much less vulnerable to statutory preemption during the trial process. Consider the following conversational extracts taken from the Kennedy Smith trial.[5]

Example 1. Opening Statements by Defense Attorney (DA) Roy Black[6]

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 Black

DA: Your friend says that she was raped. Is that right?
AM: Yes.
DA: But what she tells you is that she wants her shoes. Is
that correct?
AM: Yes.
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 the police or a relative, perhaps making a

[5] I suspect there will be several arguments against the use of such data, basically organized around the following: One atypical and sensationalistic rape trial is hardly representative of the vast majority of rape trials and therefore my own observations are anecdotal and impressionistic. In response I must mention first that my unit of analysis is not the rape trial per se (any more than my study is actually about rape) but the study of language use and the performance of knowledge in the trial context. While a sample size of one may appear quite small, especially compared with conventional social-scientific studies employing large data sets and complex statistical processes, for qualitative sociolinguistic research such as mine I am employing a great deal of data—explicating in depth and in great detail utterances and other properties of discourse. Such interactional processes represent the unit of analysis other than the trial per se, and only a few minutes of live testimony yields thousands of these properties. Second, the interactional processes found in the Kennedy Smith trial are part of our cultural knowledge and competence about constructing meaning locally in context and will most likely appear in any setting, trial or otherwise, formal or informal, where assessing blame and allocating responsibility are going on interactionally through the performance of knowledge. More specifically, these processes of interaction will be found in other date/acquaintance rape trials, no matter how sensational or mundane. And third, the Kennedy Smith case was, to be quite blunt, accessible, especially since the two states in which I live and do research permit neither audio nor audio-video taping of trial proceedings.

[6] All the data extracts have been highly edited from the original recordings and linguistic transcriptions.

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 logico-normative 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 (Smith 1978; Atkinson 1984; Heritage & Greatbatch 1986; Holstein 1993; Matoesian 1993).

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 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 by Defense Attorney 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 by Defense Attorney 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 by Defense Attorney Black

DA: You told us yesterday that Will invites you into the house. Is that correct?
V: Yes sir.
DA: You want to see the house?
V: Yes sir.
DA: 'Cause you want to see what it looked liked?
. . .
V: It's a landmark home. It had some interest.
DA: Even though it was late, you wanted to see the house?
V: I was uncomfortable about that . . .
DA: So even though it was early in the morning, you wanted to see the house?
V: It didn't appear to pose any problems for Mr. Smith.
DA: My question is even though it was early in the morning, you wanted to see the house?
V: Yes.
. . .
DA: All right. Even though you were concerned, for example, about your child, you still wanted to see the house?
V: Yes.
DA: Even though you had to get up early in the next morning to take care of her, you still wanted to see the house?
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 (Pomerantz 1988/89). 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 DA's 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 (Matoesian 1993; Drew 1990; Tannen 1987; Holstein 1993).

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 "involved" 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 (Russell 1984; Rubin 1983; Finkelhor 1984; Chodorow 1978; Baca-Zinn & Eitzen 1990; Allison & Wrightsman 1993; Schur 1988). In the specific and narrow sense in which I am deploying this concept and following de Lauretis (1987) and Smart (1992), 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 (1987; see also West & Fenstermaker 1993), 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.

The Female Logic of Sexual Irrationality and the Illogical Organization of Motivation

I do not wish to claim, however, that knowledge of the female model of sexuality—that sex should occur within a relational, intimate, and romantic context and that it does not necessarily have to culminate in penetration (Russell 1984; Rubin 1983; Chodorow 1978; Baca-Zinn & Eitzen 1990)—is always deactivated or suppressed during the trial. In specific environments, both the defense and prosecution strategically activate this cultural model to address and evaluate issues of motivation for fabricating the charge of rape and, in so doing, open a salient epistemological space to permit interaction between the male and female models. But most important, during the course of this tightly organized interaction, an issue of power surges into epistemological prominence: the patriarchal logic of sexual rationality predominates and the female model is transformed into a minefield of double-bind situations against the victim. As a technology of gender, the rape trial generates knowledge of sexual desire and sexual access as the *same* for men and women prior to and during the alleged rape incident but constructs knowledge of sexual relationships—especially knowledge of romance—as *different* in the wake of the incident: prior to and during the rape incident, the victim aligns with the patriarchal logic of sexual rationality, but after the incident she departs from this locally situated logic-in-action. In the midst of this *method* of producing fixed gender identities, the female standard of sexuality merges not into a logic of sexual rationality, as is true of the male system but, ironically, into a *logic of sexual irrationality* and an *illogical organization of motivation*. In the merging, sexual history inferences interlock with sexually gendered knowledge to create a gestalt-like aura of rather unflattering symbolic meanings about the victim's character and credibility in general and her sexual character in particular—a serious problem which supersedes the applicational limits of rape shield. And it is in this theoretical sense that the rape trial instantiates a contingent technology of gender which creatively produces, rather than merely reflects,

knowledge of gender difference and sameness as covert, strategic resources designed to accomplish certain interactional tasks in the adversarial context. Consider the following examples.

