**Reinforced Trial by Media: Smuggled Information in Courtroom Discourse**

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**Abstract**

In the discourse arena of the Common Law courtroom, it is lay participants on the jury who are charged with ensuring a fair trial for defendants. The jury is supposed to represent a close link between the legal system and the values of the community it purports to serve (Heffer, 2008). In theory, jurors draw on their combined knowledge to evaluate ‘facts’ presented in court, and then apply the relevant legal principles to reach a verdict beyond reasonable doubt.

The jury represent arguably the most important lay participant in court, whilst also being the least discursively powerful. Trial by media should be reconceived as a consistent and routine process, which recognises that media discourses are operational in the courtroom trial through the conduit of the jury. A range of linguistic and discursive ‘isolators’ render these ‘fact finders’ reliant upon alternative cognitive conceptualizations of crime, propagated habitually and ideologically by the discourses of the press.

This paper contends that legal professionals in the courtroom arena can act discursively to appropriate the marginalized position of the jury, and in so doing can act to ‘reinforce’ the trial by media already operational. ‘Smuggled information’ (Aldridge and Luchjenbroers, 2007) is contained within the cognitive models instantiated by lawyers’ questions and monologues in the courtroom. This analysis shall address the language strategies of advocates in the hybridized discourse environment of the courtroom (Heffer, 2005), establishing that they can serve to reinforce (mis)conceptions of crime which are constructed and maintained by the ideological language of the media and, owing to the range of ‘isolators’ at work at trial, upon which jurors’ reliance is already enhanced.

In exploiting the investigative potential of Stylistic methodology, Critical Discourse Analysis and Forensic Linguistics, this work seeks to establish a Critical-Forensic Interface which yields a re-evaluation of the phenomenon of trial by media as a routine, systematic and ideological process.

**Keywords:** jury, lawyers, isolators, trial by media, smuggled information, smuggled evaluation, critical-forensic interface.

1. **Phenomenon versus Process: Towards the Spectrum of Trial by Media**

In principle the participation of media discourses in the operation of criminal trials by jury is an infrequent and irregular occurrence. Legal systems in Great Britain and the United States operate by a number of statutes and conventions which purport to regulate the potential of media representations of crime to play a routine role in the justice arena. Lord Denning, one of the most prominent British judges of the twentieth century, commented in a judgment in 1982:

Whoever has to consider it should remember that at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folk who sit in juries, they are good sensible people [...] the risk of them being influenced is so slight that it can usually be disregarded as insubstantial.

(Lord Denning, *R v Horsham Justice, ex p Farquhason, 1982.* Corker and Young, 2003:251)

Dominant Common Law legal systems rely on several laws and procedures which are designed to secure this apparent insubstantiality.

In Britain the Contempt of Court Act 1981 makes it an offence for publications to interfere with the course of justice. The so-called ‘strict liability rule’ in this Act states:

1. The strict liability rule.

In this act the “strict liability rule” means the rule of law whereby conduct may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

(Contempt of Court Act 1981, Chapter 49, Section 1)

Section 2, specifically subsections 2 and 3, provides clarification that the Act refers only to active trial proceedings and that the risk to these proceedings by representations in the media must be considered ‘substantial’:

2. Limitation of scope of strict liability [...]

(2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

(3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of publication.

(Contempt of Court Act 1981, Chapter 49, Section 2)

In the United States, owing to the free press provision of the First Amendment, regulation of the media is in most cases unconstitutional and so there is no replicable U.S. equivalent to the Contempt of Court Act. Rather than impose regulation on media coverage of crime, U.S. trials instead proceed by a process of jury selection known as *voir dire*. Potential jurors are questioned by opposing attorneys and the judge in order to assess their suitability to serve. Jurors may be dismissed ‘for cause’ or by Peremptory Challenge, for which for lawyers require no specific or technical justification. By attempting to ‘tilt’ the jury as much as possible, attorneys attempt to assess preconceived notions of a case or crime which might be possessed by potential jurors. Levi and Corker (1996:623) describe the principle of *voir dire* as ‘the selection out from the jury panel of anyone who seems to have paid the remotest attention to the world around them’.

One of the strongest conventions operated by Common Law courtrooms in the apparent regulation of media participation in the trial is known as the ‘fade factor’. This is basically that the immediacy of the trial environment will act to eradicate previous misconceptions about case or crimes from the minds of the jury. Controversial British Law Lord Sir John Donaldson, in passing judgement in a 1987 libel case involving England cricketer Ian Botham and New Group Newspapers, which was influential in solidifying this cognitively unaware convention, stated in his ruling:

Proximity to the trial is clearly a matter of great importance and this trial will not have taken place for another ten months, by which time many wickets will have fallen, not to mention much water having flown under many bridges, all of which would blunt the impact of publications.

(Lord Donaldson, *A-G v News Group Newspapers, 1987.* Corker and Young, 2003:25)

In the trial of serial killer Harold Shipman, who was convicted in January 2000 for the murder of 15 of his patients when he was a general medical practitioner in the northwest of England, defence barristers urged Mr Justice Forbes to dismiss the case against Shipman owing to the high profile and vitriolic nature of how ‘Doctor Death’ had been portrayed in the media. In invoking the fade factor, the Crown counter-argued the immediacy of the courtroom experience would trump the effect of any pre-trial publications on members of the jury (Coulthard and Johnson, 2007:98).

Regulations like the Contempt statute, *voir dire*, and the fade factor are important in the casting of the process of trial by media as an infrequent phenomenon which can be adequately policed by legal officialdom. These regulations link closely with those which set out the role of the jury in the courtroom trial. Most important amongst these is the operation of the ‘law/facts distinction’, the principle by which the jury are the ‘triers of fact’ and the judge is the ‘trier of law’. In theory, jurors are coveted for the experience they represent at trial, ‘the man on the Clapham omnibus’ – as Lord Bowen once famously termed the average and reasonable juror – is the embodiment of the common sense which classifies the ‘good sensible people’ of Lord Denning. According to the law/facts distinction, jurors apply their community values and common sense to evaluate the ‘facts’ that are presented in the Evidence stage of the trial. Many legal figures who have supported the institution of the jury, often to the arguably detrimental end of preventing required improvements of the system, in the face of attacks upon jurors’ ability to adequately perform their prescribed functions, have lauded this community values role of lay participants at trial:

In theory the jury exists in order to ascertain what are the true facts, and then to determine on the basis of these, the guilt or innocence of the accused. The jury has been dominion “over the facts” because historically, the criminal law has accepted that the *common sense, popular knowledge of a group of ordinary citizens* is more likely to reach an understanding of the truth than might some collection of specialised, professional minds.

