

In Her Image:
Iconic Modalities Driving Law, Gender, and Cultural Perceptions of Rape

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Abstract

Historically, there has been a dearth of literature acknowledging the importance of iconicity in sociocultural studies. In this paper, I first outline Peirce's semiotic framework, with a focus on iconicity. I then discuss the relationships between language and law, and language and gender, paying particular attention to iconicity. Finally, I sketch the relationships between law, gender, rape, and language. I analyze the role of iconicity in four sites of legal discourse on rape: statutory discourse, judges' discourse, courtroom discourse, and pre-trial procedural discourse. Finally, I focus on pre-trial procedural discourse as a particularly potent site for iconic modalities, and argue that the iconic processes therein significantly shape rape discourses at all other levels.

Please note that while it is acknowledged that rape victims are not exclusively female, nor perpetrators exclusively male, this paper focuses on the rape of women by men.

Notational Conventions

Following conventions in phonology:

[] Square brackets enclose token-level phenomena, e.g. a specific occurrence of a word: if I say "dog" this is transcribed [dog].

// Slashes enclose type-level phenomena. So, when I say [dog], this is an instance of the word, /dog/.

1 Preliminaries

"There is difference and there is power. And who holds the power decides the meaning of the difference."

—June Jordan, *Technical Difficulties* (1994, p. 197)

1.1 Introduction: Law, language, gender

Laws and legal language have tremendous impact not just within the courtroom but also outside the narrow confines of the legal space—and yet the language of law is a register that is alien to the majority of those who end up encountering it: defendants, complainants, jury members, courtroom audiences. In fact, it can sound so alien to our ears that we may think it has nothing to do with us, that it does not "reflect reality"—at least not *our* reality. Legal language belongs to lawyers and describes some arcane world that lawyers alone can navigate.

But this is patently untrue. Legal language is part of our world, the world we inhabit together with lawyers, judges, and policymakers. And not only does legal language exist together with us in our social space, but it has tremendous power within it. Before we can begin to understand how the interaction of law, language, and gender shapes the social worlds and identities of those who find themselves at the intersection of the three, we must first understand how legal language works.

The power of law to shape lives and serve as a means to an end has long been an object of reflection and study (e.g. Philbrick 1950, Melinkoff 1962, Kevelson 1982). Recent years have also yielded a wealth of studies attesting to the power of language as a key resource for asserting and realizing group and individual identities, and for harnessing these identities in turn to achieve social and political goals (e.g. Eckert 1989, Eckert & McConnell-Ginet 1992, Bucholtz 2001) The intersection of these two powerful resources has yielded a rich landscape for social and linguistic research. Perhaps the most often remarked-upon feature of legal language has been the performative¹ nature of decisions, judgments, and ceremonies (e.g. Kurzon 1986).

¹ A performative is an utterance that, in being spoken, performs the denoted action. A judge can say "I declare the defendant guilty", and the defendant is made guilty by the judge uttering that it is so. Other

However, performatives are far from the only linguistically interesting features of legal language. Legal language is also characterized by distinct, powerful, and creative semiotic processes that lie behind the everyday means lawyers use to achieve their ends, and it is these processes to which we will devote our attention. We understand the legal system to be a reflection of our society, and our conception of justice hinges on equal treatment under the law. Mertz, meanwhile, shows us how lawyers are socialized to recontextualize case law to harness precedents for their particular arguments (Mertz 1996). As we will see, these are semiotic systems and semiotic processes, and I will argue that the semiotic process at the heart of recontextualization—namely, diagrammaticity, a form of iconicity—is one of the socially creative and linguistically interesting aspects of legal language.

Gender is likewise one of the most powerfully orienting institutions in our society, but it is only decades ago that views of gender have progressed from viewing it as a fixed, preexisting property to a continuously enacted and re-enacted performance. I will argue that this performance is itself iconic, demonstrating again the social importance of iconicity. Yet this performance is constrained by social institutions, and one of these shaping forces is rape as a legal fact.

The role of rape legislation and common knowledge about rape and rape trials play a powerful role in shaping performances of gender. Legal statutes, judges' opinions, courtroom talk, and pre-trial procedural acts regarding rape all orient towards the social conception of rape. I will argue that pre-trial procedures—namely, prosecutorial decisions on whether to take allegations of rape to trial—are a powerful site for shaping popular conceptions of rape, and that this is done through iconic modes.

The role of iconicity in socioculture is underrepresented in the literature. I will assert that iconicity drives some of our most important and taken-for-granted social processes. But first, we must understand what iconicity is.

1.2 Peircian Semiotics

Semiotics is, preliminarily, the study of how signs *mean*, how sign processes work and how signification and communication happen. Peircian semiotics provides a powerful, articulate vocabulary and framework for understanding and analyzing how

examples include a priest saying "I pronounce this couple man and wife", or someone saying "I apologize", "I promise" or, "I bet you that..."

meaning is made and understood. But this powerful vocabulary has also yielded terminological complexity that "has been a factor in limiting the influence of a distinctively Peircian semiotics" (Chandler 1994: §2). Some few of Peirce's terms and ideas have leaked into the general vocabulary of anthropology and social linguistics; but of these few, most are used with gross imprecision and lack of understanding ("icon", "index", "symbol"), or, when they are used correctly, it is without the benefit of the framework in which they are rightly embedded ("type/token").² While our primary concern in the present context will be with icons, and, to a lesser extent, indices, it is necessary to give a general background of Peircian semiotics due to generally poor understanding of its terms and applications and because of our own great need for precision.

At the outset we must draw some distinctions between the frameworks and purposes provided for by Saussure's and Peirce's differing accounts of the sign. Saussure's sign is dyadic, consisting of the *signifier*, such as the sound of the word "dog", and the *signified*, the idea of "dog" triggered upon exposure to the signifier. The link between signifier and signified is arbitrary, in the sense that it is conventional rather than due to any "natural" connection. Saussure makes much of the arbitrariness of the signifier-signified relationship, dismissing as linguistically uninteresting other modes of signification. Saussure's approach emphasizes autonomous, arbitrary systems and takes language as the primary and ideal model. (Saussure 1916)

Peirce, on the other hand, defines a sign in the broadest and most flexible terms as *something that stands for something else to somebody in some capacity* (CP 2.228).³ As such, anything can and does function as a sign as soon as someone takes it to mean or refer to something. Moreover, for Peirce, the sign is not a self-evident idea or entity but a *catalyst for an effect* (Turino 1999); such as the alarm I feel when I hear a police siren or the certain idea that springs up in my mind when I hear the word "cat". A fundamental premise here is that a sign has to create an effect (called in this framework the *interpretant*) within the living being who is the recipient of the sign: *nothing is a sign unless it is interpreted as a sign*. This premise precludes the abstract assigning of

² The type/token distinction, for example, leaves out the third term ("tone") that forms the trichotomy. This is a significant error because Peircian semiotics is grounded in triadic, rather than dyadic, relations.

³ By scholarly convention, references to Peirce's *Collected Writings* (1931-58) are formatted as: CP volume.paragraph.

meanings; there is no inherent meaning in a sign, only meaning in context⁴. Peirce's framework will provide us with a way of classifying signs according to how and why they mean or signify, but it is important to remember that the categorization of any given sign is not inherent but dependent on the context and the interpreter. Peirce's theory of signs was meant to illuminate how people experience the world and make concrete the very process of thought. Such is the *process* (note that this is an activity, not an idea) of semiosis, where one sign effects an idea that in turn becomes a sign for a different idea, and so on. This is semiotic chaining, which models, among other things, the process of thought.

In turning to Peirce then, we are not simply presenting a system for the precise categorization of signs (although precision of language is necessary in this endeavour). We are attempting to "elaborate the distinct workings and potentials of different sign types in human life" (Turino 1999: 222).

1.2.1 *The Main Trichotomies*

Peirce's semiotic framework is predicated upon the central categorization of all phenomena into three modes of being. Though not often elucidated in linguistic scholarly work that uses Peircian semiotics, this basic trichotomy is the organizing principle by which the rest of Peirce's semiotic is structured. We will outline it briefly to begin with, and return to it after our tour is complete, when we will better be able to discuss and harness it.

There are, then, three modes of being: Firstness, Secondness, and Thirdness. Firstness is the realm of pure quality and possibility. Firstness exists in and of itself, without relation to and independent of any second entity or particular instantiation. Firstnesses are simplex and immediate, and we almost never meet true Firstness in our mundane world. Examples might be *redness* or *Americanness* or fear independent of any particular instantiation. It is significant to note that Firstnesses are not necessarily "natural" or themselves non-semiotic— *Americanness*, for example is socially constructed and socioculturally relative.

Secondness is the realm of existent objects, the experience of actual fact, of pure reaction. Secondness is a relation between two entities, unmediated by any third entity.

⁴ As will become clear after our discussion of the logical order of determination of the sign, sign relations do have the *potential* to stand for some things prior to any context or interpretation by a living being.

An instinctive reaction of pure startlement is Secondness. If I were to react to something large and dark with pure, thoughtless fear, I would be experiencing Secondness. But if I stopped to think about it (thus mediating my response), I might be able to consider why I am afraid and what exactly it is I'm afraid of. Tables, chairs, roses, words, and everyday objects also partake of Secondness, and necessarily include and embody Firstness, as a red rose embodies the quality of redness.

When earlier I reacted with fear to some occurrence and then mediated my response, I touched upon the realm of Thirdness. Thirdness involves the mediational capabilities of a thinking entity to form general, law-like relationships between two other objects. This is the domain of habit, reflection, and, indeed, representation—as we will see, representation necessarily involves mediation between a sign and its object. When we habitually associate, by convention, one thing with another, we partake of Thirdness. Although earlier I experienced Secondness in the form of unreasoning fear at seeing a strange, dark shape approach, when I realized that it was my faithful dog, whom I associate with safety and protection, this association and its effect of calming my fear was due to Thirdness.

This foundational trichotomy underlies and informs the rest of Peirce's semiotic. Equipped with this basic categorization, we can move on to another central trichotomy, that of the sign-relation itself.

A sign-relation is composed of three basic semiotic elements⁵: the representamen, the object, and the interpretant⁶ (Fig. 1.1). The representamen is what we commonly call the sign. If we look at a weathervane and assume it indicates the direction of the wind, then the weathervane itself is the representamen. Likewise, if I were to say the word "dog", referring a certain type of domesticated mammal, and it brought to mind for you the idea of a dog, then the *word* "dog", my particular use of it in that instance, is here the representamen. Representamina are a kind of Firstness, as they exist in and of themselves. Though a representamen only functions as a sign in the full context of

⁵ Sign-relations are, of course, not the only examples of triadic relations. Peirce uses acceleration as another example of a genuine, irreducibly triadic relationship: "Now an acceleration, instead of being like a velocity a relation between two successive positions, is a relation between three." (CP 1.359). For the purposes of this paper, we are only interested in sign-relations.

⁶ In his more mature writings, Peirce actually conceives of two objects, the dynamical object or ground and the immediate object. This, along with Peirce's distinction of three interpretants, will not play a role in the current project and we will use generally use only the generic terms *object* and *interpretant*.

representamen-object-interpretant, its existence as a thing with the potential to mean something is independent of any other element.

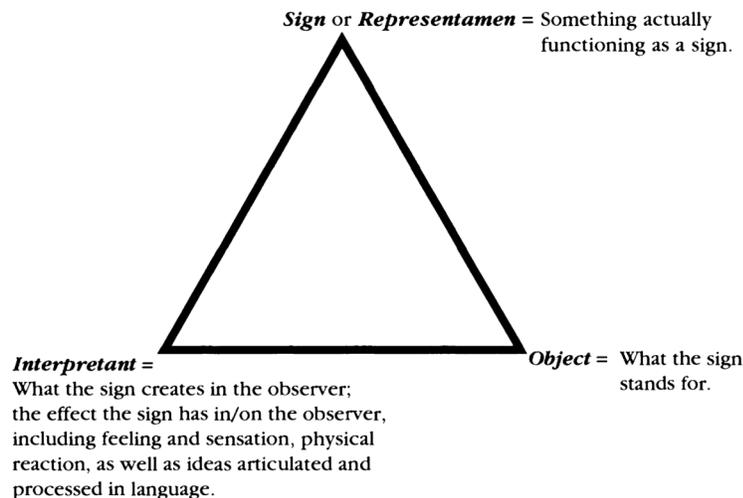


Figure 1.1. The sign-relation (from Turino 1999: 223)

The object is the entity stood for by the sign, the thing to which the representamen refers, or the thing that caused or shaped the sign. It can be a concrete object, such as a particular dog, or an abstract idea, such as the idea of "dog" in general. For the weathervane, the object is the wind that causes it to turn in a particular direction. Notice that objects cannot be accessed directly, but must be referred to by a representamen. Even the act of seeing something, which we might think of as a natural and non-relational act, does not directly access the observed object. When I look at a horse, I do not see the *horse itself* but rather the light that has bounced off the horse's form and into my eyes. This light-image is my representamen for the object, the horse itself. We will return later to the dyadic relationship between sign and object in great detail, but for now it is only necessary to observe that, because this relation is dyadic, it is Secondness.

The interpretant is the *effect* of the sign in/on the observer, what we might call the "sense" or meaning made from the sign. This can be a feeling (a Firstness), a physical reaction (a Secondness), or a complex idea articulated in linguistic terms (a Thirdness). If we take "The Star-Spangled Banner" as a whole as a sign, then it might create in us feelings of pride or hatred; cause us to cry or smile; or bring to mind complex ideas like "home", "country", nationalism, patriotism, or imperialism. The interpretant involves a triadic, mediated relationship with the sign and object; it is a type of Thirdness.

This is the fundamental structure of the sign-relation. There are further categories for types of signs and the kinds of relationships that exist between representamena, objects, and interpretants which will allow us to talk about exactly what goes on when something acts as a sign.

1.2.1.1 Trichotomy I: Types of Representamena⁷

This first trichotomy of the sign-relation involves the nature of the representamen, and is one of Peirce's contributions that has survived somewhat intact into the general literature in the form of the type-token distinction.⁸ Peirce himself gave these categories various names over the course of his writing and development, but we will here use the most common names along with their more vernacular equivalents: qualisign (tone), sinsign (token), and legisign (type).