Example 7. Cross-Examination of Bowman by Defense Attorney Black

DA: And he was sitting there, and I think you said, with his legs crossed?
V: He had his ankle up on his knee.
DA: And you say that he was very calm at that time?
V: And very smug.
DA: And arrogant? Made you madder than you were?
V: It didn't make me mad. It confused me.

Example 8. Cross-Examination of Bowman by Defense Attorney Black

DA: He was calm and arrogant, you say?
V: Yes sir.
DA: He certainly was not being very nice to you?
V: It was more an indifference.
DA: He was cold and indifferent?
V: Yes sir.

Example 9. Direct Examination of William Kennedy Smith (D) by Defense Attorney Black

DA: What then happened?
D: We chatted for a couple of minutes and I kissed her and I said, "I gonna go to bed."
DA: What was her response to that?
D: She said, "Can I come into the house?"
DA: What did you say?
D: I said that there were a lot of people in the house and that I was sharing a room with my cousin Patrick and I said, "It was pretty late and I was going to bed."

Example 10. Cross-Examination of Kennedy Smith by Prosecutor (PA) Moira Lasch

PA: So you have this conversation—, well you had this act, then you ejaculate and then you say, "Well I'm going into the water and take a swim now."
D: Yes.
PA: That sounds not too romantic, Mr. Smith.
D: I don't know how to respond to that.

Example 11. Cross-Examination of Kennedy Smith by Prosecutor Lasch

PA: So you say to her on the lawn that you're going to bed and she says, "Can I come in with you?"
D: What I said was, "It's late and I'm gonna go to bed."
PA: So at this point now you . . .
D: I was—, I was tired. I mean I'd been out late and I really, I guess, I wanted her to leave . . . maybe that was not romantic but, you know, that's what happened.

Example 12. Direct Examination of Kennedy Smith by Defense Attorney Black

1 DA: Then what happened?
2 D: (pause) She said to me, "What's your phone number?"
3 DA: What did you say?
4 D: I said, "I don't know."
5 DA: Did you know the number of the house?
6 D: I didn't know the phone number of the house.
7 DA: What was her response?
8 D: She said, "Tell it to Cathy."

A critical feature of the testimony in the above examples is that they reveal—in distinctively complex yet interactive fashion—the cumulative interpretive force of gendered sexual norms pressed into the service of motivational issues. After the alleged incident (in which contraceptives were not used, posing an especially severe danger for the victim since pregnancy for her is considered to involve a high risk), the defendant was "calm," "cold," and "indifferent" to the victim—"not being very nice" nor "too romantic" (examples 7, 8, 10, & 11). In examples 9, 11, and 12, two further violations of the gender order unfold. First, the defendant does not invite the victim to spend the night, which might preserve at least a minimal sense of "romance," and when the victim is thus put in the unenviable face-threatening position of having to ask permission to come in the house, possibly to spend the night, he refuses her request (Goffman 1967). And, second, the defendant never asks for the victim's phone number, as she had hoped he would and which would perhaps again restore a minimal sense of "romance" or even salvage remotely the possibility of a future date and the genesis of a relationship. As a consequence, when the victim asks for his telephone number, the defendant once again refuses a request—a second face-threatening act with more disastrous results this time around.[7] Through this motivational nexus of gender-relevant norms, the defense attempts to expose the putative purpose of the evening not as "romance" or even as a prelude to a possible future relationship or an impending date but, at its starkest, as impersonal sex. Quite noticeably, the gendered relevance of exonerating motivational issues is mobilized not only by the defense, as might be expected, but also more ironically by the prosecution (as in example 10).

More theoretically, the logical trajectory of this process unfurls as follows. First, since the victim conformed to the patriarchal logic of impersonal sex during the course of the evening, she therefore violated her own feminine normative sexual preferences for sex in an intimate relationship. Second, because the

[7] Kennedy Smith claimed that he and Patty Bowman had consensual sex on two separate occasions through the course of the evening and that during the second of these he called out another woman's name—"Cathy"—which, according to him, triggered a hysterical outburst from Bowman.

victim violated these cultural standards, she felt guilty and angry, even to the point of becoming irrationally hysterical or revengeful. Her irrational "hysteria" was further hyperaggravated through vain attempts to restore some minimal sense of romance and to thus save face. And, third, because the victim felt guilty, angry, and revengeful, she culturally inherited the (illogical) motivational factors for fabricating the charge of rape, which, in turn, furnishes an exonerating motive diminishing the credibility of inculpatory evidence against the defendant. The victim is linguistically thrust into a classic double bind. On the one hand, her actions prior to and during the rape incident reveal an *equivalence* to ostensibly generic standards of sexual access and desire—applying as *sameness* to males and females coequally—as *her* (and *his*) standards of sexual access and desire. On the other hand, her actions after the incident embrace a *difference* compared with male logic—as specifically female standards governing normative preferences of sexual relationships and romance. And what is critical here is this: Knowledge of sameness/difference does not simply reflect a given reality about male and female normative sexual preference. Rather, knowledge of sameness and difference is micro-linguistically constituted through the patriarchal logic of sexual rationality: a socially structured, epistemological method for producing inconsistency in the victim's account and attacking her credibility and sexual character. That is, it functions as a creative technology of gender and power.