(Findlay, 1988:163 *– emphasis added*)

Supporters of the jury system, many of whom are in favour of maintaining the secrecy that surrounds the deliberation process, insist that the arrangement which gives juries ‘dominion over the facts’ provides a very real societal check on potential miscarriages of justice:

The function of infusing *community values* into the operation of the criminal law is one of the most compelling arguments in favour of the jury system. Criminal law engages some of our *deepest and most strongly held moral sentiments*.

(Brown and Neal, 1988:131 *– emphasis added*)

The theory of the law/facts distinction proceeds from the evaluations of the ‘facts’ reached by the community values and common sense of these courtroom neophytes into a verdict in conjunction with the law as set out in the statute books by a process of courtroom conversion which is performed by Judicial Instructions towards the end of the trial. A juror is tasked to bring his/her ‘knowledge of life’ conscientiously to bear on ‘facts’ presented in the Evidence stage of trial proceedings (in an adversarial courtroom these are of course ‘disputed facts’). The panel is then instructed by the judge on the relevant legal conditions they should apply and the ‘reasonable’ manner in which they should do so. As Dumas (2000) puts it:

In every (Anglo-) American jury trial there is an obligatory ritual during which the trial judge attempts to convert a group of ordinary citizens [...] into experts on substantive law and judicial process.

(Dumas, 2000:50)

Critical linguistic perspectives of the theory which underpins the role of the jury in the courtroom trial are the crux of the research which redefines trial by media as a systematic and routine process, rather than as an infrequent and sensationalist phenomenon regulated by the provisions described above. The legal system views the ‘deepest and most strongly held moral sentiments’ of laypersons who are selected for jury service as atomistically conceived. The great dissenting Supreme Court Justice Oliver Wendell Holmes Jnr famously commented of the jury that ‘the life of the law is not logic, but experience’ (Holmes, 1881:35). Critical linguistic alarm bells begin to sound however when this ‘experience’ is lauded by legal officials and commentators as if it is acquired intuitively by courtroom jurors.

The community values by which jurors are charged to evaluate the ‘facts’ in Evidence are ‘experienced’ through social discourse interaction with how crimes are constructed in the media. The 30000 British Crown Court cases and 150000 jury trials in the United States per year address what are perceived as the most serious crimes (Walby and Allen, 2004; Margolis, 2009); murder and manslaughter and rape and robbery are tried annually by 400000 British citizens and 1.5m Americans who are unlikely to have had direct experience with these crimes. Furthermore, and somewhat ironically, processes of *voir dire* and jury vetting would likely dismiss potential jurors who had garnered such direct experience from serving. Crime occupies a significant and central position in the contemporary media, indeed this coverage of crime has endured from the earliest emergence of the prominence of the press (Leps, 1992), and when readers who become jurors act as the conduit for these media made pre-trial representations of crime to enter the courtroom trial the process of Direct Trial by Media can be said to have occurred.

The legal system, despite the lack of critical awareness of some legal commentators and sociologists of the law, does not say that jurors should enter the courtroom trial as blank slates upon whom only the judge’s definition of a crime can be etched. Freiberg reminds us that the jury should parallel the views of the community:

Although the legitimacy of the jury depends upon its impartiality, impartiality does not mean that jurors should be without prejudice, only that the balance of prejudices in the community is reflected in the jury.

(Freiberg, 1988:115)

The legal system instead holds true to the principles of the law/facts distinction, insisting that the courtroom trial will perform the required conversion of these ‘balances of prejudices’ into criteria for a verdict which are in line with the law. In theory, the incursion of media made concepts of crime defined as Direct Trial by Media should be stopped in its tracks.

The conversion of lay participants who Kalven and Zeisel (1966:4) describe as an ‘ever-changing, ever-inexperienced group of amateurs’ into experts in substantive law however presupposes that jurors can comprehend the technical features and discursive irregularities of the courtroom arena to an unlikely degree. In the face of a range of linguistic ‘isolators’ which pervade the trial process, rather than pre-trial media made conceptualisations of crime being eradicated for courtroom jurors, their reliance on them is increased in what is defined by this research as Enhanced Trial by Media. These linguistic isolators are represented on the Framework of Jury Isolation below, and demonstrate that jurors are linguistically vulnerable throughout the genres which compose the courtroom trial.

**Table 1: Framework of Jury Isolation**

**“PEOPLE” →** Discourse construction and maintenance of ‘common sense’ ideologies.

TECHNICAL LANGUAGE

*(Intervention of vetting and voir dire)*

**JURY →** Representatives of ‘common sense community values’ at trial

Experts in the “facts” apply this evaluation to Evidence stage events.

SILENCE

Disputed “facts” of the case evaluated - contested narratives of each side.

Judicial Instructions

**DEFENCE → ← PROSECUTION**

EVIDENTIAL

NARRATIVE STRUCTURE

(LEXIO-GRAMMAR)

STANDARD OF PROOF  **→** Jury experts on “law”

CONSEQUENCES OF

LINGUISTIC ISOLATORS

“Law” applied to “Facts” – SECRET DELIBERATION

**VERDICT**

Trial by media is hence redefined as a systematic and routine process when viewed and analysed from a critical and forensic discourse perspective. The critical-forensic interface developed in this research, forensic in its analysis of the linguistic vulnerability of the jury throughout the trial and critical in its analysis of the crimes which fill the resultant comprehension gap, reconceives trial by media on a spectrum basic, represented by Table 2 below:

**Table 2: Spectrum of Trial by Media**

**Direct Trial by Media Enhanced Trial by Media Reinforced Trial by Media**

Law/facts distinction. Fade factor.

Smuggled information/evaluation.

Framework of Jury Isolation.

Preconceived crime Reliance on schema enhanced Legal participants rhetorical

schema enter the owing to linguistic and tactics reinforce preconceived

courtroom. discursive isolators. schema.

The present research contends that the law/facts distinction fails to recognise language as ideology laden discourse – the ‘common sense’ which jurors bring to their evaluation of the ‘facts’ is not intuitively acquired but institutionally and routinely constructed in the discourses of the press. Neither are jurors the ‘blank slates’ which some sociological and psychological research has mistakenly defined them. The presupposed immersion of jurors within the courtroom trial is undermined by a range of linguistic and discursive isolators which, rather than enhance their involvement, enhances their reliance on their preconceived notions of crime and criminals when deliberating. This may also be a factor in the continued secrecy of the jury room.