A qualisign is a sign that is pure quality—an abstract, distinct characteristic or feature. Such might be the quality embedded in a sign such as redness, or the pitch of a musical note. Linguists are more familiar with qualisigns in the context of phonetics, where they are qualities such as "+voice" or "fricative". Qualisigns are prime examples of Firstness, being abstract qualities that are instantiated in Secondnesses. These instantiations are sinsigns. A sinsign is an actual occurrence or fact; it is a singular actually existent object in the world, a specific instance of a sign. Finally, a legisign is a law that is a sign, an abstract law of association independent of any particular instantiation of it. Being laws, legisigns are Thirds. Phones and phonemes are particularly good and familiar examples of tokens and types, respectively. Linguists are familiar with the concept that there is the idea, distinct from all other such ideas, of a sound /t⁹ in English, and that it is different from /d/, for example. Likewise, we take various qualitatively different sounds, such as the aspirated [t^h] in *tip* and the unaspirated [t] in *stand* to be instances of the same "idea" /t/, phones of the same phoneme. And the qualities of each occurrence [t] that we find relevant in these instances, the alveolar-dental-plosiveness, are the qualisigns that determine its potential to serve as a sinsign of the legisign /t/.

⁷ My numbering of the Trichotomies is based on that of Turino (1999).

⁸ Note again that general knowledge omits the third piece of this triangle.

⁹ Notational convention: In phonology, the convention is that entities encased in slashes, /x/ are phonemes and those in square brackets, [x], phones. This notation is very useful and concise, and we will continue to use it here, encasing type-level phenomena in slashes, e.g. /dog/, and tokens in brackets: [dog].

Notice that sinsigns are the only kinds of signs that are single, existing objects. Qualisigns and legisigns are both dependent on realization through and instantiation in sinsigns. Legisigns must each have a multitude of sinsigns to support their categorical nature—a class- or type-level phenomenon can't be defined around a single object, but can only be defined around multiple objects that can be classed together. Likewise, any sinsign is dependent upon the qualisigns, the qualities of the sign, that allow us to apprehend it, and our understanding of a sinsign is informed by it being an instance of a particular legisign. Thus, I might say [dog] and through its particular combination of phonetic properties (qualisigns) you can recognize it as being an instance of the word (legisign) /dog/. Likewise, the fact that any two tokens [dog]—for example, one I speak and one you speak, or one I write and one I speak—can be identified as being "the same kind of thing" (even though the manifestations may differ in all kinds of ways) and are taken to refer to the same object attests to the reality of legisigns. Similarly, *the colour red* is a legisign, instantiated in such vastly different shades as the red of a rose or the red of a stoplight. Legisigns themselves—the classes by which we group phenomena—are generally nested within other such type-level classes, so that /cat/ as an idea is nested within classes like "pets", "mammals", or "animals to which many people are allergic".

Legisigns have been recognized as socially relative categories by which we conceptually group phenomena, and are thus a foundational aspect of culture (Turino 1999). What is possibly less recognized is that qualisigns, too, are socially relative categories: what "counts" as a quality is socially determined. This idea is crucial to understanding the power of icons, for our judgments about what counts as similarity are based on what qualities we find important or interesting, what qualities count towards the semiotic potential of a sign, what, indeed, counts as a quality at all.

1.2.1.2 Trichotomy II: Representamen-Object Relations

This second trichotomy is one of Peirce's better-known and less-understood contributions to linguistics. It deals with the ways a representamen may stand for its object: by being an icon, index, or symbol. These are not mutually exclusive; in fact, most signs partake of more than one. With this trichotomy the categories do not "correspond directly to distinct, natural types of signs [but rather] to *aspects* of signs", and most signs involve a little bit each of iconicity, indexicality, and symbolism. Indeed, these mixed signs are often the most interesting (Stjernfelt 2006:70). I make explicit this point because it is often forgotten, and some critiques of Peirce are based on the incorrect idea that most signs are of pure types. We will be discussing iconicity (and indexicality,

to a degree) in much greater detail later; for now I provide rough sketches for the purposes of establishing the Peircian framework.

An icon, roughly speaking, denotes its object by sharing qualities with it; that is, an icon refers to its object by being similar to it in some way. Note that an icon possesses these qualities, which give it the potential to act as a sign, regardless of the object and interpretant. Moreover, icons are the realm of possibility, for a given icon cannot point to a specific object but only refer to the possibility of an object that shares qualities with it. An icon, then, is a First. So, a stick-figure drawing of a man is iconic of a man because, like a man, it has a head, torso, and limbs and stands upright. We will discuss the basis of such resemblance in greater detail, but for now it is important to note two things. First, we must recall that similarity is culturally grounded. Secondly, we assert that iconicity is the only mode through which one may learn something about the object using nothing but the representamen. However, this cannot be done by an icon *alone* (recall that most signs are of mixed type), because icons cannot refer to specific objects: the stick figure cannot refer to a specific man—it might not even refer to humans, but to an alien species that stands upright and has four limbs. This has the simple but powerful corollary that, if we can learn something about the object using *only* the representamen, then that sign must have an icon embedded in it; we will discuss this further below.

An index refers to its object by being spatio-temporally contiguous with it, and thus it can "point" to or focus our attention on its object. This is a Secondness, involving a necessary relationship—spatio-temporal contiguity—between representamen and object. Thus, if I point my finger at my cat to draw your attention to her—notice that the cat in question has to be present at the time I point, and I would have to be within sight of her—then my pointing finger is an index of my cat. Likewise, smoke is an index of fire—it is spatiotemporally contiguous with the fire, being a necessary and intrinsic byproduct of it. An index, then, focuses the attention on a *particular* object—something icons cannot do, as anything that shares qualities with an icon might be its object. Moreover, because an index is spatio-temporally contiguous with its object, it is a sign that is "related to its object through co-occurrence in actual experience [...] The power of indices derives from the fact that the sign-object relations are based in co-occurrences within one's own life experiences, and thus become intimately bound as experience" (Turino 1999:227). The meaning of indices, then, is dependent upon the particular experiential history of the sign recipient, such that "The Star-Spangled Banner" may to different people—or even the same person at different times—index baseball games, Olympic victory, or imperialism.

Finally, a symbol only refers to its object by convention or habit—no causal or natural (indexical) connection obtains, nor are symbols related to their objects by any

kind of similarity. This is the realm of much of what we commonly consider to be "language". A common noun is a good symbol: there is no natural, factual, or inherent relationship between the word "dog" and its object—we merely associate the two by learned force of habit. Symbols are legisigns—they are of a general type, Thirdness—and so their objects may only be classes of phenomena, not specific instances. Thus, the word "dog" can only refer to the general idea of dogs; to get a reference to a particular dog, we must provide an indexical element such as a deictic: "this dog". Unlike indices, the meanings of symbols are largely independent of personal experience and are relatively fixed through social agreement. Thus, although I personally may never have seen a dog, I will have some idea of what the word "dog" refers to because I have heard dogs described and talked about in my society.

1.2.1.3 Trichotomy III: How Signs are Interpreted to Represent their Objects

As can be deduced from the increasingly lengthy title-summaries of these trichotomies, the trichotomies themselves have been steadily increasing in complexity. Trichotomy I dealt with one thing only, the representamen, while Trichotomy II dealt with the relationship between two things: the representamen and the object. Note how this adheres to the hierarchy of primary categories of Firstness and Secondness. We now turn to discussing a type of Thirdness, the trichotomy that involves all three elements of the sign-relation. Trichotomy III deals with how a sign is interpreted as representing its object, the mediated relationship between the object and interpretant. These can be seen as degrees to which the representamen can specify its object.

A rheme radically fails to specify its object; it is interpreted as a qualitative possibility, a set of parameters. It represents a possible object and cannot offer information about real, specific objects. A rhematic sign is semiotically weak, and the work of determining the object is done by something outside the sign. For example, in a rhematic index like a pointing finger, the spatio-temporal context does the work of determining the object: when I point at my cat, the only way to figure out what my finger is indicating is to examine the context and discover that near my finger is a cat, which we can then take to be the object. Likewise, for a rhematic symbol such as /dog/, the representamen tells us exactly nothing about dogs, and all the work of determining an object is done by the socioculture that links /dog/ to the idea of dogs. A rheme, then, simply points to the possibility of an object, and partakes of Firstness.

A dicent, on the other hand, can be seen as something that both points to its object and tells us something about it. This is because a dicent somewhat determines its object;

it is understood to represent a specific actual existent object and, moreover and most importantly, a dicent is interpreted as *actually being affected by its object*, thus being a Second. It is in this sense that a dicent can "tell us something about its object": because it is causally affected by its object, we can interpret it by reading back from the effect to the cause (object) that affected it.

By definition, then, all icons *must* be rhemes, as an icon does not, *cannot*, specify any singular, particular object. An icon may only give parameters, and any object that meets these parameters can be a referent of the icon. For example, a drawing of a crescent shape may refer to the moon, which, when partially occluded, looks like a crescent. Or it may instead refer to a pair of horns, which also shares the crescent shape. Similarly, a clip-art drawing of a light bulb cannot refer to any specific light bulb, but only provides some basic characteristics of objects with which to associate it. Even a painted portrait¹⁰ does not refer to a specific person, but to any person that matches the depicted appearance, or to the possibility of some person appearing this way.

Likewise, rhemes cannot have a truth value—they are not propositions but simply parameters. For example, "_____ is black" is a rheme, where the blank is unfilled. This obviously can't be said to be true or false or have any truth-value at all. It's simply a quality, not attached to any particular thing.

An index can also be rhematic. For example, the ring of a doorbell can be a rheme. Let's assume I have a doorbell that can only be rung once and has a specific tune, so that the person ringing the doorbell cannot change the tune or repeat it to indicate impatience or excitement. The sound of the doorbell, then, points to some token of the type "person at door"—and that is all it does. I can learn no more from my doorbell. For all I know, in actual fact a squirrel ran up my doorframe and rang the bell, or a fairy appeared, rang my bell, and disappeared. But to me, the doorbell can only say "someone at your door rang me."

Indexical rhemes, like iconic rhemes, have no truth value: "that cat" is a rhematic index (with symbolic parts, to be sure), pointing out a specific cat—and that's all. There is no truth or falsity to it.¹¹ Many of the symbols we associate with language—common

¹⁰ We are not considering the cases of *labelled* portraits that specifically tell us that they are a portrait of this real, specific person. Let us say we are considering a painting we found in our attic that shows, in reasonable detail, a person, and that is all we know about the painting.

¹¹ Notice that this rheme does not posit the existence of the specific cat. An index cannot exist without its object in the first place, so by saying "that cat" we are not saying "that is a cat" or "that cat exists" but

nouns, for instance—are rhematic, so /cat/ does not have any truth value, nor does it tell us anything about its object—whatever we know about the object of /cat/ comes from sociocultural knowledge, not from the representamen.

Unlike an icon, an index may be dicent, both pointing out an object and giving some information about it. One classic example of a dicent index is a weathervane—its orientation is actually affected by the wind, so it is in a causal relationship with its object. Thus, when we see a weathervane, we read back from the effect (the direction it is pointing) to the cause (the direction of the wind) and learn something about the object, the wind.

Another classic example of a dicent index is a footprint on a beach, and it also helps illustrate another important principle of dicents: they always contain an embedded rheme. The object of the footprint is the foot that made it. It is indexical, having been spatiotemporally contiguous with said foot at the time of production, and refers to the specific foot that made the print. But we can also learn something about the foot from examining the footprint. This, of course, depends on who is doing the interpreting. You or I might be able to tell how many toes the foot had, and whether it belonged to a child or adult. An experienced tracker may be able to infer also the weight of the person who left it, their gait, or whether they had a parrot on one shoulder. Notice that we are learning something about the object—this must mean an icon (a rheme) is afoot here.¹² And indeed it is so: the footprint certainly shares qualities with the foot that made it; it is an icon of that foot. In our weathervane example the icon is a little harder to pick out, but it is there in the similarity between the direction the vane points and the direction of the wind. Another good dicent index is a bullet hole. It indicates that a bullet has been here, and its shape is iconic of the bullet itself. Yet another example is a fingerprint. Indeed, much of science is based on dicent indices, and this is our primary means of learning about the world: through associations that also inform.

Dicent indices, then, are particularly important because they are direct and convincing signs: they are interpreted as real, natural, or true. Such a connection has often been proposed of body language: our unconscious gestures, stances, and expressions are taken to be dicent indices of actual internal states—they are taken to be the effects of real causes within our bodies (see Bateson 1972 for general kinesics and Bolinger 1983 for

merely drawing our attention to a specific thing, the cat. Neither does the legisign /cat/ in itself posit the existence of such a thing as a cat.

¹² Please pardon the pun.

application to intonation). And yet notice that body language can be feigned—this is commonly done by actors, performers of any kind, and politicians. This type of communication feels so convincing and powerful to us because we read it as "true", so when an actor or politician's body language is of the form that conveys chagrin, we are swayed by it. Of course, we are also aware that body language can be manipulated, and so we might not take it at face value. As soon as something can be feigned—as soon as something we generally see as the effect of a cause is used separately from said cause—we are no longer dealing with an index but a symbol. Thus, a smile can be both an index of true happiness—as when it is an unreflexive, natural response to a real feeling of happiness—or it can be a symbol we use to convey happiness when we might not actually feel anything of the sort, as when we smile for a school picture. An act of lying or pretending, then, is one of producing an icon of a dicent index.

We see, then, that a dicent index is always "true"—by definition, a dicent index shows us the real effect of an actual cause. Of course, dicent indices can be, and often are, misunderstood or misinterpreted, but by definition the effect that should be read as the "meaning" of a dicent has a true causal root.

Symbols can also be dicent, and here we can see again that any dicent necessarily contains a rheme by putting together our previous rhemes—"___ is black", "that cat"—to construct a dicent symbol, a proposition that tells us something but only means by virtue of cultural association: "that cat is black". Note that a dicent *symbol* may be false—that particular cat might in fact be white.

Finally, an argument completely specifies its object; it is a "sign of law" (CP 2.252). A syllogism is a type of argument. Arguments necessarily contain rhemes and dicents. All arguments are symbolic legisigns; our main focus will be on icons and indices. So, tempting as it is to associate arguments with lawyers, arguments do not have much to do with our purpose; rhemes and dicents are much more relevant.