Even more ironically, note in the data extracts below how the patriarchal logic of sexual rationality may prompt another powerful double-bind situation against the victim.

Example 13. Cross-Examination of Bowman by Defense Attorney Black

DA: He told you he was in medical school?
V: Yes he did.
DA: Of course, that got you more interested in him, didn't it?
V: I was interested in any other outlooks he could have on my daughter's problem . . .

Example 14. Cross-Examination of Bowman by Defense Attorney Black

DA: And you talked to him about medical matters involving your daughter, isn't that right?
V: Yes sir.
DA: You became more interested in him as you found out that he had this kind of background?
V: I became more interested in what he had to say.

Example 15. Cross-Examination of Bowman by Defense Attorney Black

DA: . . . So perhaps you were viewing him as a potential date then?
V: No. I think I stated that I was not viewing him as a potential date but as a potential friend.
DA: OK. Just as a friend perhaps you would call up and you could discuss medical terms again.
V: I was in college. He was in college. We had a common ground in the medical field.
DA: Somebody who you're never going to see again because he lives out of town as you said?
V: I have many friends who live out of town but we communicate by telephone . . .
DA: Oh, friends that you had in college, not friends you met in a bar?
V: My friends that are in college that I communicate with by telephone.
DA: Yesterday you told us that you were not interested in him, isn't that right?
V: I was not interested in him in a sexual way.
DA: Oh, now you're interested in him as friendship?
V: I think I've stated that our discussions, you know, were friendly.

On the one hand, if the victim attempts a maximal alignment with her cultural model, the slightest departure or "deviation"—the slightest implication of impropriety on her part—escalates the probability of having her actions merge into the patriarchal logic of sexual rationality, and, once this calibration occurs, she first consents to sex and then falls into alignment with the female logic of irrationality and its attendant illogic of motivation. On the other hand, even if the victim maintains a maximal or "pure" fit with the female model, the patriarchal logic recalibrates a second alignment because she must have had some relational interest in the defendant. To claim otherwise, to claim that the interaction between them was totally impersonal, that she was totally innocent or virtuous, and that there was not even the genesis of any sexual interest on her part, would appear unrealistically inconsistent and suggest a strategic manipulation of testimony. Hence if a woman maintains that a kiss was innocent or merely friendly—her sexual autonomy and cultural model—patriarchal logic reinterprets, realigns, and reevaluates this very same act as sexual desire and thus as sexual access. If a woman attempts a pure fit with the female model—that she was just interested in "friendship" or "what he had to say"—patriarchal logic continues to recalibrate a logical inconsistency because there is practically no "reasonable" way for a woman to be with a man in the first place and maintain any strict platonic alignment (Coombs 1993; Matoesian 1993). In the former case, the woman's bodily experience is disqualified, and during the course of the trial, this may well turn out to furnish the basis for an exonerating motive on behalf of the defense. In the latter case, the female's testimony is too perfectly aligned for evaluational criteria, and thus the jury

may well consider the possibility that she has not only "polished" her testimony to provide a more coherent, convictable story in court but that she has also "polished" her moral character (Estrich 1992; Coombs 1993; Bumiller 1991; Matoesian 1993). As this testimonial trajectory unfolds, the actions of the victim and the defendant during the incident are recursively calibrated and recalibrated through the locally situated logic-in-action of patriarchal sexual rationality, a dynamic moral inferential system whose evaluational logic rests not in exposing consensual sex between the victim and defendant in any objective sense but in furnishing the resources for constructing a sexual relationship, constructing sexual desire, and, more generally, constructing truth and knowledge through the micro-technologies of power in institutional talk (Foucault 1979, 1980; Conley & O'Barr 1990). Indeed, the patriarchal logic of sexual rationality is not just a system of logic but a logic of power.

While the victim could, doubtless, mobilize alternative symbolic forms—that she was merely attracted to or interested in the defendant or the house or that a kiss was just a friendly gesture and nothing more—such forms of resistance might well turn out to be tactically injudicious, since they could seriously imperil any chance of conviction in the trial (Estrich 1992). According to the patriarchal logic of sexual rationality, the victim's interest in "what he had to say" (or in the "house") can never be disembodied from an interest in him, and since "interest" is embodied ethnocentrically according to the manner in which men are "interested" in women, this means that it is interpreted as sexual interest. And, of course, an explicit interest in the defendant suffers the same moral interpretive fate: that she was interested in him sexually. Caught in this patriarchal double bind, the victim is constrained to embrace the patriarchal logic of sexual rationality and, as it turns out, thus be implicated in constructing the very same dominational structure that oppresses her and contributes to her own subordination in the first place.

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 directly 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" (Spohn & Horney 1992:173).