Table 2 demonstrates that the ‘world knowledge’ upon which jurors rely is largely constructed and maintained by media discourses, which can hence be redefined as active participants in the administration of justice. This participation is enhanced by the linguistic make-up of the trial. The Spectrum of Trial by Media illustrates that trial by media is not the infrequently occurring phenomenon that can be hence represented as regulated by the statutes and conventions of the legal system, but rather it is a systematic and routine process which is contained in consistent media constructions of crimes, and the reliance on these ‘world knowledge’ interpretation frames by courtroom jurors isolated by elements of the linguistic make-up of the trial. Having briefly introduced the way that trial by media has been redefined and the Direct and Enhanced elements of the Spectrum of Trial by Media proposed by the critical-forensic interface of analysis developed in this research, the remainder of this paper shall focus on Reinforced Trial by Media.

Reinforced Trial by Media refers specifically to the strategies of legal advocates in appropriating the linguistic vulnerability of trial decision makers. This paper shall analyse the lexical choices and narrative strategies of lawyers that can be seen to reinforce conceptualisations of crime or other social constructions which have been made prevalent by the discourses of the press.

1. **Reinforced Trial by Media: Smuggled Information at Trial**

The core strength of the critical-forensic interface for analysing trial by media is that it considers both the language of the courtroom trial and the media discourse with which it interacts, be in that in filling the comprehension gap of isolated jurors or in being offered as a crutch of comprehension by professional advocates. The analysis of this paper shall consider Reinforced Trial by Media in terms of the language of violent sexual assault cases; how rape is represented in the press and how defence attorneys can appropriate such representations to construct a non-credible victim in the courtroom. By focussing on such traumatic crime events, the very real effects and implications of trial by media are demonstrated. Lawyers have at their considerable rhetorical disposal the ability to introduce schemata into their questioning of witnesses, or their Opening Statements and Closing Arguments in a case, which can reinforce the ‘world knowledge’ upon which linguistically disorientated jurors are already heavily reliant. By making lexical choices such as ‘prostitute’ or ‘pornography’ in questioning witnesses or constructing monologues in sexual assault cases for example, advocates can capture the body of social expectations associated with these choices. Given that legal advocates fulfil the dominant speaking roles at trial, it is important that a language-based reassessment of trial by media analyses the part played by the professional lawyer.

***Legal Professionals and Discourse in the Courtroom***

Morison and Leith remind us that, as practitioners of the law, it is essential that any attempt to evaluate the workings of justice must address the role of lawyers:

The advocate and advocacy are central to the very notion of the nature of law and legal practice. A legal theory which ignores the art and science of advocacy is limited and blinkered by bottle-end spectacles.

(Morison and Leith, 1992:3)

The fact that lawyers and specifically the manner in which they practice law are fundamental to the positing of any legal theory means that they are also very significant for research into trial by media. The proposing of a critical-forensic interface by which to analyse the routine operation of trial by media inevitably makes a comment upon, and indeed a contribution to, how these jury trials operate. The jury are viewed as a conduit for media-maintained discourses to be active at trial; it is thus crucial that co-participants who possess such a powerful position to influence the jury are also examined.

Heffer (2005) contends that much of the language found in courtroom trials by jury composes a ‘legal-lay discourse’:

[Legal-lay discourse] involves a complex dialogic play between two broad ways of making sense of the world: one based on the subjective reconstruction of personal experience; the other on detached analysis following logical principles.

(Heffer, 2005:3)

The two complementary modes of legal-lay discourse are termed the ‘narrative mode’ and the ‘paradigmatic mode’ respectively, and linguistically reflect other tensions between the functions of logic and rhetoric at trial that have been discussed by legal professionals (Morison and Leith, 1992) and psychologists (Finkel, 1995; 2000). The paradigmatic mode is aligned to logic-scientific reasoning and relates to legal training and tradition which ‘encourage legal professionals to view the trial in terms of timeless logic, definitional certainty, and the working of universal rules and principles’ (Heffer, 2005:28). The paradigmatic mode of legal discourse is abundant in the technical language which characterises the legal arena for many lay onlookers. Away from the decontextualization sought by the paradigmatic mode, the narrative mode is context-dependent and proceeds by intersubjectivity and evaluation. Some of the features of these modes are illustrated in Table 3 below:

**Table 3: Legal-Lay Discourse**

|  |  |
| --- | --- |
| **Narrative Mode: *Context-dependence*** | **Paradigmatic Mode: *Decontextualization*** |
| Actional Strategies |  |
| Focus on dynamics of events | Focus on categories deriving from events |
| Focus on human or human-like agency | Ignore agents or class them as categories |
| Situate events in time and place | Abstract events from time and place |
| Sequence temporally | Sequence logically |
| Intersubjective Strategies |  |
| Try to read internal consciousness of others | Deny what is not publicly testable |
| Focus on subjectivity (intention, belief) | Focus on objectivity |
| Show dialogic potential | Aim towards monologic view of the truth |
| Appeal to shared experience | Formulate and test hypotheses |
| Normative Strategies |  |
| Follow constraints set by cultural canons | Follow constraints set by legal or logic canons |
| Appeal to folk psychological scripts and stories | Appeal to definition and logical deduction |
| Focus on epistemic probability | Focus on epistemic possibility and necessity |
| Base validity on verisimilitude | Base validity on veracity |
| Evaluative Strategies |  |
| Intensify the actional or intersubjective | Demonstrate logical or empirical truth |
| Compare actional and intersubjective with canonical | Compare demonstrable instance with definition of class |
| Use direct speech of narrative agents | Appeal to authority (e.g. through citation) |
| Comment subjectively on narrative events | Comment objectively on analytical results |

(After Heffer, 2005:23)

Table 3 illustrates the range of strategies identified by Heffer’s large scale corpus study of the language of legal professionals. It is clear that the subjective nature of the narrative mode differs extensively from the objective and logic-dictated tactics of the paradigmatic. It should also be clear that neither mode can classify so-called ‘lawyerly speech’ by its characteristics alone. As Heffer puts it:

Legal genres are as they are today at least partly because they have been shaped by the paradigmatic approach to the regulation of society. Jury trial has become the complex genre it is partly because it has been shaped by the paradigmatic framework of the law and partly because it is unable to completely ignore the narrative mode.