1.2.1.4 Combining the Trichotomies

Having taken a tour of the basic Peircian framework, we can return to the three basic categories of Firstness, Secondness, and Thirdness. While all semiotic processes involve Thirdness, each of the classifications we have discussed moves from relative Firstness to relative Thirdness. Thus, the first term in each of the trichotomies (qualisign, icon, rheme) pertains to Firstness, the realm of possibility and quality, of the monadic mode. Likewise, the second terms in the trichotomies (sinsign, index, dicent) partake of Secondness—existent objects, experience, actual relations between objects. And, of

course, each third term (legisign, symbol, argument) is in the realm of Thirdness: mediated, abstract, and general. Finally, the trichotomies themselves, as was mentioned before, move from Firstness to Thirdness, from the monadic quality of the representamen to the dyadic relation between sign and object to the mediated triad of sign-object-interpretant.

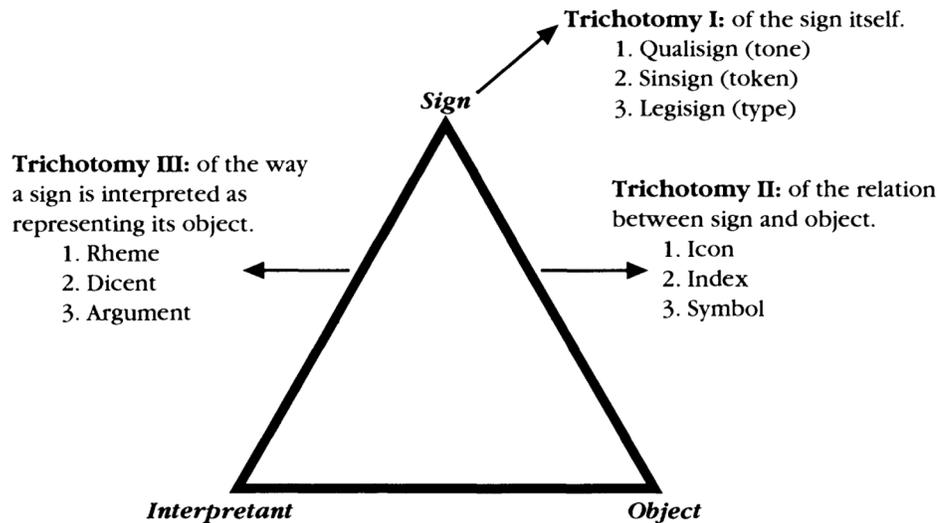


Figure 1.2. The sign-relation and the three trichotomies.

The sign-relation is shown with Trichotomy I aligned with the representamen or sign, Trichotomy II aligned with the sign-object relation, and Trichotomy III aligns with the sign-interpretant relationship. Each trichotomy is ordered from relative Firstness to relative Thirdness. From Turino (1999: 226).

Peirce's semiotic framework rests upon the combination of the trichotomies, giving rise to ten basic types of signs such as rhematic iconic qualisign (like a feeling of "red"), dicent indexical sinsign (like a specific footprint), and rhematic symbolic legisign (any common noun, like /tree/). This gives us the contextualized vocabulary to describe sign relations with great precision.

1.2.2 Inference and the Logical Order of Determination in the Sign

Up to this point we have talked vaguely about "a sign denoting its object", or a sign's capacity to stand for an object (like the clip-art lightbulb has the capacity to stand for any kind of light bulb). Having assembled the basic Peircian semiotic we are poised on the brink of turning our discussion to iconicity and what it has to do with lawyers. But first

we must pause and be more clear on the role of inference and the logical order of determination in the sign-relation.

It is necessary to remind ourselves that Peirce's semiotic, and the principle of iconicity in particular, is a structure of philosophical rather than linguistic concepts: Peirce's system was meant to deal with all kinds of phenomena, unlike the narrowly verbocentrist task defined by Saussure's *Cours*. It is true that language as a system deals primarily with symbols, and the *Cours* deals admirably with that facet of language. However, as Peirce aims for a much broader subject, his semiotic framework is equipped to deal with a larger variety of concepts. As such, the concept of iconicity is wrapped up in "the structure of inference and Peirce's conception of cognition and scientific activity. [...] Peirce defined the means of discovery—inference—and the objects of the processes of discovery—signs—as elements of the same semiotic system, and made them subject to the same constraints and definitions" (Jappy §1). Peirce's belief in the inferential nature of cognition is central to understanding the actual functioning of the sign-relation and the logic of the icon—recall that icons (embedded in dicent indices) are the only type of sign from which we can learn(=infer). Since knowledge is gained by inference, and it is through perception that we infer qualities, existent phenomena, and signs or relations, a complete and systematic logic must be able to deal with the full range of sensations of daily life (Jappy §1). This is part of the reason that Peirce's semiotic is equipped to deal with the everyday occurrences of social life, and why we will proceed to use it to explain the quotidian activity of lawyers in the courtroom, performances of gender, and typifications of rape.

It also means that inference and logical order play an important role in the sign-relation. Where we have before talked vaguely of a representamen referring to an object, we can now state precisely that it is the object that determines¹³ the representamen, such that the logical order of determination is object → sign → interpretant. What this means is that the sign is what mediates between the object and the interpretant; there is no direct path from object to interpretant as there would be in a stimulus-response (as opposed to inference-based) theory of cognition. This is illustrated in Fig 1.3, where the arrows indicate order of determination and the dotted line represents the impermissible direct path from object to interpretant.

¹³ By "determine" here we do not mean "fully determines", but more along the line of "constrains" or "imposes limits on".

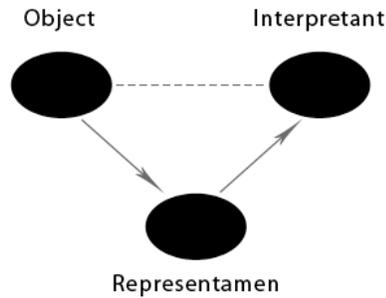


Figure 1.3. The logical order of determination of the sign.

The order of determination is from object to representamen to interpretant. The dotted line represents the forbidden direct connection between object and interpretant.

The interpretant is mediately—rather than immediately, directly—determined by the object. Relating back to inference, it is *because* the object determines the representamen that we can infer things about the object from the sign (recall how we read dicent indices). Peirce provides the following examples to illustrate that this is the only possible order of determination:

There must be an action of the object upon the sign to render the latter true. If a colonel hands a paper to an orderly and says "You will go immediately and deliver this to Captain Hanno" and if the orderly does so, we do not say the colonel told the truth; we say the orderly was obedient, since it was not the orderly's conduct which determined the colonel to say what he did, but the colonel's speech which determined the orderly's action. (CP 5.554 as quoted in Jappy §2.2)

Moreover, the object not only brings the sign into existence but also determines its structure, the object informs the sign; this is of import for iconicity in particular. What is imparted on or communicated to the representamen is pure form or quality, because quality—Firstness—is the only monadic phenomenon, the only stable, indivisible quality that exists eternally and independently. We can see what this means after we examine one of Peirce's formulations of the sign-function:

The Icon has no dynamical connection with the object it represents; it simply happens that its qualities resemble those of that object, and excite analogous sensations in the mind for which it is a likeness. But it really stands unconnected to them. The index is physically connected with its object; they make an organic pair, but the interpreting mind has nothing to do with this connection, except remarking it, after it is established. The symbol is connected with its object by virtue of the idea of the symbol-using mind, without which no such connection would exist. (CP 2.299 as quoted in Jappy §2.3)

The representational capacity of the icon is grounded in qualities that it possesses. And the representamen possesses these qualities independent of object and interpretant. It only comes to signify, to *mean* anything, when an object determines it and it is in turn used to excite an interpretant in the receiver. Thus I might scribble a bunch of lines on a sheet of paper without any intention to draw a particular thing, and the scribble will possess whatever qualities it comes to possess. Then I may ask you to look for a picture of a duck in the scribble, and suddenly my scribble will become an icon of a duck, because some intersection of lines in it happened to resemble the outline of a duck. My scribble was not *meant* to be a duck, but happened to have the *potential* to stand for a duck because it possessed some qualities in common with ducks. We see, then, how the object determines the representamen, and how an iconic representamen is such as it is independent of its object and only becomes a sign for its object when we call upon particular qualities of it by asking it to stand for a particular object. Peirce provides the following elucidation of the icon:

An Icon is a sign which refers to the Object that it denotes merely by virtue of characters of its own, and which it possesses, just the same, whether any such Object exists or not... Anything whatever, be it quality, existent individual, or law, is an Icon of anything, in so far as it is like that thing and used as a sign of it. (CP 2.247 as quoted in Jappy §2.3)

My scribble possessed whatever qualities it did regardless of anything else. The same scribble could well have turned out to possess some qualities in common with a horse and could have been taken as a sign for a horse, but whatever these qualities are, they were inherent in the representamen. In this sense, an icon is monadic, possessing, by itself, the *capacity* for signhood as long as it has at least one quality.

We can also now clarify what we mean by an object informing or communication form to a representamen. We do not mean that an actual physical transfer of qualities must occur (though it might with a footprint or wax seal, for example), but rather "the appropriateness of one thing standing for another thing by virtue of at least one common quality" (Jappy §2.3).

Let us turn, within this framework, to the index. In the case of the icon, the existence of an object is not necessary for the representamen to have the *capacity* (as long as it has at least one quality) to serve as a sign for a particular object. The index, however, is defined precisely by its dependence on an object that is contiguous with it or affects it and thus makes it fit to serve as a sign for that object. This is most evident in dicent indices, wherein, without the cause, no effect can be read into the sign. A weathervane by

itself cannot refer to the wind¹⁴ until it has been actually affected by the wind and, because the wind has caused it to point a certain direction, can then serve to tell us something about the wind, to function as a sign for the wind. In short, a weathervane is literally meaningless without the wind that determines it. Such is Peirce's definition of the index, and the dicent index in particular, which also serves to elucidate how an index must have an embedded icon:

An Index is a sign which refers to the Object that it denotes by virtue of being really affected by that Object. [...] In so far as the Index is affected by the Object, it necessarily has some Quality in common with the Object, and it is in respect to these that it refers to the Object. It does therefore, involve an Icon, although an Icon of a peculiar kind; and it is not the mere resemblance of its Object, even in these respects which makes it a sign, but it is the actual modification of it by the Object. (CP 2.248 as quoted in Jappy §2.3)

Thus, our weathervane shares a directional quality with the wind: it points in the direction the wind is blowing. It follows that an index is dyadic, although indices, like icons, obviously cannot function as signs until they determine an interpretant. Note that this dyadic relationship that inheres in indices is pre-semiotic, while representation using indices *is* semiotic. Thus, as soon as our weathervane was actually affected by the wind, it had the *capacity* to serve as a sign but could not actually do so until we received it as a sign and formed an interpretant for it—until we read it and formed an idea of the direction of the wind from it.

Finally, the symbol is completely triadic, requiring not only the representamen and object, but also an interpretant before it has the capacity to function as a sign. A symbol "is a sign which would lose the character which renders it a sign if there were no interpretant." (CP 2.304 as quoted in Jappy §2.3) Peirce also provides a fuller definition:

A Symbol is a sign which refers to the Object that it denotes by virtue of a law, usually an association of general ideas, which operates to cause the Symbol to be referring to that Object. It is thus itself a general type or law. [...] As such, it acts through a Replica.¹⁵ [...] Now that which is general has its being in the instances which it will determine. [...] The Symbol will indirectly, through the association or other law, be affected by those

¹⁴ Although it may, perhaps, be an icon of a rooster or arrow, but we are considering its fitness to refer to the wind in particular. Note, however, that the weathervane's inherent qualities, such as its shape, render it an appropriate icon for a rooster or arrow. But without having been affected by the wind, the vane cannot serve as an index for the wind.

¹⁵ *Replica* was another of Peirce's terms for a sign or token.

instances; and thus the Symbol will involve a sort of Index, although an index of a peculiar kind. (CP 2.249)

This means that, if the interpretant were to vanish, not only would no relation obtain between the object and representamen, but the representamen would cease to have the *capacity* to function as a sign for that object at all. So, if I were to say "dog" in the absence of a law to associate it with some object (any law would do, even if it didn't refer to domesticated canines but instead related an occurrence of "dog" to invasion by aliens or to an all-powerful being in the sky), then that instance of the word "dog" would at best be a nonsense syllable, not a sign, or at the very least not a symbol. It may be a rhematic index that takes me, the utterer, as the object, but it would have no real "meaning".

We can now return to Peirce's definitions of icons, indices, and symbols in terms of what kinds of connections they have with their objects. What Peirce is referring to is that the iconic relation is a relation of reason, while the indexical relation is a real relation.

A relation of reason is a relation between two things such that if one of the two were to disappear, the relation still remains. We can see how this is an iconic relation: when a representamen shares qualities with its object, if we were to remove the object or leave it unspecified, the qualities that related the two would still be present in the representamen; the qualities themselves are not affected. A relation of reason requires human cognition or intervention—recall our emphasis on the cultural dependence of similarity and the social construction of qualities. The following might be an example of such a relation: Jefferson and Hamilton are both Americans, and as such are in at least one capacity iconic of each other: they share the quality of Americanness. (They also share the qualities of being male, white, dead, etc., all of which are as culturally constructed as the idea of being American.) If Hamilton were to vanish from existence, Jefferson's Americanness would still be intact.

An indexical relation, on the other hand, is a real relation. This is a relation such that if one of the relates were to disappear, the relation disappears as well—this closely recalls our discussion of the index's dependence on a second element, its object. Marriage is a real relation: one cannot be a husband without there also being a wife to be husband to, and vice-versa. The existence of a husband points to, is indexical of, the existence of a wife. If either relate were to vanish, then no marriage obtains. (Notice that this is different from one of the persons dying—they would still have participated in the relation, and the remaining participant is still thought of as a husband or wife, but a widowed one.) A partnership of any kind is a real relation: there is no such thing as a singular, lone partner; the existence of one partner points to the existence of at least one other partner.

In this sense, we come to understand the order of determination in the sign-relation. While the representamen may exist as a thing in itself, its capacity *as a sign* is determined by its object. It can then, as a sign, in turn determine an interpretant. This understanding is necessary for a discussion of iconicity.

1.2.3 *Icons and Hypoicons: Image, Diagram, and Metaphor*¹⁶

We come at last to the final trichotomy we will consider and the one most central to our argument: the three types of icons. Although iconicity has the potential to be of much interest to anthropologists, linguists have largely ignored the potential of icons, focusing largely on the symbolic aspects of language (see, for example, Saussure's dismissal of onomatopoeia and focus on symbols). While it is true that most of the lexical items in language are symbolic in nature, a lot of the most interesting creative and social work of language is done through icons and indices (e.g. Turino 1999, Mertz 1996). Icons have a powerful potential for social action because they are signs of possibility and similarity, and as was emphasized above, what counts as similarity is culturally determined.