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 (Goldberg-Ambrose 1992). 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 (1992; see also Spohn & Horney 1991; Horney & Spohn 1991), 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 reportings, 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 (see also Marsh et al. 1982). 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 (Frohmann 1991, 1992; Spohn & Horney 1992). 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 sur-

face 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 (Eisenstein & Jacob 1977). 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 (1992:117–40) 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 decisionmaking 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 courtroom 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 researchers 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. Two methodological points about the aggregation of data on rape reform are also relevant. First, the effects of shield need to be disaggregated from the other components of rape reform: from concerns for definition, corroboration, and consent. Lumping data on the components, extrapolating the data from one or several components to reform in general, and then claiming that rape reform has thereby totally failed ignores the distinct applied characteristics and merits of each particular reform component. As I have noted, perhaps shield has been modestly successful, registering local effects during the trial, but there is no way to know this unless we extricate the pure effects of shield from data on the other reform components. And, second, data on the ability of shield to restrict overt sexual history references, on the one hand, and covert sexual history inferences, on the other, need to be disaggregated. When this is done, the causal efficacy of shield can be further distinguished from the complex details of covert descriptive inference, legal-cultural inferences superseding the statutory perimeter of shield's operation and thereby eroding its

significance. The aggregation of these two levels of description has generated considerable confusion about the inability of shield to block sexual history references and has led researchers to attribute incorrectly this failure to shortcomings in the legal design of shield; in fact, the failure stems not from shield but from covert descriptive inferences deriving from the patriarchal logic of sexual rationality. And while implementing this analytic goal will surely present researchers with a difficult empirical task, the position advocated here is that such a scientific enterprise can indeed be accomplished but only by elevating the status of language use in court to an unprecedented level of applied analytic prominence.

6. 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 (O'Barr 1982; Suchman & Jordon 1990). 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.[8]

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 lin-

[8] It is unclear what these interviews actually reveal about rape shield (1) because these five very simple and made-up scenarios fail to represent the micro-emergent details of real trials and (2) because interviews may bear no logical or empirical relationship to what actually takes place interpretively during the contextually bounded parameter of the trial. Interviews, in and of themselves, do not constitute surrogate data for real-time courtroom performance.

guistic object to which shield is applied responds positively to the influence of statutory variables sufficiently to activate significant legal and social change.[9] 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.

The Legal and Extralegal Distinction

The features of talk emerge most forcefully when we examine a major issue in the application of rape reform: that judges, attorneys, and especially jurors consider legally irrelevant or extralegal factors in determining case outcome or (in the case of the prosecutor) whether to even initiate prosecution (Reskin & Visher 1986:424–26; LaFree, Reskin, & Visher 1985; Berger et al. 1988; Spohn & Horney 1991, 1992; Goldberg-Ambrose 1992; Marsh et al. 1982). A major underlying assumption governing this position is that substantive testimony (and other materials) is neatly divided into discretely layered zones of legal evidence and extralegal factors. Legal evidence refers to authenticated probative evidence that is useful to finding a fact, whereas extralegal factors are irrelevant, immaterial, or unduly prejudicial and bear no logical weight in the proof and disproof of an alleged issue. Smuggled into the legal versus extralegal dichotomy, of course, is a thoroughly unveiled allusion that legal evidence is objective, "hard," and relevant to the historical issues in the case, while extralegal factors are much more subjective, "soft," and reflect moral values that are inapplicable to the facts in question or are unduly prejudicial in determining the merits of the dispute (Reskin & Visher 1986:426–27). When this distinction is applied to the rape trial, legal evidence includes facts about physical injury, the presence or absence of a weapon, the defendant's behavior, or corroborating eyewitnesses testimony from disinterested witnesses; extralegal factors typically refer to a particular witness's personal characteristics, especially the moral character of the victim and the accused, and reflect more general cultural assumptions about contributory negligence on the part of the

[9] As Patton (1980:60) observes: "the 'process' focus in evaluation implies an emphasis on looking at *how* a product or outcome is produced rather than looking at the product itself; that is, it is an analysis of the processes whereby a program produces the results it does" (emphasis in original; see also Rist 1994).

victim during the rape incident (Reskin & Visher 1986:424–26; LaFree 1989:72, 110).[10]

But is it possible, in practice, to separate the moral from the legal-factual, the evaluative from the descriptive? Is there a clear dividing line between the two as many proponents and researchers of rape reform seem to presume? Or is the threshold standard of relevance constructed at such a low level in date rape cases like that involving Kennedy Smith—cases in which much of the "hard" evidence is absent and where a conviction or acquittal often turns on which side presents the better narrative—that the distinction collapses?