(Heffer, 2005:32)

At its core, legal-lay discourse is essentially the accommodation of meaningful communication between lay jury and legal professional. Attorneys and barristers can employ strategies from the narrative mode of trial discourse to circumvent some of the linguistic isolation of the members of the jury. Reinforced Trial by Media has much in common with this perspective, indeed it might be defined as an example of legal-lay discourse in that professional participants seek a communicative common ground with lay participants. When this common ground is acquired by the smuggling of information for example, the discourse construction of which can be located in the language of the news media, lawyers can be said to be appropriating the linguistic isolation of the jury by reinforcing certain media-constructed conceptualisations.

Table 3 above illustrates the narrative mode characteristics identified in the large scale corpus study of Heffer (2005). Of particular interest for the present paper is the aptly named Normative Strategy wherein lawyers ‘appeal to folk psychological scripts and stories’. Heffer (2005:18) has drawn on Bruner’s (1990) ‘folk psychology’ as ‘a sense of the world which is common to the community’. Folk psychology equates to the mental resource which legal literature has referred to as ‘community values’ or ‘common sense’. For the critical linguist, an appeal to ‘folk psychological scripts and stories’ in the courtroom occurs by the activation of ‘common sense’ ideologies which have been constructed, disseminated and maintained by social discourse interaction. The advocate appeals to conceptualisations of the ‘sense of the world’ which, especially in terms of perceived crime and deviance, have a significant presence in the discourses of the news media.

Reinforced Trial by Media is then addressed by the critical-forensic interface by examining how these ‘folk psychological scripts’ occur in legal-lay discourse in the jury trial. By activating these scripts, attorneys are not further isolating already vulnerable jurors but rather they are attempting to reach a communicative accommodation with lay participants. Of course, this strategy, because of the ideological load of the information invoked, is much more than simply throwing jurors a bone of comprehension. When an attorney questioning a witness in a sexual assault case invokes a prostitute schema for example, it is not simply a matter of relying upon the likely fact that jurors will have access to a cognitive network of associative information about prostitution. A consideration of trial by media goes a step beyond identifying such instances; the source of the information invoked by such strategies is also of paramount importance.

***Reinforced Trial by Media: Sexual Assault in the Press***

Aldridge and Luchjenbroers (2007:87) link the very low conviction rate in rape cases to the perceived position of victims and witnesses as disempowered in these trials, irrespective of guidelines that address their ‘vulnerable’ status. A reflection on the operation of trial by media such as the present work, concentrating very much on the role and perception of lay jurors, seeks inevitably to analyse this disempowered position alongside how such participants are portrayed in the press. Witnesses and victims in rape cases can be evaluated according to the cognitive frameworks invoked by advocates. This smuggling of information reinforces pre-trial schemata which have been ‘experienced’ by jurors through their routine ‘reading’ of press portrayals of crime and associated event scripts.

Discourse construction of rape and rape victims has been the focus of research that investigates these portrayals as a major site of the disempowerment of women in language introduced above. Clark (1992) uses both naming analysis and transitivity to examine a series of articles from the *Sun* newspaper, Britain’s most popular tabloid and flagship publication of News International, the British arm of Rupert Murdoch’s News Corporation.

Clark’s analysis exposes a systematic pattern in which the *Sun* lessens the criminal culpability of the male perpetrator, whilst often projecting blame onto female victims. Portrayals of violent crimes against women are found to be ‘sexualized’ in the newspaper text – some rapes for example being represented solely as sexual acts whilst not being cast in terms of the violence and domination which they perpetuate – and the culpability for these crimes are attributed to sexuality often beyond the control of the attacker.

The specific centring of the research of Clark on what is termed ‘male/female violence’ allows her to draw further conclusions located in this specific context. Naming analysis examines the labels attributed to victims and attackers respectively, and found that ‘names seem to relate to sexual availability: ‘fiends’ attack ‘unavailable’ females (wives, mothers and girls) while ‘non-fiends’ attack ‘available’ females (unmarried mothers, blondes, and sexually active girls)’ (Clark, 1992:211). The transitivity analysis leads to similar conclusions regarding the *Sun’s* manipulation of blame in these reports. For example, in examining the newspaper’s portrayal of the so-called called ‘M4 Rapist’ John Steed, who raped three women and killed a fourth in 1986, the *Sun* consistently casts Steed in a passive role, such as in the headline below:

**SHARON’S DEADLY SILENCE: Lover Shielded M4 Sex Fiend**

(*The Sun, 11th November 1986:1)*

In this headline, Steed’s crimes are only implied by the *‘Sex Fiend’* label rather than explicitly mentioned. The focus is upon Sharon Bovil, girlfriend of Steed, who himself is not identified and is displaced to the sub-headline. The Actor of the Material Process *‘shielded’* is Sharon Bovil whilst Steed is the Goal; he is the acted upon rather than the active participant, and his victims are not present at all. The *‘deadly’* actions of this case appear to be those of Sharon Bovil. Further analyses focus on the ‘unrespectable woman’ portrayal of Bovil – by such typically sexualized terms as *blonde, beautiful,* and *petite* – and the fact that the ‘fiend naming’ of Steed only occurs in relation to her, *‘Bovil, 21...her psychopath boyfriend’* (see Clark, 1992:214-5).

Contemporary media language continues to construct sexual assault along Clark’s line of demarcation. Article 1 below is from the *Sunday Life* in January 2012, relating the sexual assault of two women in February 2010:

**Article 1:**

1 **THE FACE OF A MONSTER;**2 **SEX PREDATOR REVEALED: SICKO'S NIGHT OF TERROR**

3 *THIS RAPE BEAST GRINNED AS HIS VICTIMS BEGGED HIM FOR MERCY*  
  
4 THIS is the muscle bound brute who grinned as he raped a woman and beat her friend in a 5 brutal attack that left his victims convinced they were going to die.

6 Lithuanian monster Dainius Antanavicius attacked the two women - one of whom is a 7 mother-of-five - as they were on their way home from a night out in Newry on February 27, 8 2010.

9 The 28-year-old, who has an address at Newry's Blackthorn Street, pleaded guilty last year to 10 orally raping, assaulting and falsely imprisoning one woman, and assaulting and falsely 11 imprisoning her friend.

12 Shaven-headed and wearing a tight white Tshirt and jeans, sadist Antanavicius appeared at 13 Newry Crown Court on Thursday as the details of his horrific crimes were revealed.

[...]

14 The friends were just five minutes from a taxi depot when Antanavicius pounced on them.

15 At first the women thought he was trying to help them, but as they passed a car park in the 16 city's New Street area he told them: "You go here."