Of course, that is not all we can say about similarity, and in order to understand iconicity it is necessary to ask the question: what, precisely, do we mean when we say two things are similar? What kinds of similarity are there?

This is precisely the question that hypoicons—the three subtypes of icons: image, diagram, and metaphor—are equipped to answer.

The first question we must ask is: what does similarity tell us about the object? Recall that quite early on we stated that iconicity is the only mode that can tell us anything about their objects simply by examination of the representamen. Recall also the importance of inference in the Peircian semiotic and the logical order of determination where an object determines a representamen. We can now substantiate our earlier claim about the information content of icons. *Because* an icon has inherent qualities that render it fit to serve as a representamen for some objects, we can, by examining a representamen that serves as an icon for a particular object, *infer* things about the object based on those very qualities that make the representamen a fitting sign for that object. It is in this sense that iconicity is the only modality that can give information, and we can see more clearly now why all signs have an embedded icon, even if it is "of a peculiar sort" (recall Peirce's

¹⁶ Some of the examples and the form of all the sign pictures in this section are taken from Jappy, although I made my own versions of the figures.

definitions of the index and symbol quoted in the previous section). This informational relationship becomes especially evident when we more closely consider the hypoicons.

An image is a pure qualisign: it shares simple qualities with its object. Being a pure qualisign, an image has no concrete existence, and its presence is only perceived in existent objects like the redness of a rose or the pitch of a note. A linguistic example of an image is onomatopoeia, such as the sound of "buzz" or "purr" having a similar quality to the sound a bee or cat makes. Linguistic representations of animal sounds, incidentally, serve as wonderful examples of the cultural relativity of similarity, as different languages come up with vastly different ways to represent essentially the same sounds, and claim that their particular representation is similar to the animal sound itself. While we might think "ribbit" is a fair approximation of the sound a frog makes, Japanese speakers think that "gero gero" is just as fair an approximation of the same animal noise and would probably reject our "ribbit" as not sounding much like a frog at all. But most onomatopoeic sounds across languages have some similarity to one another, all being images of the same sounds—such as the trill or flap in the sound we say a frog makes. So, while an object may have many qualities, an image needs only one such quality to function as a sign for that object. In this sense, an image is monadic, a First Firstness (as icons are themselves monadic), independent of both interpretant and object. This situation has been illustrated in Fig. 1.4.

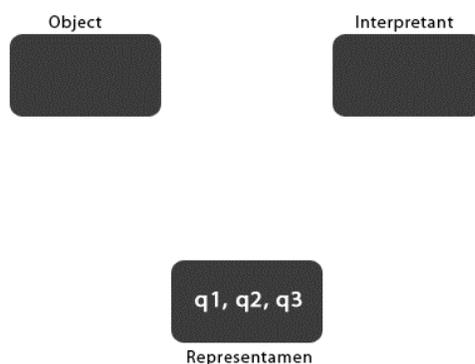


Figure 1.4. The first hypoicon, the image

The representamen is shown to have some qualities $q1, q2, q3$, while the object and interpretant are left unspecified, and no connections are drawn.

Note that the representamen has certain qualities $q1, q2, q3$ independent of the object and interpretant, which are left unspecified.

The representative character of the diagram, on the other hand, is tied to its dependence on the object. A diagram relies on analogous relationships between parts in

object and representamen; its capacity as a sign relies on there being at least two elements associated in a representamen that are likewise related in the object. Note that, just as with images (or any type of icon), the diagram's representational fitness is grounded by indexical relations that already exist in the representamen—in each case, the necessary constituents (qualities for the icon, relations for the diagram) must be present in the representamen. Diagrams, then, are dyadic. Such a sign is a map, where the distances and general scale of the map are proportional to their equivalents in the terrain the map represents. Note that most maps do not share simple qualities like colour with their objects (the red and grey roofs of houses that dot the landscape, the dark grey of asphalt, do not appear on most maps). An architectural blueprint is also a diagram; so are bar graphs and pie charts. Fig. 1.5 below is an example of the latter:

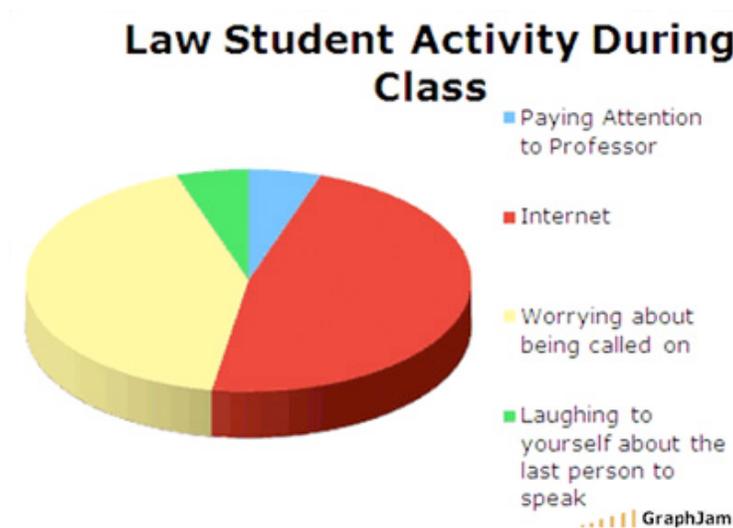


Figure 1.5. Pie Chart: Law Student Activity During Class
 Graph by "Law School Burnout Victim" on Graphjam:
<http://graphjam.com/2008/11/02/song-chart-memes-law-student-activity/>

We see that in such charts, the relationships between the sizes of the slices of the pie chart are taken to be the same as the relationships between the relative sizes of the things they stand for. Here, among law students, there is much more Internet usage and worry about being called on than paying attention to the professor. Elements of this chart are, of course, symbolic, such as all the legends that help us understand what the chart refers to. But the chart as a whole signifies the relative frequency of activities through a diagrammatic relationship between slice size and activity frequency.

Perhaps because we are used to thinking of language in symbolic terms, iconicity is usually harder for us to perceive when its manifestation is linguistic rather than visual.

But linguistic examples, while perhaps serving as poor explanations, are particularly illuminating once the basic idea is grasped and are furthermore important because we will be applying these concepts to linguistic acts. So, a linguistic diagram:

(1) □ This surgeon is a golfer.

The diagrammaticity of this relationship can be illustrated (how we regress to relying on visuals!) in Fig. 1.6, with s ="this surgeon" and g =the class of golfers:

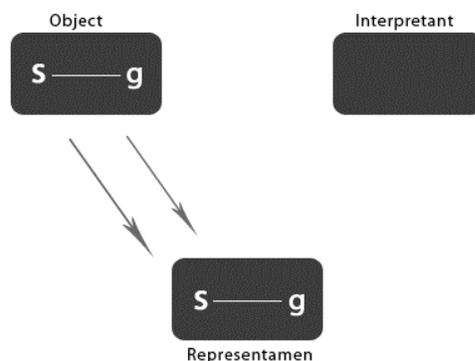


Figure 1.6. The second hypoicon, the diagram.

A relationship $s-g$ is shown in the representamen and in the object, with a connection drawn between the two.

Our subject is the surgeon, and we claim that there is a relationship between the surgeon and golfers—namely that the surgeon *is* a golfer. The surgeon may also be a woman, a blues fan, or a dog owner, but all we are focusing on is that the surgeon is a member of the class of golfers. The membership relation between the individual surgeon and the class of golfers is what is common to both object and representamen. Notice that while the parts of the diagram itself require symbolic interpretation (so that we may know what is meant by "surgeon" and "golfer", for instance), the diagrammatic relationship itself requires no third, mediating entity: as it is in the object, so it is in the representamen.

This is manifestly different in the case of the metaphor, the last and most complex of the hypoicons.¹⁷ Peirce provides the following cryptic definition of a metaphor: the properties of the metaphor are such as to "represent the representative character of a

¹⁷ The following example, and its formulation and discussion, are in large part owed to Jappy, so much of the terminology and structure—though little of the exact phrasing—of the following must be attributed to him.

representamen by representing a parallelism in something else" (Jappy §3.2). This at first seems quite opaque, and unlike the previous two categories, we will begin right away with a linguistic example:

(2) This surgeon is a butcher.

The nature of this metaphorical form is illustrated in Fig. 1.7:

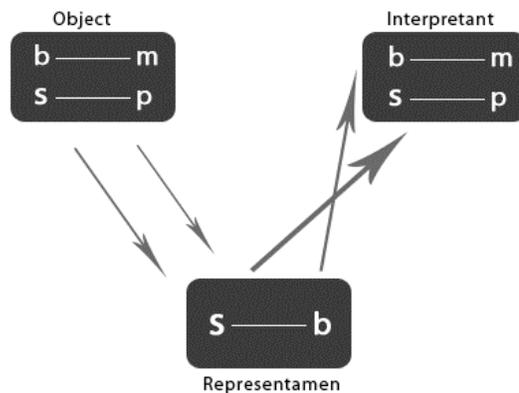


Figure 1.7. The third hypoicon, the metaphor.

The object and interpretant show relationships $b-m$ and $s-p$, while the representamen shows: $s-b$. This relationship is not directly present in either object or interpretant. The lines of association cross between representamen and interpretant, indicating that to make sense of the metaphor, we must untangle the parallelism using sociocultural knowledge.

Notice that the metaphor requires all three elements, sign, object, and interpretant, to be specified. For the sign to be interpreted correctly the parallelism to be found in the object must also structure the interpretant, for, notice that the representamen only has two relates to the object's four, and this missing information must somehow be restored. This is the role of the interpretant, and this is the meaning of the crossed lines between representamen and interpretant: something has to happen there, a process that we will detail below. We elucidate this idea using our utterance (2), an oft-quoted example of metaphor.

First, notice that from a syntactic point of view, our linguistic examples of diagram and metaphor are identical, both being of the form: $NP_1 = NP_2$. However, as described earlier, (1) is a simple diagram, with a member-class relationship that can be understood and taken literally. Meanwhile (2) cannot be "taken literally" and still retain the intended metaphorical meaning: if we take it literally, claiming that this surgeon does not treat his patients like meat but really is, perhaps as a side-job, and necessarily unrelated to his role

as a doctor, a butcher, our utterance becomes a diagram and not a metaphor. But back to (2) as metaphor.

What (2) is doing is establishing a *parallel* (recall Peirce's definition above, which hinges on *parallelism*) between a "base domain" of butchers and the target domain consisting of the particular surgeon in question. In the base domain figures the class of butchers, who, by definition, cut up meat, saw bones, and throw big hunks of flesh around, perhaps with brute force and little finesse. The target domain, the domain that the speaker is trying to characterize or pass judgment upon, probably contains an incompetent surgeon who operates with little finesse or precision and treats his patients like hunks of meat and bone. Our surgeon is not literally a butcher; he is not in a member-class relationship with the class of butchers. Rather, there is a parallel, a *resemblance*, a common quality about the way the surgeon treats his patients and the way a butcher treats his meat.

This is what is represented in Fig. 1.7, with *b* and *m* (for *butcher* and *meat*) representing the classes associated by inclusion in the base domain and *s* and *p* representing the surgeon and patient in the target domain. But note how impoverished the representamen is. The parallelism is quite evident in the object and interpretant, but the representamen is quite underspecified with respect to the notions of "meat" and "patient"—and "incompetence" and "lack of finesse"—all of which have to be inferred from pretty impoverished data, our representamen.

Something is obviously missing from the representamen, and these blanks must be filled in by sociocultural knowledge, like how you and I know that surgeons are supposed to be precise and competent while the work of butchers is messy and involves brute force. Notice how the same metaphor can participate in different evaluative judgments depending on the socioculture in question. An example from fiction can be found in Jacqueline Carey's *Kushiel's Dart*. At one point, the heroine and another woman discuss the sexual prowess of a man, and agree that he "makes love as if he's hunting a boar" (Carey 2001: 152). Later, the comparison is repeated in a different context, where a man from a different culture asks the heroine about his performance in the bedroom:

I remembered what Cecilie had said about Childric d'Essoms. "My lord makes love as if he is hunting a boar," I said; it was not as much of an insult to a Skaldi as it would be to a D'Angeline. "It is a heroic act, but not necessarily pleasing to women." (Carey 2001: 398)

The same metaphor, in two different cultures, is evaluated differently. When the description is attributed to Childric d'Essoms, it is within a culture that values finesse in the arts of love, and is seen as somewhat of an insult. In the second context, however, the

heroine addresses a recipient from a culture which values masculinity, strength, and skills in hunt and battle, and so the same description is much less insulting.

Notice again how much sociocultural knowledge we need to fill the gap! Another popular example of a linguistic metaphor is "lawyers are snakes". Lawyers do not share simple properties like scales or forked tongues with snakes, nor would it make sense for lawyers to literally be a subclass of snake, so we cannot take the expression literally. Rather, our sociocultural knowledge of lawyers and snakes fills in the gaps to tell us that what we mean is that lawyers are slippery, conniving, and related the Devil. Another linguistic metaphor, this time of a different syntactic form, is "a mountain of a man", where we must draw on our sociocultural understanding of mountains to infer that the man in question is probably tall, sturdy, and durable.

Much of advertising is predicated on metaphors. Jappy uses the example of a print ad featuring a woman victorious and relaxed, with great makeup, in a boxing ring with her vanquished male opponent behind her. To interpret this ad, Jappy says we must draw upon our sociocultural knowledge of mens' and womens' roles, boxing matches, male-female relationships, and the role of makeup and beauty in the social power of a woman to come to the conclusion that it is because this woman has chosen the featured brand of makeup that she has won this particular round of the battle of the sexes (Jappy §3.2). Another example is the following excerpt from Augusten Burroughs's memoir, *Magical Thinking*, describing how he came up with a metaphorical ad for potatoes:

One of my first projects was to write a print ad for a potato.

The National Potato Board needed to replace its current ad, which featured a potato covered in thick, green, latex paint and the headline "What must we do to make you realize we're a vegetable?" This was when they were trying to reverse the perception that potatoes were just junk food.