A fundamental problem that the legal/extralegal dichotomy encounters is that fact and value or description and evaluation are inextricably intertwined and not isolable (Jayyusi 1984:45; Atkinson & Drew 1979; Holstein 1993; Matoesian 1993). Descriptions and our interpretations of them, legal or otherwise, are always moral. They are always constructed with an eye toward the interactional work they accomplish such as judging, persuading, instructing, accusing, justifying, excusing, ascribing blame, allocating responsibility, and imputing motives for actions (Atkinson & Drew 1979; Watson 1978, 1983). Their factual status is always authorized by and interpreted through the actor's moral character and credibility, a systemic epistemological practice of the adversarial system of justice. As Imwinkelried (1989:84–85) has written, "As soon as the witness answers one question on direct examination, his or her credibility becomes an issue in the case." And while the law of evidence may indeed mark a fuzzy distinction between credibility and character, in light of my previous discussion the distinction becomes ever more difficult to sustain, for the patriarchal logic of sexual rationality is not just an epistemological method for constituting inconsistency but also a system of moral domination (Phillips 1992:249).

Thus our descriptive practices and the legally relevant particulars embedded in them are not disinterested reports that referentially mirror or correspond to some objective reality but are constructed locally *in situ* as intimately moral and motivated selective accomplishments (Holstein 1993:5–7). We never describe or interpret actions, actors, and events in a contextual vacuum but *do* things with descriptions as "persuasive work." And when legal participants mobilize descriptions as testimony unfolds, they simultaneously and irremediably activate culturally bequeathed moral judgments about its contents (Watson 1983). Because of this fusion between the factual and moral, the legal/extralegal distinction collapses into the inferential logic of our

[10] It appears that when references are unfavorable to the victim, they are called extralegal; when unfavorable to the defendant, they are called legal.

culturally endowed descriptive practices and the underlying dominational logic it covertly propels (Frohmann 1992).

None of this implies, of course, that the court fails to rule properly on the legal relevance or irrelevance of evidence during the trial proceedings. The court certainly makes competent decisions about the admissibility of evidence more or less routinely on a daily basis. Nor do any of the above points challenge the myriad of legal rules governing the admissibility of evidence—at least not for all practical purposes the court has in mind when deploying them.[11] What I wish to resurrect for empirical attention, however, are some forgotten but timely issues on recent attempts to separate fact and value insofar as the debate has resurfaced in the evidentiary context of the rape trial (Temkin 1986; Bourque 1989; Largen 1988:289; Goldberg-Ambrose 1992; Spohn & Horney 1992; Reskin & Visher 1986; Adler 1987). And even though a new terminology has surfaced to frame an old debate, many of the old analytic themes are still on point.

To illustrate the social organization of descriptive practice and the manner in which the moral and factual orders merge into an embodied, incarnate unity, let me introduce the following data extract.

Example 16. Cross-Examination of Bowman by Defense Attorney Black

1 DA: And you had a difficult time with your daughter's father?
2 V: I had a difficult time losing my daughter's twin.
. . .
3 DA: And one of the worst parts of it is that you didn't get
4 support from the man involved, did you?
5 V: He tried, sir, to do his best . . .

One way in which legal participants organize their descriptive practice is through the use of culturally endowed classification practices or categorization devices: a logic through which members of a culture, during the course of practical activities, ascribe conventional knowledge about motives, expectations, and obligations to types of actors and actions (Sacks 1992; Jayyusi 1984; Watson 1978, 1983; Smith 1978; Silverman 1993; Hester & Eglin 1992; Atkinson & Drew 1979; Holstein 1993). As such, categorization devices not only constitute a central sociocultural mechanism for organizing the moral production of descriptive practices but function simultaneously as a normatively structured sense-making resource that is semantically imposed on the way members of a culture interpret social action.

Observe in example 16 that the defense attorney deploys the descriptor "your daughter's father" which automatically activates

[11] And if the court admits certain items into evidence, then what objectively privileged criteria or algorithm should researchers employ to mark such admitted evidences as legal on the one hand and extralegal on the other, as relevant or irrelevant, granted that all evidence incorporates a moral interpretive component and is selectively relevant?

the relevance of the category "family," a category that further subsumes the co-incumbent "mother," and which thereby activates further the interpretive relevance of distinct categorical units within the family, such as "siblings" and "marriage partners" or "husband/wife." But there is no way to derive the category "marriage" or "marriage partners" from "your daughter's father" or from the ensuing descriptor "the man involved," as would perhaps be the case with a description using "your husband" or "your ex-husband." In fact, the classifications "your daughter's father" and "the man involved" both mobilize a cumulative, interlacing web of sexual history and motivational factors for the jury to entertain and thereby sustain the threshold of reasonable doubt. Especially prominent among these is the fact that the victim belongs to the nonmarital category of "unwed mother," along with the attendant characterological and sexual history inferences such a designation culturally inherits.

Consider a final example. Observe in example 2 (p. 678) that the defense attorney specifies the category "rape victim" as culturally tied to particular category-bound activities, which might include running away, calling the police, or worrying about one's general safety. But "wanting" or "worrying" about something so insignificant as one's shoes constitutes activities noticeably disjunctive with the "rape victim" category, and may well lead, in conjunction with other descriptions, to warrantable inferences that transform Patty Bowman from incumbency in the oppositional category of "rape victim" into co-incumbency (with the defendant) in the category "incipient (sexual) relationship." We can also note here the delicately precisioned interaction between categorization work and the sequential/grammatical structure of the contrast set. The contrast device generates the anomalous status between the category "rape victim," on the one hand, and the socially structured expectations governing categorical incumbency on the other. It is in the midst of such micro-symbolic processes of power that issues of force, consent, and sexual history are socially constituted. It is through this articulation between law and society as microcosmically embodied in the social organization of talk that a woman's experience of rape is transformed into routine consensual sex in the trial process, into what MacKinnon (1989) calls the "erotization of desire," and, more structurally, into the moral order of the patriarchal logic of sexual rationality.[12]

[12] In light of this discussion, it is difficult to conceive of such evidence as "soft," as Reskin and Visher imply. As it turns out, many of these "soft" data are quite hard.