17 The pair refused, and it was then Antanavicius turned violent, dragging the women by their 18 hair into the car park.

19 Both women were punched and kicked by the thug and one of them said she saw him 20 smiling as he dragged her with such force that her feet left the ground.

[...]

21 Then Antanavicius took down his trousers and told her: "Do it, do it," forcing one of the 22 women to perform oral sex on him while he continued to kick and punch her friend. The 23 rape victim said she had never performed this sex act before and only did so because she 24 was so scared Antanavicius was going to kill her friend.

[...]

25 The beast was caught after CCTV footage showed him approaching the two women and his 26 DNA was found on one of the victim's jackets.

27 As well as their psychological scars, the court heard one of the women was left with bruises 28 and abrasions on her legs and buttocks, while the other victims' physical injuries were too 29 numerous to detail.

30 Both women suffered significant hair loss after being dragged to the car park.

[...]

(*The Sunday Life,* January 2012:28)

The labels employed to describe the perpetrator in Article 1 are highlighted in red in the excerpts above, and clearly represent a potent example of ‘fiend naming’. This rapist is described by an array of these references: *monster; sex predator; sicko; rape beast; muscle bound brute; Lithuanian monster; sadist; the thug; the beast*. Clark concludes that ‘fiends rape unavailable women’, and Article 1 epitomises this conclusion. The victims are two ‘respectable women – *‘one of whom is a mother-of-five’* – who are duped by this *‘beast’* because they mistakenly *‘thought he was trying to help them’*. Certainly this neo-Gothic naming strategy (Clark, 1992:222) can be said to capture the horror and trauma of attacks like this, however this presentation of the culprit as ‘not a man, but a monster’ has alternative ideological implications also. Crime and criminals are often ‘Othered’ – they are constructed in opposition to society rather than as results of social organization. The strategy of ‘fiend naming’ casts rapists like Dainius Antanavicius as ‘not of this world’, and by implication constructs the violent acts that they carry out in a similar light. Specific dangers are highlighted by such linguistic constructions: ‘normal men’, as it were, do not carry out these acts. Whilst the so-called sensationalized portrayals of media discourse representations might highlight the depravity of these violent acts, these strategies simultaneously detach the acts from the ‘real world’.

There is an extremely important implication for the potential social schemata of courtroom jurors which arises from the reference strategies in media portrayals of violent sexual assaults. One is able to clearly identify the ‘fiend naming’ strategy prevalent in Article 1, a potent example of research findings which attribute attacks on ‘unavailable’ and ‘respectable’ women to beastly perpetrators. Article 2 below, from the regional British newspaper the *Bradford Telegraph*, helps to demonstrate and more fully explicate the ideology being uncovered here:

**Article 2:**

1 **GIRLINGTON MAN RAPED ONE PROSTITUTE AND ROBBED ANOTHER IN** 2 **BRADFORD ALLEY**

3 A 24-year-old man has been jailed for more than seven years for raping one prostitute and 4 robbing another after he lured them into a secluded alleyway in Bradford city centre.

5 Peter Kovacs, who came to the UK from Slovakia in 2010, committed offences of indecent 6 exposure and voyeurism before he struck on consecutive nights in Lower Grattan Road, 7 Bradford Crown [Court](http://www.lexisnexis.com:80/search/?search=court&topic_id=1736) heard.

[…]

8 Judge David Hatton QC was told that Kovacs was dealt with by Bradford and [Keighley](http://www.lexisnexis.com:80/search/?search=Keighley&topic_id=3970) 9 Magistrates in 2011 for staring into a woman's home while rubbing his groin.

10 Prosecutor Jonathan Sharp told yesterday's hearing Kovacs raped his first victim late on 11 November 11 last year.

12 He lured her up an overgrown alleyway, off Lower Grattan Road, after she understood he 13 wanted to pay for sex.

14 Kovacs refused to hand over any money, punched the woman full in the face and wrestled 15 her to the ground.

[…]

16 The woman called 999 while being raped from her phone which had been tucked in her bra.

17 The next night, Kovacs robbed another prostitute in the same alley after beckoning her to 18 follow him.

19 Mr Sharp said the offence had "a substantial sexual overtone."

20 Again, he refused to pay for sex before snatching her bag with such force the strap broke 21 and the victim suffered cuts and scratches.

22 Kovacs ran off with her money and cigarette lighter, leaving her other belongings strewn in 23 the alleyway.

24 When he was arrested for rape, on November 14, his second victim's cigarette lighter was 25 found on him.

26 Kovacs' solicitor Anne-Marie Hutton said: "This is a very disturbing and serious case, in 27 equal measure."

28 Kovacs' family had abandoned him and his time behind bars would allow him to reflect on 29 what he had done.

30 Judge Hatton said: "You have no significant remorse and little understanding of the trauma 31 you will have caused."

[…]

(*The Bradford Telegraph*, 01st February 2013:1)

Article 2 describes an event similar to that of Article 1, referring to a violent sexual attack on two women, although in separate instances in this case, by a lone rapist. The naming strategies utilized in Article 2 are also highlighted in red and reveal a stark contrast to those used above. There is no ‘fiend naming’ at all in this piece. Peter Kovacs is almost exclusively referred to by his surname or by the innocuous third person pronoun *‘he’*, apart from in the headline and opening sentences when his place of residence, his home country and his age are given. The key difference, revealed by Clark’s analysis of the *Sun* over two decades ago and still very pronounced in contemporary examples of media discourse analysed here, is the status of the victims. The victims of Peter Kovacs are identified as prostitutes, whereas in Article 1 sexually ‘unavailable’ women have been attacked:

Any attack is fiendish when committed against a female who is named as ‘respectable’, i.e. sexually ‘unavailable’ and as a stranger to her attacker (and also when another woman is not held responsible for the attack). It is not seen as fiendish when committed against a woman who the attacker is married to or against a woman who is named as ‘unrespectable’.

(Clark, 1992:223)

In Article 2, the victim is construed as sexually available and hence her attacker is not cast in the monstrous terms as those evident in Article 1.