The new strategy was all about speed. Microwave ovens were relatively new, so speed was exciting news. And potatoes were known to be slow. So I did an ad that featured a potato in a wind tunnel, like a car. The headline was "Aerodynamically designed for speed." (Burroughs 2005: 57)

As part of the body copy of the ad itself, Augusten included a fast and easy microwave potato recipe.

Notice that both versions of the ad, Augusten's and the version he replaced, draw on cultural knowledge that is not available from the ad itself. If we did not know that vegetables are, as a rule, green, then covering the potato with green paint would make no sense to us. Likewise, if there was no common perception of potatoes as junk food (and the underlying idea that junk food is unhealthy), and of vegetables as healthy food, then

the attempt to portray the potato as (green=)vegetable would make no sense either. A similar logic applies to the second ad: wind tunnels are known to be related to speed, aerodynamics, and fast cars, while potatoes are, as Augusten says, known to be slow. Putting a potato in a wind tunnel would make no sense to us without these associations, and the general cultural discourse about convenience, speed, and modernity.

Likewise, the print ad in Fig. 1.8 calls upon understandings of sex, the game Twister, and the role of erectile dysfunction medication (note that while this is an ad for Viagra, the name of the pill itself is nowhere pictured in the ad—all that is shown is a little blue pill juxtaposed with the photo of the Twister-bed).



Figure 1.8. A print ad for Viagra featuring a bed patterned like the game Twister.
 Agency: Ogilvy & Mather, Mexico City, Mexico; Creative Directors: Marco Colín, José Montalvo; Art Directors: Alejandro Guadarrama, Carlos Oxté, Aurora Morfin;
 Copywriters: Carlos Oxté, Alejandro Guadarrama; Photographer: Flavio Bizzarri
 Source: Ads of the World http://adsoftheworld.com/media/print/pfizer_viagra_bed

We need all these things to understand that the ad means that Viagra will restore fun to the bedroom.

These visual examples help us understand a very important feature of metaphors: the representamen is called upon to represent an object far more complex than itself. In the process, information is necessarily lost, and we ourselves have to restore it using our

cultural knowledge. It is only thus that a potato in a wind tunnel can stand for the complicated idea that potatoes are fast and modern.

Now remember our syntactic comparison of examples (1) and (2). One consequence of the impoverishment of the representamen is that diagrams and metaphors are often *formally identical*, even though their semiotic differences are vast and socioculturally important. The semiotic work that is done by each one is quite different. In claiming something is a diagram, we claim that the connection is direct, immediate, and *already existent in the object*. But when I make a metaphor, the relationship in the representamen is *not directly available in the object* but must be inferred from sociocultural knowledge. In a metaphor, something is "missing" from the representamen, and it is the power of metaphor to play upon these missing elements. In a diagram, everything is already "there", the relationship that exists in the representamen is claimed to exist in the object.

1.2.4 Naturalization and Essentialization

Naturalization and essentialization are two very important social processes that can be described in semiotic terms. Naturalization is the process by which dicent symbols (rhematic symbol + rhematic index) come to be read as indices (natural, causal connections) and not symbols (arbitrary, sociocultural connections). A certain way of speaking, say, an accent, is a rhematic index of the speaker by contiguity. The accent is also a rhematic symbol: it gives us an idea of the speaker because of socioculturally-determined notions about the type "speakers with this accent". The accent is thus a dicent symbol—a *proposition* about the speaker: it picks out the speaker and tells us something about them. Recall our basic example of a dicent symbol, combining the rhemes "____ is black" and "that cat" to make the proposition "that cat is black". Likewise, a British accent combines a rhematic index, "this speaker" (as any utterance indexes its speaker) with, say, the rheme "____ is British" (though other sociocultural associations may be substituted or added, such as "is stuck-up", "is upper-class", "is foreign", etc.). Note that this proposition, just like the one about the cat, can be false: the speaker could be putting on a British accent and not actually be from Britain.

Many symbols of this kind come to be interpreted as dicent indices—in which case the inference is: this speaker talks this way *because* they are from a certain place, just as a weathervane points east because the wind is pointing east. This interpretation implies a causal, rather than sociocultural, connection between speaker and accent. This is naturalization: interpreting a socioculturally-based, arbitrary connection as one of natural causation.

The related process of emblemization also involves a step down the semiotic ladder, as dicent indices are less semiotically complex than dicent symbols. Emblemization, likewise, demotes group membership from a diagrammatic relation to an imagic relation: groupness is conceived of in terms of *qualities*.

These processes are relevant to the history of gender studies, and essentialization especially will play a larger role in the discussion of rape.

We are now equipped to consider in precise terms the semiotic modalities of legal language and gender and language. Iconicity plays a tremendous part in most any social endeavour, but as the next chapters will make clear, its role in law and ideology of law is absolutely central, and it is one of the grounding principles of gender performance.

2 Language and Law

"The law is a peculiar language: it's not meant to be a mirror of reality."

—Darius Rejali in a lecture on rape, violence, language, and law (November 11, 2008)

Having outlined in detail our semiotic framework, we may now turn it to tackling the problem of legal language. As a broad area of research, the study of legal language includes under its aegis not only a particular linguistic register but also most any use of language in a legal context. Thus the courtroom testimony of a rape victim who is not herself competent in the legal register can come to be studied as legal language, language in a legal context. Research into language in the judicial process has been undertaken by scholars from a variety of disciplines: anthropology, literature, psychology, law, sociology, political science, and, of course, linguistics (Levi 1990). Each discipline has brought with it particular interests, biases, framework, and methodologies, amounting to a rich, if scattered, array of approaches and tools that have been put to work on the problem of legal language. This research, especially work within the last couple of decades, has historically been informed by several key concepts which have themselves only become elaborated relatively recently: speech act theory, conversational analysis, and registers and communicative competence.

Kevelson reminds us (1982) that the legal system is itself a semiotic system, consisting of a repertoire of legal rules, acts, and signs just as language contains a repertoire of verbal or grammatical rules, acts, and signs. More broadly, a legal code itself is often taken to be a mirror, one big iconic sign, of a society, mirroring its correct organization and structure (contrast this scholarly understanding with the layman's xenolith perspective on legal language mentioned above).

While linguistic inquiry into legal language has ranged from inspection of its peculiar lexical forms (Mellinkoff 1963) to fascination with its characteristic use of performatives (Kurzon 1986) to examination of semiotic and discursive properties (Mertz 1996, Kevelson 1982), it is the most recent research, growing out of the last category, that is most relevant to our purposes.

2.1 Acquiring the cant: language (re)socialization of lawyers (OR The Mertz Mambo)

Educational research by Collins (1996) has demonstrated that during early educational experience, students are taught to regard texts in a certain way. The less elite students are taught to see text as something that is to be pronounced correctly, while the more "able" or elite students are taught to read text for its semantic meaning. This meaning is framed as fixed and objective and accessible to any member of society (if they try hard enough). This approach to text forms a key part of language socialization in our society; it is the default frame in which most of us are taught to approach language and texts.

In a series of studies and papers, Elizabeth Mertz (1996, 1998, 2000, 2007) has shown that language *re*-socialization—the breaking down of this objective semantico-referential approach to text—is part of the program of the law school classroom. In fact, the instruction of the law school classroom manages to impart a coherent, shared cultural worldview, and epistemology "[at] the core of [which] is a distinctive orientation toward human social conflict and related notions of authority and morality. Interestingly, achieving this orientation involves the creation of a new relationship with language and text." (Mertz 2000: 98). Her initial study showed how professor-student interactions are structured as indexical icons¹⁸, demonstrating (iconically) the proper attitude towards text and drawing students' attention to (indexing) the text's contextual possibilities by focusing on key words which delimit the scope of that case's applicability. Mertz argues convincingly that the central task of the first year of law school is to teach lawyers to focus on how legal texts index their contexts of productions and use—in other words, lawyers are taught to approach text with an eye to contexts, both indexed past and possible future, as the central task of the first year of law school (Mertz 1996). This approach to text is a sharp departure from the language socialization of the layperson. Where laypeople are taught to look at texts as having a single objective "meaning" accessible through its semantic content, lawyers are taught to see the "meaning" of texts—their usefulness, their applicability, their scope—as mutable and context-dependent, as indexing their contexts of use.

¹⁸ Note that this sign, the professors' method of instruction law students, is an indexical icon, not a dicent index. Both involve an icon and an index, however, in a dicent index, the icon is *governed* by the index. In an indexical icon, the icon is not governed by the index, they are separate modalities of the same sign by virtue of having the same object.

Mertz elaborates on the language socialization of lawyers in subsequent studies. In "Linguistic ideology and praxis in U.S. law school classrooms" (1998) she addresses the professors' strategy of forcing students to "take positions" and role-play in the classroom as part of an ongoing metapragmatic structuring of discourse.

That structuring is a key ideological message of law school socialization. It prepares students for a legal world that constantly effects a translation of people into their roles (plaintiff, defendant) and actions into their legal categories (tort, breach of contract). This translation occurs within a system in which either of two opposing results is always possible (guilty, not guilty) and in which effectual and "correct" metapragmatic regimentation (in courts, legal documents, in law office talk) yields powerful social results. A key presupposition of the legitimacy of those results in our society is the untying of the drama as legally translated from its usual social moorings, the putative objectivity of the story once told in the apparently dispassionate language of the law. (Mertz 1998: 158)

This discourse is full of iconic relations and not a few essentializing processes. And not only is iconicity here prevalent, it is the very *key* to the success of law's legitimation as a system: narratives of human conflict are stripped of indexical features that ground them to the specific instance (their "social moorings") and are instead "legally translated"—abstracted away from individual actually-occurring instance and turned instead into an icon of existing law.

Likewise, in her 2000 paper, "Teaching lawyers the language of law: Legal and anthropological translations", Mertz goes straight to the heart of the matter and raises the question of "whether there is any possible connection between this orientation to text and authority found in legal education and the epistemology underlying legal thought in the United States" (2000: 103). Mertz re-emphasizes that professors focus students' attention to the "pragmatic warrants", directing their "increasingly expert gaze" towards hierarchies of authority and away from the drama and moral ambiguity of human conflict narratives. Equipped with this understanding of the language socialization of lawyers, Mertz is prepared to connect this orientation-to-text in lawyers to an orientation-to-law in society:

The "reoriented" students search for those key "facts" and pragmatic cues that allow them to link this story to previous cases and situate it within its current legal context. [...] [This method] tests the students on their ability to read texts for legal pragmatics rather than for social, emotional, or narrative content.

There is an interesting combination of abstraction and specificity involved in this process. In order to connect each new conflict story with legal precedent, students must focus on detailed aspects of the stories, in order to categorize the new facts as instances of general, legally-specified types. For example, a student would argue that a particular act or event in this

new conflict story constitutes a breach of contract because it is arguably the "same" as an action or an event in a previous case where the courts found a breach. Yet, this apparent concern for specificity wrenches detail from its particular social and narrative context in ways that can obscure or erase the features of the story to which lay people look when reaching moral judgments. One could argue that there is an attraction in the apparent neutrality of this kind of categorization; it conveys the idea that no matter who you are, you will be dealt with similarly. Thus, by running the "facts" of your conflict or case through the filter of legally relevant categories (guided by and invoking forms of legal authority), any individual may escape the prejudices and inequities of socially-embedded moral judgments.

[...] Moreover, this step out of social context provides the law with a "cloak" of apparent neutrality, which can conceal the ways in which law participates in and supports unjust aspects of capitalist societies. This approach also gives the appearance of dealing with concrete and specific aspects of each conflict, thereby hiding the ways that legal approaches exclude from systematic consideration the very details and contexts that many would deem important for moral assessments. (Mertz 2000: 104-105)

What emerges, then, is a picture of powerfully present iconicity. Iconicity is inherent in the legal system and is part of its power, part of its influence over laypeople, incorporated into our ideology of law. Iconicity, I would argue, is at the heart of performances of law and is its native semiotic mode: the idea of law is to treat everyone the same, to treat all "equivalent" cases in the same manner. Iconicity is the basis of our legal system.

Moreover, diagrammaticity is arguably the most essential semiotic modality. The task of the lawyer, after all, is to make diagrams. In arguing a case or providing an opinion, lawyers and judges are primarily engaged in gauging the applicability of existing law to the present case and recontextualizing such law appropriately to harness it as precedent to the case presently at issue. The problem of the lawyer and judge is then to use this approach to text to harness precedential case law to achieve their ends. In order to claim a case as precedent—or, indeed, in order to claim that a law does or does not apply in general—the lawyer must draw a connection between the case under consideration and the law or precedent they wish to use. This connection is diagrammatic.

The lawyer's task is to show that a law or precedential opinion that gives certain parameters and defines certain relationships is applicable to the current case. The lawyer must show that their current case is fit to be an icon of this law. But what the case shares with the law cannot be simple qualities—laws and opinion are generally formulated quite differently from the facts of a case as enters the courtroom. The only recourse is to draw a diagrammatic or metaphorical connection. But a metaphorical connection will not suit

either: if the facts of the case (the representamen) are a metaphorical parallelism to the relationships set out in the law (the object) then the relationships that obtain in the representamen *do not actually obtain in the object*.

A successful and convincing application of law or precedent to a case must then be a diagrammatic relationship. The lawyer must show that the *relationships* that obtain in the representamen, the case, also *actually obtain* in the law or precedent, thus rendering the case a fit icon of the law or precedent.

It is in this sense that the primary task of a lawyer is to draw *diagrammatic* rather than imagic or metaphorical connections. In doing so, the lawyer makes a powerful assertion about the social realities of the case at issue and the laws and precedents he tries to apply to them: the assertion is the difference between a real, existent relationship and one that is contingent on outside factors.

With an eye towards the importance of iconicity in law, we can now examine sites of legal discourse.

2.2 Sites of legal discourse

While the language socialization of lawyers takes place in the law school classroom, there are many other sites of legal discourse with relevance to our topic. Here, a broadening of the scholarly conception of legal studies is indicated to bridge the gap between "law-as-legislation" and "law-as-practice" (Ehrlich 2001: 22). While socially-licensed bodies may implement important legal statutes, it is still left up to judges to interpret them, police to enforce them, and lawyers to deploy them. And yet, the law claims a special place as the objective definition of events, refuting, disregarding, or ignoring alternative formulations.