Conclusion

I have analyzed here the applied policy implications of the Kennedy Smith rape trial and proposed new methods of interpreting and evaluating rape shield reforms based on an examination of the social organization of talk and the performance of knowledge in context. While we still need careful analysis of more data from many trials and legal cases before definitive claims can be made and more constructive recommendations proposed, I have made a case for situating the relevance of talk in the applied policy areas of rape reform and evaluation impact studies. Proponents and analysts of rape reform have noted the applied import of talk, employing it as an unexplicated resource for legal and social change. But they have ignored the dynamic properties of trial language and the social organization of descriptive practice as topics of empirical inquiry, even though the exclusionary rules of rape shield apply directly to the linguistic features of evidence in testimony. As a consequence, proponents of rape reform have watched progressive reforms in the legal system fail to materialize because the law of evidence is interpreted, in crucial moments of a trial, through the patriarchal logic of sexual rationality. By the same token, research analysts have attempted to assess the instrumental impact of rape shield legislation indirectly through attitude surveys, correlation of residual output factors, and hypothetical claims about the courtroom work group without in-depth processual analysis of the interactional object to which such reform statutes are directly applied and through which legal and social changes are implemented. Unfortunately, both proponents and researchers of rape reform have never subjected the intricate institutional properties of trial talk, especially its inferential capacities for the performance of knowledge, to detailed empirical scrutiny and analysis, and this neglect, in turn, has led to considerable conceptual confusion and applied policy frustrations.[13]

The findings presented here possess clear implications for recent research which claims that impeachment strategies in the rape trial are strikingly similar to, if not identical with, those found in other types of criminal trials and that the degradation experienced by the victim on the stand is due more to the systemic properties of the adversarial system of justice rather than to the gender specificity of the rape trial (Brereton 1993; McBarnett 1984). But while the rape trial indeed employs ge-

[13] As one researcher in the field of criminology astutely observes, to understand more about the nature of crime, those in the field need to "collect different kinds of data" and expand the forms of data and research methodologies beyond standard statistical techniques with their attendant premature data categorizations to include more qualitatively inclined processual approaches to the study of social organization, such as "linguistic analysis" of social interaction and conversation (Maltz 1994:426–27; see also Maynard & Manzo 1993:173).

neric impeachment strategies, it also activates through those very same strategies a covert interaction with the patriarchal logic of sexual rationality in crucial moments to fashion the penetrating thrust of blame attributions against the victim. Even though these processes for impeaching credibility and attacking character appear superficially as generic cultural-legal techniques of practical reasoning, at a deeper level they represent epistemological procedures that function to create and perpetuate our sexually gendered identities through a linguistically organized interaction between law and society.

I have emphasized that understanding the manner in which large-scale legal outcomes are mediated through the tissue of interactional processes is necessary when formulating and evaluating legal reforms like rape shield, but this understanding, in turn, can only occur through an interpretive analysis of the linguistic performance of knowledge. In so doing, we can observe the inner workings of what Maynard (1990:90; see also Mertz 1992; Frohmann & Mertz 1994) refers to as the "law in action" and can thereby witness how the interpenetration between law and society is embodied in the constitution of our sexually gendered identities through the linguistic performance of knowledge. After all, the rape trial, like other adversarial trials, is not necessarily about truth and falsity but about winning and losing in a warlike yet tightly structured game of forensic strategy—a war of words, utterances, and ideas, a war in which the ability to perform knowledge through talk represents the preeminent weapon of domination.

References

Adler, Suzsanna (1987) *Rape on Trial.* London: Routledge & Kegan Paul.

Allison, Julie, & Lawrence Wrightsman (1993) *Rape: The Misunderstood Crime.* Newbury Park, CA: Sage Publications.

Atkinson, J. Maxwell (1984) *Our Master's Voices.* London: Methuen.

Atkinson, J. Maxwell, & Paul Drew (1979) *Order in Court.* Atlantic Highlands, NJ: Humanities Press.

Baca-Zinn, Maxine, & D. Stanley Eitzen (1990) *Diversity in American Families.* New York: Harper & Row.

Bachman, Ronet, & Raymond Paternoster (1993) "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?" 84 (3) *J. of Criminal Law & Criminology* 554.

Berger, Ronald, Patricia Searles, & W. Lawrence Neuman (1988) "The Dimensions of Rape Reform Legislation," 22 *Law & Society Rev.* 329.