Despite the fact that the incidents in each of these articles are quite similar, the perceived sexual availability of the victim is reflected in their different linguistic rendering of the rapes. The victims’ status as ‘unrespectable’ is made apparent from the headline’s identification of them as prostitutes. In fact both the headline and the opening sentence appear somewhat awkwardly constructed – *‘raped one prostitute and robbed another’*; *‘raping one prostitute and robbing another’*. Whilst the fact that the attacker has committed more than one offence is highlighted here, so too is the fact that not one, but both of his the victims are prostitutes, and he is somewhat further mitigated in only have committed one rape. The article is also ‘sexualized’ from the outset; the sexual elements of the attack are highlighted in *‘he lured them into a secluded alleyway’*, the attacker has a history of *‘indecent exposure and voyeurism’* and has previously been before the courts for *‘staring into a woman’s house while rubbing his groin’*. This focus exposes the typically tabloid fronting of the sexual elements in articles which portray violent attacks against women, and of course it also highlights that that this attacker has only previously ‘looked’ at women. The only women against whom he has committed physical acts of violence are the prostitutes of the headline and opening paragraph; women who are ‘unrespectable’ and ‘sexually available’.

The actual attack on the first victim occurs after *‘she understood he wanted to pay for sex’.* Unlike Kovacs’ previous crimes, when he acts only upon *‘a woman’s home’* in crimes which are constructed with no victims present at all. His so-called *‘first victim’* is clearly complicit in the attack upon her, easily *‘lured[...]up an overgrown alley’*. In the list of Kovacs’ crimes, the first is *‘refusing to hand over any money’* and, despite being eager to sexualize the apparently victimless crimes, the most sexualised element of the first physical attack is the fact that the victim’s phone was *‘tucked in her bra’.* The sexual provocateur of this incident is the victim. This is equally the case when *‘another prostitute’* is attacked. We are told that she *‘suffered cuts and scratches’* but these occur as part of the Circumstances of *‘her bag’* being snatched. When the attacker flees the scene of the rape, the victim’s belongings are *‘strewn in the alleyway’*. No mention is made of the victim’s condition at this point.

In Article 1 the victims’ injuries are focussed upon in a very different manner: *‘One of the women was left with bruises and abrasions on her legs and buttocks, while the other victims' physical injuries were too numerous to detail’*. The damage has very clearly been done to the victims themselves rather than to their possessions as in Article 2. There is an element of specificity in Article 1 not present in the descriptions of the next article. In the former, the ‘unavailable’ victims have been sexually defiled, and as such their injuries and the sexual nature of them are highlighted. In Article 2, the victims are labelled as *‘prostitutes’*; they were sexually ‘available’. Any sexual nature to their injuries is not referenced, they are physically attacked as a result of their sexual availability. The victims in Article 1 have ‘*psychological scars’* whereas any necessity for reflection in Article 2 is that of the perpetrator, who has been *‘abandoned’* by his family and has *‘little understanding’* of his crimes.

Critical linguistic perspectives on the news construction of violent sexual assaults points to the ideological operation of patriarchal concerns in an almost ubiquitous institutional discourse. It is clear from the above discussion that victims in these cases are defined according to their perceived sexual ‘availability’ and ‘respectability’, concepts which are also of course examples of patriarchal ideologies. Further, the perpetrators of these crimes are also defined according to these parameters. The connection between perceived sexual ‘availability’ and the naming strategies for labelling men in accordance with this perception remains prevalent in contemporary newspaper articles (Meyer, 2010).

What makes such analyses particularly relevant to considerations of trial by media is the contribution that they make to the criteria upon which jurors call in the courtroom. In the case of sexual assault crimes, the wider social discourse construction of rape and associative information is obviously crucial. Practices of linguistic representation which differentiate between types of victim and types of perpetrator are fundamentally important in the ideologies which they construct. The distinction between fiends and non-fiends is what Clark (1992:223) calls a ‘patriarchal myth’ which ‘assumes that strangers are the men to be feared’ by vulnerable females.

The distinction between ‘respectable’ and ‘unrespectable’ victims is, as Clark has pointed out, constructed entirely by the discourse portrayal of the press. The reality, as neutrally as one can articulate it in this context, is that ‘men’ attack ‘women’. The above commentary notes the effect of placing the perpetrators of crime, and often the crimes themselves, as outside ‘normal’ society. The strategy of ‘fiend naming’ mitigates the organization of society from responsibility for these attacks, and in so doing leaves intact the dominant patriarchal system. Clark’s statistics suggest that over 50% of women have had some prior contact with the men who raped them. Obviously these figures are somewhat dated, however the British Crime Survey 2001 (Walby and Allen, 2004) shows that only 17% of reported rapes are so-called ‘stranger rapes’, tallying with Home Office statistics in 2002. It is perhaps both a testament to the effectiveness of ideological discourse strategies and an indictment of the society which they operate to construe as ‘common sense’ that these statistics are as consistent as they are consistently misunderstood. Over four decades after the data of The Rape Counselling and Research Project (1979) cited by Clark, when Home Office figures (2002) have more recently suggested that around 80% of reported rapes are ‘simple rapes’, media discourse continues to perpetuate a distinction that only extra-societal monsters attack ‘respectable’ women and when ‘unrespectable women’ are attacked their sexual availability is to blame.

Reinforced Trial by Media refers to the strategic introduction by courtroom attorneys of media made conceptualisations of crime in the midst of jurors’ general linguistic isolation. When lawyers fill jurors’ comprehension gaps with representations of crime garnered in the press, they are reinforcing not just the media portrayals of these crimes but the patriarchal ideologies which they maintain. If extra-societal ‘fiends’ rape ‘respectable’ women and ‘unrespectable’ women are complicit in the attacks upon them, as suggested in Articles 1 and 2 analysed above, there seems to be little room left to attach culpability to the defendant in the courtroom. If ‘available’ women are partly to blame for the attacks upon them for example, a cross examining attorney might attempt to suggest at this ‘availability’ at trial. If ‘men’ are rarely to blame for rape, if ‘unrespectable’ women ‘have it coming’ and ‘respectable’ ones are the victims of other-worldly monsters, defence attorneys can make these suggestions by the narratives they construct in the courtroom, hence ‘reinforcing’ societal norms about rape as constructed by the press.

***Reinforced Trial by Media: Sexual Assault from Press to Trial***

Violent sexual assaults continue to be constructed by the language of the media in a manner at odds with official statistics. In demonstrating the operation of trial by media, this research invokes a critical-forensic interface which considers courtroom interaction alongside news discourse. The routine effect of media conceptualisations of crime upon courtroom jurors who are exposed to a range of legal linguistic isolators at trial is introduced above. This ‘enhanced’ reliance on pre-trial categories of crime does not render jurors deaf in the courtroom, and attorneys have at their disposal elements of the narrative mode of legal-lay discourse (Heffer, 2005). Advocates appeal to ‘folk psychological scripts’ which are ‘common to the community’, in communicating with the jury. When these conceptualisations are viewed as constructed by ideological discourse interaction, we can say that attorneys are acting to ‘reinforce’ social schemata in the courtroom.