2.2.1 *Legal doctrine: statutory discourse*

The body of statutes that comprise the overarching entity of a state's "law" is one site for legal discourse. This body has been represented as a complex icon of the ideal or imagined ordering of society. The law not only imposes sanctions to ensure compliance with social norms, but also robustly generates definitions and categories that discursively regulate social life. (Ehrlich 2001: 19). For example, laws that do not extend to gay and lesbian couples the same rights and privileges afforded heterosexual couples help define and generate the category of "normal sexuality" in our society. The treatment of gay and lesbian couples under the law is an icon of the cultural conception of "normal" sexuality.

Likewise, different treatment of minors and adults under the law reflects and reproduces our notions of aging, adulthood, and agency. The categories provided for in legal doctrine dialectically reflect and shape the categories of our society. Legal doctrine is then in a very real sense a diagram of the society that generated: the relationship between homosexual and heterosexual couples under the law is like the relationship between society's views of homosexual and heterosexual relations.

However, legal doctrine does not exist in a vacuum—it must be interpreted and applied in each instance. For example, although our system provides for different treatment of suspects who are minors, it is possible to petition the court to have the minor tried as an adult, requiring the court to actively address the cultural assumptions behind the law. Application of legal doctrine cannot be culturally neutral, for it is an instance of diagrammaticity, which is necessarily culturally dependent. This viewpoint may later help us examine the question of why many cases of rape that meet the doctrinal definition are not considered or treated as such by judges, juries, lawyers, and police.

2.2.2 Judges' discourse: opinions and holdings

Judges generate another site of legal discourse in their opinions and holding on cases. These texts index the hierarchical structure of authority in which verdicts and appeals are embedded—judges reference and attempt to make clear the case's procedural history and on what authority the judges make their decisions. This authority can be referenced implicitly, by indexing the judge's office and thus the authority society has vested in it, or explicitly, referring to prior applications of law to this case that were overturned and must be reconsidered. In these texts, judges attempt to elucidate the application of statutes by referencing case details, always with an eye to limiting or otherwise influencing potential future use of this ruling as precedent. Judges' discourse is generally very aware that opinions and holding will form the objects of future case-law diagrams, and thus orients itself towards the practical consequences of sentencing and decisions.

Judges' discourse is particularly important in courts of appeal. While trial opinions and holdings have been shown to be oriented towards the blameworthiness or culpability of the offender, concerns about community safety and standards, and the practical consequences or social costs of sentencing decisions (Steffensmeier, et al. 1998), judicial discourse in courts of appeals foregrounds the issue of law applicability and correctness of procedure. Here the legal system is highly self-reflective, and in such cases judicial discourse plays a major role in interpreting statutory discourse—in deciding what will count as valid icons of law. The ultimate example in America is the Supreme Court,

which ultimately decides whether the legal system is serving as a fit icon for our society. When the law is seen to deviate from ideal organization of our society, the Supreme Court holds it unfit to represent us and our mores.

2.2.3 *Trial discourse: The legal register in action*

Trials are the most public and public-oriented face of the law, such that performances in the courtroom have a greater power to influence popular ideology. "In the criminal trial, applicability of statutes, relevance of evidence, and rules of procedures must be interpreted an enacted locally *in situ*" (Matoesian 1993: 22). The courtroom is also the site of public, discursive deployment of the legal register.

Crucially, the courtroom is also where the law exercises its power to claim an objective framing of a narrative, although this process has more precisely and fruitfully been conceived of in scholastic work as the co-production of an "official story"¹⁹ in which the legal institution has asymmetrical access to power and resources to shape this official story. This unequal co-production of the official story of an incident in turn has consequences for both legal and popular perceptions of categories. In the courtroom, people are presented as victims, perpetrators, witnesses, and experts, thus producing and reflecting each category in the eyes of the public and the law. In the case of experts, for example, legal and procedural points define who can be called upon as an expert and what kind of testimony they may give, and strategic manipulation of these procedural and legal points can set precedent for including or excluding different kinds of experts. Likewise, the public (as members of the jury, or consumers of news if the trial is covered) is then exposed to these experts, helping to shape their conceptions of an expert, which in turn influences lawyers' decisions about who to tap as experts in terms of who the jury will find to be a convincing expert.

By the time a trial has come to sentencing, an official story of the incident in question will have been created, incorporating evidence, testimony, jurors' opinions, and judges' holdings and sentencings. In creating an official story of an incident—by labelling it a breach of contract, armed robbery, or rape—courtroom discourse creates a repertoire of

¹⁹ This official story encompasses any testimony given in a foreign language. As described by Haviland in "Ideologies of language: Some reflections on language and U.S. law" (*American Anthropologist* **105**(4): 764-774), U.S. try to maintain one single translation for foreign-language testimony. If jurors are familiar with the foreign language, they are asked to disregard their own translation and base their decisions only on the court's official translation.

exemplars of the aforementioned categories which can be referenced later—by both lawyers and laypeople. This creation and reinforcement of types of categories in an iconic process, based on deciding which qualities or an incident are salient and then classing incidents together based on criteria of similarity of these salient features.

Courtroom discourse is also iconic in another way: the domination of laypeople by lawyers, experts, and professionals (such as policemen) in the courtroom is iconic of the raising of legal, expert, and professional narratives above lay narratives in our society. Recall that the courtroom is the primary public site for deployment of the legal register; professionals and experts likewise have access to privileged registers (often the register of scientific inquiry). Matoesian (1993) demonstrates in conversational-analytic detail how lawyers and judges dominate rape victims; while domination of rape victims may still be more prevalent and severe, most laypeople are likewise dominated by figures of authority in the courtroom. This domination reflects our conception of a properly ordered society, where law, expertise, and professionalism are called upon to arbitrate lay disputes.

2.2.4 Semipublic discourses: police, interviews, and the pre-trial shaping of the case

Lawyers are very aware of the preceding points about the public nature and impact of courtroom discourse. In connection to this, one final site of legal discourse must be mentioned: pre-trial discourse wherein the preparations for court are conducted. This discourse is semi-public, as laypeople come in contact with policemen during arrests and responds to calls; with investigators in interviews and interrogations; and with doctors, psychiatrists, and other professionals who are called upon to assess and interpret evidence. And, of course, this is the site of first contact between laypeople and lawyers over the course of a case's procedural history. During this pre-trial phase, lawyers collect information from the case principals, witnesses, and aforementioned professionals and decide how to frame the case: whether to take a case to trial or not, what charges to present, whether to plead insanity (or otherwise plea bargain), which jurors to select, etc. All such framing decisions are aimed towards the public and legal scrutiny of the courtroom.

These pre-trial decisions have an enormous impact on the outcome of cases—in fact, many cases never make it past this stage. Frohmann (1991, 1998) and Spohn, Beichner, and Davis-Frenzel (2001) have claimed that from one-third to one-half of rape cases stall at the pre-trial stage and are not fully prosecuted. This pre-trial phase is an important site

for controlling access to privileged resources of the legal sphere. Moreover, this site is key to deciding what the public gets to see: if certain kinds of cases consistently do not make it to trial, then those same sorts of cases are never presented to jurors and so do not participate in forming public conceptions. It is at this stage that initial classifications of people (defendant, complainant; victim, perpetrator; reliable/unreliable witness) and decisions about admissible evidence are made. In deciding if and how to proceed with a case, it has been shown that prosecutors and police are influenced by the popular conceptions of certain crimes and people in a specific way (Frohmann 1991, 1997, 1998; Kerstetter 1990; LaFree 1980; Spohn et. al. 2001), orienting their decisions and actions around what they believe juries will see as a believable token of the aimed-for type. Thus, for example, deciding to charge a suspect with a higher charge, such as a felony, can be oriented towards what the prosecutor believes constitutes a felony in the eyes of jurors. Likewise, in deciding whether to proceed with a rape trial, lawyers are influenced by what they believe jurors think counts as a credible rape victim—usually, a woman who doesn't engage in risky behaviours such as drinking, drugs, or walking alone at night (this last regularly raises suspicions of prostitution). And in choosing jurors, lawyers actively attempt to choose jurors whose conceptions they believe will be sympathetic to the lawyer's framing of the case.

In the pre-trial phase, then, lawyers are in the business of assessing the public's (potential jurors') ideas of acceptable, typical, or credible types, and base their strategies around exploiting the iconic relationships between their case and these types.

The pre-trial phase also shapes public opinion in one other way: especially for those complainants whose cases were not prosecuted, this pre-trial phase is constitutive of their impression of and performed relationship with the law. People read how they are treated at this stage of the proceedings as iconic of the way the law has or will treat them, or the way the law treats their groups as a whole (women, whites, minors, etc.), or, most broadly, how the law treats the layperson in general. Lawyers are aware of this, too; Frohmann (1998) has shown that in rape pre-trial interviews, lawyers actively try to "manage" victims and victim case rejection such that the victim's impression of the legal system remains favourable.

We have seen, then, that iconicity plays a powerful role in the legal system—in law as a representation of society, in layperson orientation towards law, in the language socialization of lawyers. We turn now to another central, orienting institution of our society: gender.

3 Language and Institutions: Gendered Talk

"Sex and race, because they are easy, visible differences, have been the primary ways of organizing human beings into superior and inferior groups..."

—Gloria Steinem, *Address to the Women of America* (1971)

The institution of gender is central to the way our society organized itself. While gender is often taken to be a basic unit of social organization, recent scholarly approaches instead view gender as a performance that is constrained, influenced, and coerced by social institutions.

3.1 Language and Gender

3.1.1 *Language as a reflection of gender: gender differences*

For a long time the dominant program in linguistics explicitly avoided focus on variation in language, following Chomsky's distinction between competence and performance. Speaker *competence* addressed fluency in the ideal, rule-governed system that is language, while *performance* referred to actual speaker deployment of this system, often varying from the ideal. Chomsky saw competence and the ideal language system to be the proper object of study for linguistics. Variations in language, then, were akin to noise in the data and were not seen as beneficial to the study of language.

After the middle of the century this began to change, most notably with Labov's quantitative variationist studies (1966), in which he found correlations between linguistic variables and independent variables such as economic class or race. Labov's pioneering work marked the rise of a robust line of quantitative research into the relationship between language and society. In this approach, language *reflects* society, such that social distinctions—race, class, gender—are reflected in language, usually as phonetic or lexical differences. Social distinctions such as race and gender, then, are conceived of as *preexisting properties* of the individuals studied: they exist prior to and are determinate

of linguistic and other social practice. Language, meanwhile, is interpreted as an *index*²⁰ of these social identities.

Following the recognition of linguistic variation as not only important but as socially meaningful is Robin Lakoff's influential 1972 article, "Language and woman's place".²¹ Lakoff argued that women speak differently from men, and that this different way of speaking both *reflects* and *produces* a subordinate position in society. Lakoff asserts that women's speech is characterized by extensive use of devices like mitigators (such as *sort of*) and tag questions, and that this renders women's speech more tentative and powerless. This style of speaking is learned as part of learning to be a woman in society, and its powerless, trivializing qualities disqualify women from positions of power and authority. In Lakoff's view, then, language is a tool of oppression—that is, language not only reflects reality, but also helps *shape* it.

Following Lakoff, studies of language and gender tended to focus on one or the other of her two key points: that (1) women speak differently and that (2) this difference is the result of—and helps propagate and support—male dominance. While early work on difference was clearly embedded in a dominance framework—such as studies on interruptions as conversational dominance—over time the difference framework spawned an independent field of study that attempted to divorce itself from the wider context of power and politics. Representative of this approach is Deborah Tannen's work on miscommunication between genders, such as *You Just Don't Understand* (1990). Tannen asserts that women and men speak differently because of different socialization experiences, akin to the different socialization of people from different class or ethnic backgrounds.

Studies of language differences were not limited to how men and women speak, but also extended to how they are spoken of. The earliest work in this field focused on lexical items, such as the asymmetries between *master/mistress* and other such word pairs and the common semantic derogation of expressions that refer to women (for example, *hussy* once simply meant "house wife") (Schulz 1975), or the standard use of *he/man* generics (using "he" to mean "any person"). However, by the 1980s, the inspection of gender difference in language expanded beyond lexical items and into discursive representations.

²⁰ This interpretation is an example of naturalization; though this is of some note, in this work we are more concerned with its close cousin, essentialization.

²¹ This article was later expanded and published as a book, *Language and Woman's Place* (1975), which is perhaps the iteration most people are familiar with.

This direction emphasized the historical, dynamic, and interactional character of language, considering language in terms of situated use. Discursive studies unearthed phenomena at and beyond the level of the sentence, such as the common grammatical passivization (from *she helped him* to *he was helped by her*), objectification (not *they did it* but *he did it to her*), or outright deletion (from *she made allegations of sexual harassment against him* to *he is accused of sexual harassment*) of women in discourses, narratives, and other texts.

By the early eighties researchers began looking at ways to reconcile the difference-dominance dichotomy, asking about the contexts in which the reported differences emerged and about differences within genders (Thorne, Kramarae, Henley 1983). Such studies argued that researchers needed to take a number of hitherto largely-uninspected factors into account, such as the details of the speech situation—who is talking to whom, for what purposes, in what setting—and the considerable differences *within* each gender group. Considering differences within gender groups shifted the focus from a search for what is common among women as opposed to what is common among men to the diversity within each gender, how it is expressed, tolerated, or challenged. This approach challenged the essentializing and universalizing tendencies of earlier work, and paved the way for a more situated, performance-based idea of gender.

3.1.2 *Language as performance of gender*

Around this same time, there was a shift in feminist theory and gender studies regarding the nature of gender: analysts began viewing gender not as an unproblematically preexisting property of individuals but as a social construct that is continuously produced and reproduced in social action. Gender is something people perform through quotidian practices such as talk, clothing, and walking into one of two public restrooms. These more recent formulations followed the especially influential work of Judith Butler (1990), and more recent formulations of identity in general and gender in particular that focus on situated talk-in-interaction have come from Penelope Eckert (1989) and her collaboration with Sally McConnel-Ginet (2003). In this approach, identities—including gendered identities—do not arise from permanent or fixed social attributes, and so their performance can vary across different interactional and social contexts. Eckert theorizes the relationship between language and gender in terms of local "communities of practice", the everyday social practices of particular local communities. In this framework, then, gender does not interact directly with language; rather the relationship is mediated by the complex set of communities of practice in which

individuals participate and enact identities. Thus, not only do men's and women's involvement in (and admittedly, access to) "gendered" communities of practice vary, but so do men's and women's relations to normative constructions of gender. Eckert and McConnell-Ginet's framework explicitly leaves open the possibility that linguistic practice—including performance of gender—may vary not only between genders and across individual speakers of the same gender but also *within* an individual speaker.