Berger, V. (1977) "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom," 77 *Columbia Law Rev.* 1.

Bohmer, Carol (1991) "Acquaintance Rape and the Law," in A. Parrot & L. Bechhofer, eds., *Acquaintance Rape: The Hidden Crime.* New York: John Wiley.

Bourque, Linda (1989) *Defining Rape.* Durham, NC: Duke Univ. Press.

Brereton, David (1993) "Are Rape Trials Different?" Presented at Law & Society Association annual meeting, Chicago (27 May).

Bumiller, Kristin (1991) "Fallen Angels: The Representation of Violence against Women in Legal Culture," in M. Fineman & N. Thomadsen, eds., *At the Boundaries of Law.* London: Routledge.

Burgess, Ann Wolbert, ed. (1985) *Rape and Sexual Assault: A Research Handbook.* New York: Garland.

Chappell, Duncan, Robley Geis, & Gilbert Geis, eds. (1977) *Forcible Rape: The Crime, the Victim, and the Offender.* New York: Columbia Univ. Press.

Chodorow, Nancy (1978) *The Reproduction of Mothering.* Berkeley: Univ. of California Press.

Cobb, K., & N. Schauer (1977) "Michigan's Criminal Sexual Assault Law," in Chappell et al. 1977.

Conley, John, & William O'Barr (1990) *Rules versus Relationships: The Ethnography of Legal Discourse.* Chicago: Univ. of Chicago Press.

Coombs, Mary I. (1993) "Telling the Victim's Story," 2 (2) *Texas J. of Women & the Law* 277.

de Lauretis, Teresa (1987) *Technologies of Gender.* Bloomington: Indiana Univ. Press.

Drew, Paul (1985) "Analysing the Use of Language in Courtroom Interaction," in T. A. van Dijk, ed., 3 *Handbook of Discourse Analysis.* New York: Academic Press.

——— (1990) "Strategies in the Contest between Lawyers and Witnesses in Court Examinations," in J. N. Levi & A. G. Walker, eds., *Language in the Judicial Process.* New York: Plenum Press.

——— (1992) "Contested Evidence in Courtroom Cross-Examination: The Case of a Trial for Rape," in P. Drew & J. Heritage, eds., *Talk at Work.* Cambridge: Cambridge Univ. Press.

Eisenstein, James, & Herbert Jacob (1977) *Felony Justice: An Organizational Analysis of Criminal Courts.* Boston: Little, Brown.

Estrich, Susan (1987) *Real Rape.* Cambridge: Harvard Univ. Press.

——— (1992) "Palm Beach Stories," 11 *Law and Philosophy* 5.

Finkelhor, David (1984) *Child Sexual Abuse.* New York: Free Press.

Foucault, Michel (1979) *Discipline and Punish.* New York: Pantheon.

——— (1980) *Power/Knowledge.* New York: Pantheon.

Frohmann, Lisa (1991) "Discrediting Victims' Allegations of Sexual Assault," 38 (2) *Social Problems* 213.

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

Frohmann, Lisa, & Elizabeth Mertz (1994) "Legal Reform and Social Construction: Violence, Gender, and the Law," 19 *Law & Social Inquiry,* 829.

Goffman, Erving (1967) *Interaction Ritual.* Garden City, NY: Anchor.

Goldberg-Ambrose, Carole (1992) "Unfinished Business in Rape Reform," 48 *J. of Social Issues* 173.

Heiman, W. (1987) "Prosecuting Rape Cases: Trial Preparation and Trial Tactic Issues," in R. Hazelwood & A. Burgess, eds., *Practical Aspects of Rape Investigation.* New York: Elsevier.

Heritage, J., & D. Greatbatch (1986) "Generating Applause: A Study of Rhetoric and Response at Party Political Conferences," 92 *American J. of Sociology* 110.

Hester, Stephen, & Peter Eglin (1992) *A Sociology of Crime.* London: Routledge.

Holmstrom, Lynda Lytle, & Ann Wolbert Burgess (1983) *The Victim of Rape.* New Brunswick, NJ: Transaction.

Holstein, James (1993) *Court-ordered Insanity: Interpretative Practice and Involuntary Commitment.* Hawthorne, NY: Aldine.

Horney, Julie, & Cassia Spohn (1991) "Rape Law Reform and Instrumental Change in Six Urban Jurisdictions," 25 *Law & Society Rev.* 117.

Imwinkelried, Edward (1989) *Evidentiary Foundations.* 2d ed. Charlottesville, VA: Michie.