Legal professionals can also appropriate the ‘sexually available’ and ‘unrespectable’ constructions of victims of sexual assault in building up narratives in courtroom testimony. By way of concluding this paper and illustrating Reinforced Trial by Media in operation, the discussion below focuses upon how an attorney introduces these portrayals in the courtroom. Jurors will have formulated their mental representations of rape and victims of rape - again assuming that most of them will not have had direct experience of and with rape – by processing the ideologically constructed information contained in media discourse portrayals. When advocates use similar narrative strategies they are ‘reinforcing’ these constructions, and indeed the patriarchal status quo which they help to sustain.

The courtroom excerpts below concern an alleged rape which occurred in Washington D.C. in May 2007. The transcript data has been made publically available on the legal information website defensewiki.ibj.org as one of several examples of Cross Examination, and as such the names of both the victim and the defendants have been redacted. The pseudonyms Mr Doe and Mr Smith respectively are attributed to the two defendants. The excerpts discussed are from the Cross Examination of the victim by attorney for Mr Doe, Mr Chris Leibig.

The victim claims that she was raped by the two defendants at their residence in Georgetown, a neighbourhood in central Washington D.C., after leaving a nightclub in the city. Mr Leibig’s questioning of the victim follows directly from the Direct Examination of Ms Sullivan, acting for the government. The victim has already testified to the prosecuting attorney the events leading up to, during, and after the attack, recalling how she encountered the two defendants outside a nightclub, and after accompanying them to a takeout restaurant and subsequently their apartment, they raped her. Mr Leibig’s Cross Examination is composed of several strategies which attempt to redefine the context of the participants’ meeting and reconstruct the ensuing events. These strategies work to compose several narratives which seek to portray the victim as ‘unrespectable’ and ‘sexually available’ and the act of sex as consensual. There are four central sub-narratives which compose the defence’s construction of a consensual sex event in this trial, which have been termed: Party Girl, No Prior Knowledge, Chose Not to Go Home, and Offered No Resistance.

*Party Girl*

A seminal part of the prosecution’s argument in this case was that the victim was too intoxicated to have consented to sex, and much of the testimony in Direct Examination is composed to reinforce this point. Ms Sullivan returns consistently to this issue in questions throughout Direct Examination:

All right. And beginning, when you arrived at Grace and Erin’s around 8.30, what, if anything, did you have to drink at their house?

How many saki bombs did you all do?

And did you have anything to drink, an alcoholic beverage, there?

(Direct Examination, p.2-4)

The asking of these questions follows a noticeably systematic pattern in Direct Examination, each one being preceded by an orientation question which establishes the time – in order to communicate the short period in which the victim consumes a large quantity of alcohol – and is generally followed by a question regarding her increasing intoxication.

This pattern of questioning, referring to time, alcohol and inebriation in a fairly clear pattern, proceeds throughout Ms Sullivan’s questioning, aiming to construct a narrative which portrays the victim as vulnerable. Disorientation is given as the explicit reason that physical and verbal resistance to the alleged crime was not offered by the victim.

The defence attorney Mr Leibig utilizes a strategy which differently construes the victim’s drinking, although he does not choose to challenge that she was inebriated in the early part of the evening in question in his Cross Examination:

Q. When you were talking about the drinks at the bar, was everybody doing the saki bombs?

A. Yes

Q. Do you remember exactly how many you had?

A. No.

Q. I think you said ten to fifteen, did you mean for the whole group, ten to fifteen?

A. No. Each of us, individually, was taking - - I mean, I - - no, I individually took ten, fifteen.

[...]

Q. Do you have any way to know how much alcohol is in each of them?

A. No. It’s a shot glass of saki and then - - but the beer is different every time depending who’s pouring it and how much beer.

(Cross Examination, p.39-40)

Despite the fact that the victim was intoxicated being constructed at length as an important part of a ‘Vulnerable Victim’ narrative of the prosecution, the defence attorney does not seek to undermine it entirely. Whilst an extreme alcohol intake could have contributed to the vulnerability of the victim, it also helps to compose a sense of irresponsibility on her part. Mr Leibig hijacks the narrative of his opponent up to a point, but by highlighting the careless attitude to alcohol expressed by the victim – especially exacerbated by her fifteen drinks in one of several establishments – rather than the disorientation these relentless rounds of *‘saki bombs’* would have caused, he instead begins to suggest an alternative ‘Party Girl’ narrative of the victim. Mooney (2007:206) suggests that, regardless of the fact that drinking culture is fairly generalised, ‘the effect of alcohol on a woman in a rape scenario is to make her culpable’, and Anderson and Beattie (2001) suggest that rape victims who are inebriated are often not construed as credible:

The legitimate victim is someone who was not under the influence of alcohol or drugs at the time of the rape.

(Anderson and Beattie, 2001:12)

Rape victims who are drunk are not reminiscent of the prototypical view victim possessed by juries. The suggestion that the victim is potentially complicit in her own vulnerability is only useful up to a point in the defence’s redefinition strategy in this trial. Certainly Mr Leibig can present the evening before the attack from a different perspective, one in which the alleged victim has displayed a somewhat carefree attitude, but he must also address the level of intoxication, or rather sobriety, later in the evening in order to present a ‘sexually available’ woman to the jury.

The defence attorney utilizes a tactic not dissimilar from his adversary in this regard. Ms Sullivan’s Direct Examination puts clarifying questions, of which those above are examples, to the victim at consistent junctures, building up a gradual ‘getting drunk’ theme throughout the entire narrative spine of the interaction. Mr Leibig, on the other hand, focuses consistent questions not about inebriation but about sobriety. He latches onto the process introduced by the prosecution to suggest a potential irresponsibility on the part of the victim, and then begins to dismantle it in order to undermine the seminal issue of consent in this case. Whilst Ms Sullivan steps outside the central chain-of-events questioning to establish and re-establish how *drunk* the victim is becoming, Mr Leibig interjects in a similar manner in Cross Examination to establish how *sober* she is becoming:

Q. And other than at that point, 3.45 in the morning, other than the one drink that you might have had in Club Five, but you’re not sure, you had not had any alcoholic drink for four hours. Right?