Gender, it has become increasingly clear, is not a *property* but a *performance*. Gender is something people *do*. And this performance, we must note, is iconic. Performances of gender can be essentializing and imagic, presenting certain properties—certain colours, voice pitch, clothing—as representative of each gender, and modeling one's own performance after the correct properties. But gender is also performed diagrammatically, as relationships between "man" and "woman" as institutions are mapped onto performances by individuals.

However, we cannot afford our subjects unbounded agency in their performances, as their actions are circumscribed by what Butler called "rigid regulatory frames". Enactments of identity, including—especially—of gender, are not produced in a power vacuum. Rather, they are always subject to the institutional coerciveness of social situations (Cameron 1997).

3.2 Gender as Institutionally Coerced Performance

An account of language and gender cannot be complete without considering the power that dominant gender ideologies exert on gender performance. To understand the coercive nature of such ideologies, we must first inspect how any institution can be coercive.

3.2.1 *The Coercive Nature of Institutions*

In their influential 1967 work, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge*, Berger and Luckmann define an institution as "reciprocal typifications of actions [that] are built up over the course of a shared history" (1967: 54). *The Social Construction of Reality* is a synthesizing work that brought together Marx's argument that ideology and ideas reflect social being; Durkheim's claim that social facts present themselves to us as real, objective things; and Weber's idea of the social world as a product of interactions. The resulting overarching schema is the dialectic of the "total

social fact" wherein (1) humans produce the social world such that (2) society is an objective fact that in turn (3) produces human being(s).

For Berger and Luckmann, typificatory schemes are categories, such as "Europeans", "chairs" and "weeding", in which people, objects, and actions are placed or classed. These typifications are the terms in which the reality of everyday life is apprehended and "dealt with". Since institutions are historically built-up reciprocal typifications, institutions set up predefined, habitual patterns of conduct and thought, the coercive power of which is to simply "channel" us in one direction as opposed to a possible multitude of others. Institutions must be legitimized to subsequent generations beyond the original meaning-makers who first performed the actions that became habitual and reciprocally typified.

Note that typification is a beautifully iconic process with immense social power: not only do typifications define similarity and difference—what things are "alike" enough to be of the same "type"—they also define what counts as a *quality*, as *comparable thing*, in the first place.

While language is an important medium in Berger and Luckmann's theory, it is Bourdieu (1991) who takes up the interaction of language and institutions as a specific project. Bourdieu works within a Marxist concern for the reproduction of class. Most 20th-century theories have misrecognized the nature of language as an equally-shared possession of society as a whole. Bourdieu asserts that language is in fact differentially shared within a society, most specifically: different social classes have different access to the standard/legitimate language. This differential access is perpetuated by standardizing institutions which concretize boundaries by arbitrarily drawing lines between "acceptable" and "unacceptable", such as the difference between a failing and a passing grade. These arbitrary distinctions are then naturalized and made to seem functional, valued, and appropriate—such as our belief that failing and passing grades are earned on merit and are not influenced by class- or gender-based differential access to standardized forms.

Also relevant here is the anthropological tradition of Edward Sapir and Benjamin Lee Whorf. The Sapir-Whorf hypothesis posits that the grammatical and lexical structures of a given language influence how native speakers of that language come to view the world, such that speakers of radically different languages²² are predisposed to develop different

²² Whorf really does mean that the languages must be *vastly* different. He lumps all languages of European decent into one large group of essentially similar languages that present us with a similar worldview. This

ways of categorizing and viewing the world—different typifications, for Berger and Luckmann. While the strong version of the Sapir-Whorf hypothesis has by now been largely rejected by linguists and anthropologists, a weaker version remains in currency. In this formulation, recurrent patterns in language *predispose* speakers to certain habitual ways of thinking, but this relationship is not deterministic. The influence of the native language is strong, but not overpowering; to see outside the setting provided by our native language, we would probably have to question some of the most basic "common-sense" assumptions encoded in our language (Ehrlich 2001: 13).

What emerges is a picture in which language, institutions, and society participate in a dialectic, wherein language and other institutions structure society and society in turn structures (and structures access to) language and other institutions. Language, then, is not a neutral or transparent medium for designating or labelling social realities. In this sense, then, are institutions and language intrinsically coercive.

3.2.2 *Sexist Language, and Beyond*

Recent locally- and contextually-grounded accounts of language and gender (e.g. Eckert and McConnell-Ginet 2003) have helped move scholarship away from essentialization and generalizations about women, men, and how they talk. However, we must still consider what force socially ascribed gender norms exert on performances of gender, how the embedded expectations of (generally binary) prescribed social norms structure the enactment of gender. These dominant gender ideologies pre-exist local performances of gender. Until recently, much work in language and gender studies was organized around the distinction between "how individuals produce themselves as gendered through language and how linguistic representations encode a culturally-dominant notions of gender" (Ehrlich 2001: 10). Cameron (1998) problematizes this division:

When a researcher studies women and men speaking she is looking, as it were, at the linguistic construction of gender in its first- and second-person forms (the construction of "I" and "you"); when she turns to the representation of gender in, say, advertisements or literary texts she is looking at the same thing in the third person ("she" and "he.") In many cases it is neither possible nor useful to keep these aspects apart, since the

is in contrast to his pet language, Hopi, which he alleges has a vastly different grammatical structure and thus predisposes speakers to a significantly different worldview.

triangle "I-you-she/he" is relevant to the analysis of every linguistic act or text. (Cameron 1998: 963)

It seems necessary, then, to consider how linguistic representation of gender "in the third person" shapes enactment of gender "in the first person".

One site of linguistic construction of gender in the third person is sexist language in the form of lexical items. Here is where early work on gendered lexical items can be situated and more comprehensively analyzed. In this framework the asymmetrical development of word pairs such as *master/mistress* and *governor/governess* encodes a gender ideology of male dominance and female inferiority. Likewise, *he/man* generics imply that men are the typical, unmarked case of humanity, while women are marked, a deviation from the norm, the Other. The sexism of everyday language coerces our performances of gender: by constantly re-enacting sexism in language use we reinforce the commonsense normality of sexist assumptions. A parallel case exists for discursive practices such as passivization, objectification, and deletion of women in discourse: the consistent use of such practices reinforces cultural perceptions of women as passive, as objects, as absent or unimportant.

This, too, is an iconic process: the representation of women in language is iconic of the normative assumptions about how men and women "are"—the institution, in other words, of gender. How women are spoken of, and how women perform their gender, is iconic of our cultural norms regarding gender.

Linguistic practices, then, have an effect on our performances of gender, which are in turn instantiated in interaction. However, there is one more powerful institution that exerts a force on performances of gender: gender-sensitive legislation, especially legislation about rape.

4 Gender in Legal Discourse: Rape Trials and Legislation

"[T]he legal system is not necessarily about truth and falsity, but winning and losing, and that, in turn, depends largely on which side can best manipulate language"

(Matoesian 1993: vii)

"In male supremacist societies, the male standpoint dominates society in the form of an objective standard—that standpoint, which because it dominates in the world, does not appear to function as a standpoint at all. The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate, and social dominance becomes invisible.

(MacKinnon 1989: 237)

"When the meaning of an act is ambiguous, the words we choose to talk about it become critical."

(Danet 1980: 189)

The legal system presents itself to the public as an unbiased, objective institution. However, numerous inquiries have demonstrated that the law operates not as a "gender-neutral and free-floating institution but as a socially structured and gendered component of patriarchal domination" (Matoesian 1993:15). Investigation into rape, and date or acquaintance rape in particular, provides rich grounds for linguistic analysis. This is especially so in the case of date or acquaintance rape, as in these types of cases, language is often the only evidence that can be presented (as opposed to physical/medical evidence and eyewitness reports in stranger rape cases). Date and acquaintance rape is interpreted as a site of ambiguity, and in most cases the question is not whether sexual acts occurred but whether there was consent.

4.1 Rape as Social Fact

Matoesian (1993) outlines the structural feminist model of rape. In this model, rape is not so much a violation of the social order as an enforcement of it—rape is not so much outlawed as it is "organized, regulated, and legitimated such that it meets male standards and beliefs about sexual access" (Matoesian 1993: 10). This explanation is structured

along four overlapping dimensions, and I provide a summary of Matoesian's treatment of this feminist approach:

- (1) The incidence of rape varies with the structural and cultural organization of society. Rape is seen as varying inversely with the degree of gender equality, and some studies indicate a connection with capitalism.
- (2) Differential sex-role socialization generates and values different traits in males and females: aggression, force, and competitiveness in men and passivity, dependence, and acceptance in women. In addition, attitudes towards sex are differentially socialized in men and women. The male model of sexuality focuses on penetration and orgasm, and prefers sex that is aggressive and physical. The female model of sexuality, meanwhile, does not necessarily orient around penetration and may have affection without a sexual component. Additionally, women are socialized to experience sex as not just—or even primarily—a physical experience, but also an emotional and intimate one. Through this differential socialization, sexually aggressive behaviour becomes a means of asserting masculinity—a facet of performing male gender—and so animates culturally generated scripts of male-female interaction. The locus of violence against women, then, rests in the middle of what is culturally defined as "normal" interaction between men and women. This is also how women can come to view rape as a form of violence, while men are predisposed to view rape as a form of sex.
- (3) "Rape and sexual violence are reproduced and legitimated through culturally interpretive devices which justify, excuse, and glorify male violence against females" (Matoesian 1993: 13). Rape myths include ideas about who is a "proper" rape victim—women who are promiscuous, drink, or go places with strange men, or otherwise violate normative female behaviour— and who is a "proper" rapist: until recently, a stranger black male, although this cultural stereotype has slowly been expanding to include whites and acquaintances (though it does not seem to have yet grown to encompass husbands, boyfriends, and partners). Other popular devices include assigning blame and distributing responsibility: women are seductresses, women mean "yes" when they say "no", nice girls don't get raped, etc. Such tools help rapists justify their actions to themselves and others. In the end, culture and language equip males and females with a framework for understanding their sexual interactions, one which legitimates and reproduces sexual violence.

- (4) Male violence against women is institutionalized and legitimated through the legal system. This assertion is buttressed by numerous facts and statistics such as the low reporting and conviction rates of rape, and the vast disparity between what types of rapes are most common (date/acquaintance) and which are most commonly reported (stranger-from-the bushes).

I would like to add to the last point in the Matoesian's framework. Studies by Frohman (1991, 1998) and Spohn, Beichner, and Davis-Frenzel (2001) have shown that the pre-trial interviews conducted by prosecutors are an important site for deciding which types of rapes go to trial. Frohmann attests that prosecutor's decisions are based more on which cases are *convictable*, as opposed to which cases are *believable*. Thus a prosecutor may believe that a woman was raped, but will encourage the woman not to take it to court because there is little chance of getting a conviction. These decisions are often based on the prosecutors' ideas about what rape should "be like" and how rape victims act and talk. However, of even greater interest is the fact that prosecutors orient their decisions towards what they believe are *jurors'* ideas about rape, rape scenarios, and rape victims. This is a powerful mechanism for filtering out ambiguous cases of rape and perpetuating the cultural stereotype of rape—the fewer ambiguous cases prosecutors let through to trial, the fewer ambiguous cases will be brought to public attention, thus reinforcing existing ideologies of rape. Again, iconicity is shown to be a prominent semiotic mode in these proceedings.

4.2 Rape in the Legal Discourse

Every site of legal discourse enumerated two chapters ago is relevant to rape. While statutes claim to give definitive shape to the idea of rape—what counts, what doesn't, and how it's punished—in reality there is a systemic failure to conform to these statutes, and this failure must be investigated at the levels of judicial, trial, and semipublic discourses.

4.2.1 Rape in statutory discourse

Rape has been differentially situated in the statutes of different jurisdictions, but in North America has taken two broad tracks. After a series of legislative reforms in Canada in 1983, 1985, 1992, and 1995, the offense of "rape" has there been replaced by the more general "sexual assault", expanding the conception of rape beyond acts involving penetration, and, significantly, shifting the conception of rape towards that of a crime of

violence rather than of sex. Canada has also abolished the marital exemption to rape (such that now it is legally possible for a husband to rape his wife) and enacted rape shield laws that restrict the conditions under which complainants' sexual history can be admissible in court. Perhaps most significantly, Canadian law has provided a definition of consent as a function of what the complainant said or otherwise communicated at the actual time of the alleged assault, rather than of what was said before or after. The 1992 redefinition of consent also introduced conditions under which consent is not obtained, which include third-party consent on behalf of the complainant, complainant incapability to consent, and cases of abuse of a position of power, trust, or authority. What these reforms in rape legislation make criminally punishable are instances of coerced sex that do not necessarily involve violence or the threat thereof.

Rape legislation reform in the United States has taken a very different direction. Reformers in the United States feared that introducing formal requirements for consent would focus undue attention on complainants and their conduct—the extent to which they resisted, their "provocative" clothing, their "promiscuous" sexual history. Thus, legislative reform in the 1970s focused on the defendant's conduct rather than the complainant's, which brought attention once again to the role of coercion and force, orienting rape statute discourse around the use or threat of violence. As in Canada, U.S. jurisdictions abolished or weakened marital exemptions and introduced rape shield laws.

While such laws ostensibly draw the line between sex and rape, they must be enacted and implemented—and such reforms do not have much impact on actual rape proceedings if juries continue to be influenced by dominant rape ideologies.

4.2.2 Rape in judges' discourse

Even in the face of waves of progressive rape law reforms, judges' talk about rape sometimes seems startlingly far removed from the spirit or even the letter of these reforms. Judges' opinions still make references to the dress of complainants, implying that it is the woman's responsibility to not dress provocatively if she does not wish to have sex. In addition, Ehrlich (2001) quotes from Coates *et al.* (1994), a systemic investigation of language in Canadian sexual assault trial, which found that judges had a tendency to use different language to describe stranger and acquaintance rapes. In describing stranger rapes, judges were more like to employ language of assault and violence. But in describing acquaintance rapes, Coates *et al.* found that judges were more likely to use vocabulary more suitable to consensual sexual acts. "For example, the unwanted touching of a young girl's vagina was described as 'fondling' in one trial

judgment; in another, a judge described a defendant acquitted of rape and forced fellatio as 'offering' his penis to his victim's mouth" (Ehrlich 2001: 26).

