Book Review of Gregory M. Matoesian, Reproducing Rape

Dorothy E. Roberts

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the Courts Commons, Criminal Law Commons, Criminal Procedure Commons, Gender and Sexuality Commons, Law and Gender Commons, and the Legal Ethics and Professional Responsibility Commons

Repository Citation
https://scholarship.law.upenn.edu/faculty_scholarship/1433

This Article is brought to you for free and open access by Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Carey Law by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Reviewed by Dorothy E. Roberts

I began a recent essay on reforming rape law with the question, "What is wrong with rape?"—meaning, what is the injury to women who are raped and why hasn't the law recognized that injury?" Two decades' reform has attempted to root out of rape law male-dominated standards of sexuality and sexual access. Yet startling statistics on the prevalence of sexual violence—most of which goes unreported and unpunished—reveal the criminal law's failure to protect female sexual autonomy.² Feminists continue to search for the ways in which the law, despite statutory revisions, so successfully continues to perpetuate women's sexual subordination. In Reproducing Rape Gregory Matoesian suggests that we have been searching in the wrong places. He points out that rape law reform has concentrated on statutes and trial outcomes while ignoring more subtle linguistic devices that structure what juries hear.³ Matoesian asserts that "[c]ourtroom talk captures the moment-to-moment enactment and reproduction of rape as criminal social fact" (page 19). He demonstrates this process through a detailed, even microscopic analysis of the defense attorney's cross-examination of the victim in three rape trials, taken from court transcripts and, in one instance, a trial tape.

This is a review written by a lawyer of a book about lawyers written by a sociologist. Reproducing Rape concerns sociology more than law, language more than rape. My purpose in reviewing the book for readers who are law teachers is to evaluate its usefulness for their particular projects. Reproducing Rape will hold special interest for two classes of legal scholars—those exploring the role of language, especially verbal language, in legal processes, and those working to reform rape law. I will examine the two topics (legal language and rape reform) separately, although I think the book's greatest contribution lies in its effort to integrate the two.

The Structure of Courtroom Discourse

Reproducing Rape studies the role of verbal language as a form of domination in rape trials. Matoesian's analytic framework is contemporary sociologi-

---

Dorothy E. Roberts is Professor of Law, Rutgers University-Newark. At present she is a fellow in the Program in Ethics and the Professions, Harvard University.


2. See Crime Victims Research and Treatment Center, Rape in America: A Report to the Nation 3-5 (Charleston, S.C., 1992) (concluding that at least 12.1 million American women have been raped, 75 percent of them by acquaintances).

3. See generally Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977) (discussing law that governs rape trials).

Journal of Legal Education, Volume 44, Number 3 (September 1994)
cal theory of language and social structure. He provides extensive background both on the sociology of talk, whose analytic task is "discovering, describing, and explicating the formal organizational technology of talk as social action" (39), and on structuration theory, which recognizes "the mutual and simultaneous elaboration of structure and action" (198). Matoesian focuses on what he calls "socially structured talk," which combines insights from these two sociological approaches. His perspective recognizes that talk and its social context are mutually enforcing and interact continually to reproduce social systems. Matoesian's primary objective seems to be theoretical—to incorporate in sociological theories of talk a more coherent approach to social structure. Sociologists' interest in the social power of talk parallels that of legal scholars. Examples are the turn to narrative and storytelling as tools of legal analysis, the close examination of communication among lawyers and clients, and the explanation of hate speech as the enforcement of unequal social relationships.

Although Matoesian ultimately examines the interaction between the formal mechanics of talk and macro social structure (specifically, patriarchy), the first part of his analysis focuses on the asymmetrical, internal procedure of courtroom discourse (98–157). Applying the methodology of "conversation analysis," Matoesian reveals defense attorneys' systematic use of linguistic devices, such as the syntax of questioning, the phrasing of evidence, and the interjection of silences, to dominate exchanges with the victim. Most of Matoesian's points in this section are observations of the elements of a skillful cross-examination—the strategies and tactics a good attorney uses to undermine the witness's version of events and convince the jury of one more favorable to her client. Reading the chapter was rather like reading a foreign ethnographer's account of one's own culture. I recognized in Matoesian's analysis of trial transcripts, once translated from conversation analytic dialect, a catalog of the rules I learned as a law student in my trial advocacy course. (I figured out, for example, that "turn type preallocation restricts first pair parts to questions only" (150) means lawyers must ask witnesses questions.)

Matoesian successfully demonstrates that courtroom talk is organized according to a "differential distribution of conversational resources"; in other


7. Matoesian observes, for example, that defense attorneys phrase their questions so as to restrict witnesses' choice of response to yes or no answers (150).
words, lawyers call the shots. Yet it will hardly seem remarkable to law teachers that only lawyers get to ask questions, that they select the order of speakers, and that they are less "charitable and polite" to opposing witnesses than to their own clients. Not only do these rules apply in all trials, but they benefit the prosecutor as well as the defense attorney. Indeed, it would distort the power balance in criminal trials to imply that defense attorneys have greater access to linguistic resources than prosecutors. Nevertheless, Matoesian's methodology forces legal scholars to think more carefully about the power inherent in the procedural rules we often take for granted.