Jayyusi, Lena (1984) *Categorization and the Moral Order.* Boston: Routledge & Kegan Paul.
LaFree, Gary (1989) *Rape and Criminal Justice.* Belmont, MA: Wadsworth.
LaFree, Gary, B. Reskin, & C. Visher (1985) "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials," 32 *Social Problems* 389.
Largen, M. (1985) "The Anti-Rape Movement: Past and Present," in Burgess 1985.
——— (1988) "Rape Law Reform: An Analysis," in A. Burgess, ed., 2 *Rape and Sexual Assault.* New York: Garland Publishing.
LeGrand, C. (1977) "Rape and Rape Law: Sexism in Society and Law," in Chappell et al. 1977.
MacKinnon, Catharine A. (1989) *Toward a Feminist Theory of the State.* Cambridge: Harvard Univ. Press.
Maltz, M. (1994) "Deviating from the Mean: The Declining Significance of Significance," 31 (4) *J. of Research in Crime & Delinquency* 434.
Marsh, Jeanne, Alison Geist, & Nathan Caplan (1982) *Rape and the Limits of Law Reform.* Boston: Auburn House.
Matoesian, Gregory M. (1993) *Reproducing Rape: Domination through Talk in the Courtroom.* Chicago: Univ. of Chicago Press.
Matthews, Nancy A. (1994) *Confronting Rape: The Feminist Anti-Rape Movement and the State.* London: Routledge.
Maynard, D. (1990) "Narrative and Narrative Structure in Plea Bargaining," in J. Levi & A. Walker, eds., *Language in the Judicial Process.* New York: Plenum.
Maynard, D., & John Manzo (1993) "On the Sociology of Justice: Theoretical Notes from an Actual Jury Deliberation," 11(2) *Sociological Theory* 171.
McBarnett, Doreen (1984) "Victim in the Witness Box: Confronting Victimology's Stereotype," in W. Chambliss, ed., *Criminal Law in Action.* New York: Macmillan.
Mertz, Elizabeth (1992) "Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law," 26 *Law & Society Rev.* 413.
O'Barr, William (1982) *Linguistic Evidence.* New York: Academic Press.
Patton, Michael Quinn (1980) *Qualitative Evaluation Methods.* Beverly Hills, CA: Sage Publications.
Phillips, Susan (1992) "Evidentiary Standards for American Trials: Just the Facts," in J. Hill & J. Irvine, eds., *Responsibility and Evidence in Oral Discourse.* New York: Cambridge Univ. Press.
Pomerantz, A. (1988/89) "Constructing Skepticism: Four Devices Used to Engender the Audience's Skepticism," 22 *Research on Language & Social Interaction* 293.
Rembar, Charles (1980) *The Law of the Land.* New York: Simon & Schuster.
Reskin, Barbara F., & Christy A. Visher (1986) "The Impact of Evidence and Extra-legal Factors in Jurors' Decisions," 20 *Law & Society Rev.* 427.
Rist, R. (1994) "Influencing the Policy Process with Qualitative Research," in N. Denzin & Y. Lincoln, eds., *Handbook of Qualitative Research.* Thousand Oaks, CA: Sage Publications.
Rubin, Lillian (1983) *Intimate Strangers.* New York: Basic Books.
Russell, Diana E. H. (1975) *The Politics of Rape.* New York: Stein & Day.
——— (1984) *Sexual Exploitation.* Beverly Hills, CA: Sage Publications.
Sacks, Harvey (1992) 1 *Lectures on Conversation.* Cambridge: Blackwell.
Schur, Edwin M. (1988) *The Americanization of Sex.* Philadelphia: Temple Univ. Press.
Scully, Diana (1990) *Understanding Sexual Violence.* Boston: Unwin Hyman.
Silverman, David (1993) *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction.* London: Sage.
Smart, C. (1992) "The Woman of Legal Discourse," 1 (1) *Social & Legal Studies* 29.

Smith, D. (1978) "K Is Mentally Ill," 12 *Sociology* 23.
Spohn, Cassia, & Julie Horney (1991) " 'The Law's the Law, but Fair Is Fair': Rape Shield Laws and Officials' Assessments of Sexual History Evidence," 29 (1) *Criminology* 137.
——— (1992) *Rape Law Reform: A Grassroots Revolution and Its Impact.* New York: Plenum.
Suchman, L., & B. Jordon (1990) "Interactional Troubles in Face-to-Face Survey Interviews," 85 *J. of the American Statistical Association* 232.
Swift, C. (1985) "The Prevention of Rape," in Burgess (1985).
Tannen, Deborah (1987) "Repetition in Conversation: Towards a Poetics of Talk," 63 (3) *Language* 574.
Temkin, J. (1986) "Women, Rape and Law Reform," in S. Tomaselli & R. Porter, eds., *Rape.* New York: Blackwell.
Watson, D. R. (1978) "Categorization, Authorization, and Blame Negotiation in Conversation," 12 *Sociology* 105.
——— (1983) "The Presentation of Victim and Motive in Discourse: The Case of Police Interrogations and Interviews," 8 (1–2) *Victimology* 31.
West, C., & S. Fenstermaker (1993) "Power, Inequality and the Accomplishment of Gender: An Ethnomethodological View," in P. England, ed., *Theory on Gender/Feminism on Theory.* New York: Aldine.
West, C., & D. Zimmerman (1987) "Doing Gender," 1 (2) *Gender & Society* 125.

Case

Stephens v. Miller, (CA 7) "en banc," No. 91-1690, 1/6/94, *Criminal Law Reporter* 2-2-94, 1398–1400 (1994).