Likewise, judges still make an issue of complainants' unsatisfactory expressions of non-consent, in one case even saying that the complainant's suppression of her concerns about the possibility of physical force from her assailant was tantamount to implied consent. Another judgment reads as following, in a case where two complainants brought charges against the same defendant on separate counts of rape:

There is little doubt that both complainants did not expressly object to some of the activity that took place that evening. It is also expressly clear that their actions at times did not unequivocally indicate a lack of willing participation.

(In the Matter of M.A: Reasons for Judgment in the University Discipline Tribunal, p. 19, as quoted in Ehrlich 2001: 116-117, emphasis Ehrlich's)

Such discourse clearly has its antecedent in the "utmost resistance" standard, which claimed that if a woman did not resist a man's sexual advances to the utmost, then rape did not occur. While this standard was generally replaced by a "reasonable resistance" standard by the 1950s and 1960s in the U.S. (and similar unreasonable requirements were modified by 1983 in Canada), the standard of utmost resistance left behind a discursive legacy that placed the burden on the woman, ultimately judging the occurrence of rape by whether the woman resisted "adequately" or "unequivocally" enough, with all other behaviour taken as consent.

It becomes clear from observing such judicial discourse that it is operating within a framework of free and rational agency, even in the context of rape. This framework presupposes access to unlimited, freely-chosen options, and complainants' strategic agency—acts like repeatedly mentioning other commitments, like class or work, or only pushing the defendants hands away and not otherwise struggling—are transformed in this framework into ineffectual, deficient agency (Ehrlich 2001).

4.2.3 Rape in trial discourse

Although rape shield laws have been in place for some time, complainants' sexual histories are still frequently brought up in the courtroom. A famous case is the William Kennedy Smith rape trial in Florida in 1991. Although the complainants' sexual history was deemed inadmissible in court, the defendant's lawyer was still able to introduce this evidence by implication by questioning the complainant on her bar-going habits and asking the jury to examine her underwear for tears—the jury passed the black Victoria's Secret panties and sheer black bra with blue satin trim from hand to hand. Such practices

discursively paint a picture of an "illegitimate" rape victim—a promiscuous gold-digger out for sex (Ehrlich 2001: 26-27). This is one example of the glaring gap between law-as-legislation and law-as-discourse.

Furthermore, extensive analysis of actual courtroom talk has demonstrated that lawyers habitually dominate their witnesses, including and especially complainants, through talk (Matoesian 1993). The distribution of power between witnesses and lawyers in a courtroom is already uneven by virtue of how courtroom conversations are structured, where lawyers and judges control the conversation and witnesses are discouraged from deviating from the form. However, Matoesian, working in a Conversation Analysis framework, points out that lawyers, especially defense lawyers cross-examining victims²³, actively mobilize this unequal framework to control courtroom discourse. Such tactics included: cooperation in defendant but not victim attempts at conversation repair; exploitation of asymmetrical multi-unit turn availability (as the victim's attempts to string multiple units in a turn could be interrupted at any time by the DA or judge); and control of question syntax, using strategies like framing questions as declaratives with negative truth-tag (confirmatory tag), e.g. "You were *attracted* to Brian, weren't you." (Matoesian 1993: 154). DA's also used what Matoesian calls "direct challenges to credibility", as in these nonsequential exchanges from one of the trials Matoesian analyzed:

DA: Miss Belcher, isn't it a fact that the reason you're in court testifying today is that this all got blown out of proportion when you were stopped on the way back to St Louis by a police officer for a speeding ticket?

V: No.

DA: Ma'am, isn't it a fact that this is all a cover-up for a wild evening of pleasure for you on Chouteau Island?

V: No.

(Matoesian 1993: 154)

²³ Typically in criminal trial proceedings, state prosecuting attorneys bring charges of rape against the assailant, who is thus the defendant, and the victim is the complainant. The defense attorney (DA) is then defending the assailant.

Note that in both of the first two, the DA uses one of the question syntax control techniques, prepending *isn't it a fact* to declarative clauses, such that the ensuing information is presented as a fact. Also note that in both cases the DA makes direct allusions to risky or raunchy behaviour on the part of the victim.

As one final note, Matoesian includes sequential poetics as one of the strategies of domination used by DAs. In a different trial, the DA asked the victim a series of questions about the situation, including (but not limited to) asking her what she knew about the defendant; this sequence lasted 24 turns. For his closing argument, the DA then wove together the threads from that 24-turn sequence, picking out a collection of disparately-voiced facts and structuring them in a sequentially poetic manner to make the emergent narrative appear cohesive, coherent, and damning:

Trial 1: DA closing arguments²⁴

She:: was willing to go alon:::g with him (0.9)

in the beginning (0.8) without knowing

his last name

where he was from

where he was employed

WHAT HE WAS ABOUT >except that he was good looking<

(Matoesian 1993: 173)

Note that poetics relies on iconicity, so that the parallels evident in the above testimony—in syntax, phonetic, pacing, and rising intonation—is constructed so as to imply a similar parallel in logical coherency.

Ehrlich (2001) also conducted a detailed case study of two rape trials, both involving the same defendant, occurring in a University tribunal and a Canadian court. Working in a Critical Discourse Analysis framework, Ehrlich focuses on discursive strategies such as passivization and objectification in courtroom talk. Among the strategies she found was usage of a grammar of non-agency by the accused, wherein the accused would minimize, obscure, or eliminate his agency in the course of events. This is evidenced in use of devices such as agentless passives ("our pants were unbuttoned", p. 47) and unaccusative

²⁴ Notation conventions from Matoesian: colons indicate lengthening (more colons = more elongated), numbers in parentheses indicate length of pause in seconds, underlining indicates stress or emphasis, and capital letters indicate increased volume. Portions between angle brackets indicate a faster speech rate.

constructions ("The sexual activity started escalating even further", p. 51). Ehrlich points out that this discourse of non-agency by the accused actually sees uptake in judicial opinion in these cases: the university ruling stated that "[the accused's] insensitivity led to harm" (p 54), while the court judgment warned:

Young men must be sensitive to a woman's right to say no, and young women, in turn, must realize that when a young man becomes aroused he will be driven by hormones rather than conscience.

(Reasons for Judgment in Her Majesty the Queen and M.A. as quoted in Ehrlich 2001: 58)

In both cases the judicial discourse engaged with the accused's grammar of non-agency, attributing his actions to outside causes (it was insensitivity, and not the accused; hormones, and not the accused) rather than holding the accused fully accountable for his actions. Note that the latter example especially invokes common perceptions of gender roles, wherein male sexuality is uncontrollable and it is up to the woman to make sure it is not aroused if she is not prepared to deal with the consequences.

As mentioned in the section on rape in judicial discourse, Ehrlich also notes that complainants' strategic agency is discursively reduced to ineffectual agency. This grammar of ineffectual agency is adopted not only by DAs and judges, but by the complainants themselves, as they are themselves constrained by the discourses of free agency and utmost resistance. Complainants are also depicted as not having sufficiently or clearly communicated their desires and intentions to the accused.

Ehrlich and Matoesian's work demonstrate how domination is reproduced in the courtroom. In courtroom discourse, female victims are subordinated to male defense attorneys and judges, and to the legal system itself, mirroring the gender norms wherein man is seen as dominant (and, significantly, as the gender of reason and logic, the founding principles of the law). Likewise, when the accused invokes a grammar of non-agency, he is performing masculinity in the sense that he is being controlled by powerful sexual drives. Finally, women are depicted as—and themselves admit to—ineffectual agency, mirroring the position of woman as the less able, weaker gender.

4.2.4 Rape in pre-trial discourse: the major site of type enforcement and reproduction

Finally, we reach the role of pre-trial discourse. As discussed in the chapter on law, this is an important site for influencing public perceptions. Research into the impact of

pre-trial procedures has been conducted by Kerstetter (1990) and LaFree (1980), and especially by Frohmann (1991, 1997, 1998) and Spohn et. al. (2001) for rape cases.

Frohmann asserts that prosecutors are not concerned so much with believability as convictability when deciding whether to take a case to court. Prosecutors orient themselves around what they predict will happen should a case go to court—in particular, prosecutors concern themselves with how the case will be interpreted and evaluated by the jury. Prosecutors actively look for any reason to dismiss a complainant's allegations, because they believe these reasons—discrepancies in testimony, risky behaviours by the victim, possible ulterior motives—will be evident to the jury and will lead to an acquittal. Perhaps of particular interest, while in the court trial the rape incident is often taken out of the context of the victim's life, in pre-trial interviews prosecutors *do* draw upon facets of the victim's life to get a sense of the "texture of a victim's life to justify case rejection" (Frohmann 1991: 222). In making these filing decisions, prosecutors refer to a set of typifications about victim and suspect characteristics and behaviours, and about rape reporting and possible ulterior motives, that they believe to be shared by the jury. If the comparison of case characteristics to typifications of rape is favourable, then the case is less ambiguous to jurors and the prosecutor is more likely to take the case to court. Case characteristics that prosecutors often use to justify case rejection include discrepancies in accounts, drug or alcohol use by the victim, a history of sexual contact with the defendant, waiting too long to file a report, suspicion of ulterior motives, and suspicion of prostitution, the last often raised if the victim was walking around town alone at night or if the encounter happened in a place known for prostitute activity.

One additional factor Frohmann (1997) found to affect assessments of convictability was what she called "discordant locales". She argues that prosecutors and other legal agents tend to ascribe the stereotypical features of a neighborhood to victims, suspects, and jurors who live or spend a lot of time there. Because victims and suspects typically reside in lower-class, racially-mixed neighborhoods while jurors reside in white middle- or upper-class, neighborhoods, jurors' worldviews may be so different as to impact their ability to understand and interpret the victim's and suspect's actions and motivations. Such misinterpretation by jurors is likely to lower the chance of conviction. It's very interesting how this technique highlights to relativity of cultural norms, even within heterogeneous subsets or a larger culture.

Spohn, Beichner, and Davis-Frenzel (2001) confirmed that each of these strategies—discrepancies between accounts, typifications of rape victims and rape-relevant behaviour, ulterior motives, and discordant locales—are used by prosecutors to justify case rejection. They also note that a significant number of cases were dropped or rejected

because the victim did not appear for interviews or couldn't be located, would not cooperate or asked that the case be dropped, or recanted. However, they also note that victim reluctance does not pose a legal barrier to prosecuting a case—but does add to its ambiguity. Finally, they also noted that in the jurisdiction they studied, prosecutors had begun to actively try to prosecute cases of acquaintance rape over stranger rape, and were making attempts to educate jurors about the reality of acquaintance rape. Although these prosecutors are incorporating facts about rape into their pre-trial orientation, it is important to note that the pre-trial procedure is still a major site of typification—and these prosecutors are actively trying to use it to change typifications of rape in their jurisdiction.

The steps of this process, broken down semiotically, are then:

- (1) The jury, as members of the public, have some culturally-influenced notions of what rape is like, including ideas about appropriate victims, perpetrators, settings, actions, and reactions.
- (2) Prosecutors form impressions of the jury's (= the public's) ideas about rape. These impressions are icons of (1).
- (3) Prosecutors orient their treatment of rape cases around (2), which they believe to be a fair approximation of (1).
- (4) Prosecutors break down the amorphous case into the statutory categories such as "complainant/victim", "defendant/assailant", "witness", "intimate-partner rape", etc. These categorizations are based on the applicability of case law to the amorphous, undefined mass that is the case at hand. When the prosecutor breaks the case down into these legally defined categories, the prosecutor is declaring that the relationships in the case are like the relationships provided for in law; the prosecutor is stating that the case is a diagram of the law.
- (5) After breaking down the case along legally provided-for categories of persons and events, the prosecutor examines these categories and divines from each the elements they believe would be salient to jurors—the prosecutor essentializes the group memberships established in (4) down to groupness defined by qualities such as "white", "young", "promiscuous".
- (6) Prosecutors take their essentialized notions of each category from (5) and compare these groupness-defining features with (2).
- (7) If a favourable match between (2) and (5) obtains, the case proceeds; if not, the case is dropped. When a case is dropped, the jury does not see the alternatives to

(1) that may have been evident in that case, and so these factors have less influence over public conceptions of rape. If the case proceeds, then the jury will be exposed to the facts of the case as presented by the prosecutor, and also to the people involved in their case. This will influence the public notion of rape by reinforcing or undermining it. A new cycle of typification begins based on these new data from the trial.

(8) The typifications begun in (7) become, in turns, the notions of rape for the next round, (1).

It is evident, then, that iconicity plays a major role in law, gender, and rape, and that the pre-trial period in particular is a major site for iconic production of rape typifications. These typifications then go on to play a large role not only in public discourse, but in every other site of legal discourse as well, as judges, jurors, and lawyers orient themselves around these typifications. These processes are driven by iconicity, and should bring to our awareness how important iconic modes are in socioculture.

5 Conclusion

All of the processes described in the chapters on law, gender, and rape describe overall tendencies and patterns—they are not deterministic, and agents can still intervene to change the outcome. Nor are all the players—judges, jurors, lawyers, uninvolved members of the public—completely unaware of the influence of these tendencies. One example has already been mentioned: in the district studied by Spohn *et al* (2001), lawyers have started trying to bring more acquaintance rape cases to trial, and are actively trying to change jurors' perceptions of rape.

However, it is still important to note that these *are* tendencies, that they are powerful, and that their influence needs to be recognized. It is important to know how sociocultural typifications of rape are remade and reinforced, as this opens a powerful avenue to changing those perceptions.

I have specifically tried to draw attention to the role of the pre-trial shaping of a case. The courtroom is the most public and most publicized site of legal discourse, but it seems too little attention is paid to the fact that those cases that do make it to court have *already* been filtered and shaped, their narratives already subsumed under the powerful forces of the legal narrative. Cases come to jurors pre-framed in specific terms, shaped by prosecutors oriented towards what they believe to be those same jurors' ideas about rape. The same logic applies to any other type of crime, as when a case comes to court pre-framed as a case of theft, murder, or breach of contract. But I believe recognizing the importance of, and understanding the processes involved in, pre-trial shaping of cases is specifically important in the case of rape. By better understanding how iconic processes shape a rape case, we may be able to better see how to begin reforming the system. While previous rape reform laws have made important progress, the next round of reforms should be informed by a better understanding of how sociocultural understandings of law, gender, and rape interact.

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