Courtroom Discourse and Rape

Although analyzing the internal structure of conversations is fascinating in and of itself, it may ultimately be unsatisfying for progressive scholars. We are likely to be more concerned about how conversational structure reflects and perpetuates unjust social hierarchies. It is one thing to study the Tibetan language as an intriguing pastime, but quite another to learn it in order to work for the liberation of Tibet. As Matoesian puts it, "Linguistic syntax can only take us so far" (157).

In the second part of his analysis, Matoesian examines defense attorneys' strategic use of their linguistic resources to reproduce patriarchal concepts of rape (157-88). He begins from a feminist understanding of rape, relying on the work of radical feminist legal scholars such as Catharine A. MacKinnon and Carol Smart (10-22). MacKinnon explains rape's origin in ordinary heterosexual relationships and its legitimization by law: "Rape and intercourse are not authoritatively separated by any difference between physical acts or amount of force involved but only legally, by a standard that centers on the man's interpretation of the encounter." The law transforms women's experience of sexual violation into normal, consensual sex. Matoesian studies how defense attorneys' cross-examination of the victim accomplishes this transformation through the organization of courtroom linguistic practice. Thus, Reproducing Rape demonstrates one aspect of the mechanics of the feminist theory that law normalizes rape.

Matoesian's project is more subtle and complicated than detailing the "painful and harrowing experience" that rape victims endure on the witness stand, as Paul Drew's brief review on the book cover might suggest. Specifically, the defense attorney reproduces rape by assembling the facts to construct the victim's moral character in a way that holds her responsible for the incident. This is what the sociology of talk calls "categorization work"—classifying actions, actors, and events into preexisting, socially structured categories. In rape trials, this moral order is driven by patriarchal standards of sexuality and sexual access. Patriarchal logic holds, for example, that "[i]f a woman 'calmly enters a man's car' then she cannot have been raped, for she must have consented" (226).

Further Exploration

Matoesian’s structural analysis of courtroom talk is a starting point for further exploration of the modes of legal domination. First, Matoesian does not claim that patriarchy exerts any influence over the sequential structure of rape trials; rather, the generic rules governing courtroom discourse are “reproduced independently of patriarchy” (187 n.1, 216). He recognizes that trying courtroom procedure in rape trials to patriarchal ideology would require comparing his findings with a similar analysis of other types of trials (58). But this concession leaves open the question whether the procedural rules themselves are designed in a way that favors the status quo. This inquiry presumes the possibility of transforming the internal structure of courtroom discourse to one that facilitates social change rather than social reproduction. For example, can we imagine a feminist procedure for cross-examining victims of crime?9

Second, how do social systems other than patriarchy interact with the structure of courtroom discourse to perpetuate current social arrangements? How do race and class influence the distribution of linguistic resources, no doubt enhancing the imbalance of power between the victim and defense attorney, as well as between the defendant and prosecutor? I suspect that Matoesian’s conclusions about defense attorneys’ power would apply to a prosecutor’s cross-examination of a black man accused of raping a white woman. In fact, for most of American history prosecutors in the South took advantage of a powerful inference, based on race alone, that intercourse between a black man and a white woman constituted rape.10 As the judge in the notorious 1931 Scottsboro rape trial of nine black youths explained: “Where the woman charged to have been raped, as in this case [ ], is a white woman there is a very strong presumption under the law that she would not and did not yield voluntarily to intercourse with the defendant, a Negro.”11

Today, prosecutors of black defendants still benefit from an arsenal of racist myths on which to lock their linguistic devices. Moreover, defense attorneys who cross-examine black victims of rape discredit their stories with racist as well as patriarchal codes. Kimberle Crenshaw reports that “[o]ne judge warned jurors that the general presumption of chastity applicable to white women did not apply to black women.”12 I can imagine the complexities of race, class, and gender applied to trial discourse that structured the cross-

9. Legal scholars have discovered in other contexts that certain procedures disadvantage less powerful participants. See, e.g., Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1345 (1991) (cautioning that mediation poses particular dangers to women since women tend to be more relational and thus more deferential than men).


examination of a black student at St. John's University in New York who claimed she was sexually assaulted by as many as five white students in a fraternity house. In addition, legal scholars using Matoesian's analytic approach would probably want to take greater account of the substantive law and explore how it interacts with cultural norms in structuring trial discourse.

Finally, how do victims of rape resist the reproduction of rape through courtroom discourse? Matoesian does not present cross-examination as simply the predetermined squelching of the victim's story, but as a negotiated process. He notes several points in the cross-examinations where the victim succeeds in undermining the defense attorney's strategy and wresting control of her testimony, if only temporarily. Perhaps Matoesian's analytic technique could help rape victims devise more successful strategies for telling their entire story at trial.

In short, Reproducing Rape provides legal scholars with a different lens with which to examine the world in which we operate. It also demonstrates the potential for uniting the insights of law and other disciplines to understand the law's role in social reproduction and to accomplish social change.