A. Yes.

Q. So fair enough, you were sobering up compared to the way you were at midnight?

(Cross Examination, p.58)

Q. You were a lot more sober than you were at midnight. Right?

(Cross Examination, p. 68)

Q. And at this point how much of the champagne did you drink?

A. Just a sip or two.

Q. But you had...you love champagne?

A. Yes.

Q. And at that point, you were sober enough to think to yourself maybe I’ll just have a sip instead of drinking more, even though you like it.

(Cross Examination, p.72)

Q. We’ve had a lot of questions about drinking. I just wanted to ask you a little bit about your tolerance for drinking. Is it unusual for you to have a night out drinking like this?

Ms Sullivan. Your Honor, I’m going to object. It’s beyond the scope of direct and object on the grounds of relevance.

Mr Leibig. Your Honor, the Commonwealth’s obviously making a point that the extreme level of intoxication contributed to what happened and explained the lack of resistance and so forth. Her tolerance for drinking is made relevant to the prosecutor opening the door to this. It’s obviously part of the case. I’d like that we be able to explore - -

The Court. The objection’s overruled.

Mr Leibig. Is it unusual for you to have a night out drinking like this?

1. Not unusual.

The Court. When I said Overruled at least at this point it is. I’m not saying all the questions on this line are going to be admitted.

Mr Leibig. So you have a pretty good tolerance right?

A. I mean, it depends how much I eat. You know, I don’t know. I mean, like I have a decent tolerance I guess.

Q. You go out drinking when?

A. Thursdays and Saturdays.

Q. So is it a fair statement that on one of those two days a week you go out, it’s not unusual in the course of the whole night for you to have as many as eight, nine or ten drinks?

(Cross Examination, p.97-99)

The defence constantly reiterates the increasing sobriety of the victim in much the same way that the prosecution have earlier tried to introduce her increasing inebriation. The first three interactions above work to contradict the seminal prosecution argument that the victim could not have consented to sex owing to her disorientation from alcohol. The defence has accepted this Vulnerable Victim narrative in the initial Cross Examination in order to redefine it as irresponsibility rather than vulnerability, and now proceeds to focus on the lessening effect of the alcohol, referring – like the prosecution – to specific time periods to cement the gradual reacquisition of sobriety. The fourth lengthier sequence above consolidates the defence’s redefinition strategy, changing Vulnerable Victim to complicit Party Girl. By focussing on the victim’s apparent propensity to alcohol – excessive drinking twice a week and a good tolerance for this – the defence can present a carefree woman, and more importantly one that is irresponsible enough to drink excessively and yet still be sober enough afterwards to consent to sex. The introduction of the topic of tolerance to alcohol simultaneously accommodates ‘unrespectable woman’ and ‘sexually available’ – albeit only potentially at this point – in the defence’s overall ‘Consensual Sex’ narrative.

*No Prior Knowledge*

The impression of the victim in this trial as ‘sexually available’ is strengthened by the fact that she willingly accompanied the alleged attackers to their home. The prosecution – presumably pre-empting the fact that this story element will be important to the strategy of the defence – addresses and attempts to define it first:

Ms Sullivan. Now at that point when it came that you were leaving Club 5, did you encounter two men?

A. Yes.

Q. And can you describe what you recall about any conversation you had with them?

A. Yes. Extremely loud. And I was - - I had decided - - it was time to leave, and I was looking for Matt, you know, either let’s leave together or let’s get a ride or something. And so I encountered two men. It was just, you know, ‘Hey what’s up?’, you know, type of thing, and I don’t know if I said, you know, I’m looking for my friend Matt, or do - - I don’t know how it came up. But they were like, ‘Matt? We know Matt’. And I was like ‘Oh You know Matt’. So it was just - - it was a quick association. I just thought, they’re good people. You know, so it was - - that was done once I knew they knew Matt.

(Direct Examination, p.8)

The prosecution attempts to undermine any impression of ‘availability’ in the accuser’s accompanying of the accused by establishing early that she believed they had a mutual friend. Matt is the person who the victim had entered the nightclub to find and the status of her relationship with him is important for the opposing stories in this trial. The defence issues a much more direct challenge than the above explanation of the prosecution:

Mr Leibig. You had, you had money - - you had money for a cab on you?

A. Yes. I had - - I’d gotten 20 bucks from the ATM. But I had my credit card, so I - -

Q. And there’s a line of cabs in front of Club 5, it’s easy to get one; if you want one?

A. Yes, absolutely.

Q. Who did you speak to first – Mr Doe or Mr Smith?

A. They were side by side, just standing there. I don’t know who I spoke to.

Q. Did you approach them or did they approach you?

A. I think - - I mean, it’s a club and you’re just standing there. I don’t know who approached who.

Q. And you talked to them about your French last name; right?

A. Yes, I mean, at some point.

Q. I just wanted to go over the part about Matt. Did you tell them Matt’s last name?

A. I think so.

Q. They didn’t tell you Matt’s last name?

A. No.

Q. Did you tell them where Matt worked?

A. No.

Q. Did they tell you where Matt worked?

A. No.

Q. Did they tell you how they knew him?

A. No.

Q. Did they - - did you have any conversation at all about anything about how they knew Matt? Anything like that, no?

A. No sorry.

[...]

Q. And for the whole night there was never another conversation about Matt?

A. No. I didn’t bring - -

Q. Not at Quick Pita restaurant?

A. No.

Q, Not in the car?

A. No.

Q. Not at the apartment?

A. No.

Q. And you asked no further questions about him?

A. No.

(Cross Examination, p.52-4)

The defence quite forcefully challenges the claim of the victim that she could trust that the defendants were *‘good people’*. After establishing that the victim could have gotten a taxi home but chose not to – another element of the ‘available’ narrative of consent which is taken up below – he presents a sequence of polar yes/no interrogatives which undermine the impression that the participants had a mutual friend. The three subsequent pages in the transcript are composed of a similar interaction to how the above extract concludes. The verbal presence of the victim is reduced to giving negative matter-of-fact answers to specific questions for a long period of interaction, represented by five pages of the transcript. Mr Leibig’s Cross Examination appears as a clarifying alternative to the somewhat confused testimony in Direct, littered with false starts and hesitations. Kebbell, Deprez and Wagstaff (2003) note that constraining question-answer forms like this ensure that that witness has no opportunity for elaboration. Ehrlich (2001) found that cross examining attorneys strategically constrain and distort complainant testimony by imposing question sequences which restrict the voice of the victim. Although Taslitz (1999) amongst others has called for rape complainants to be granted an opportunity to provide an uninterrupted narrative, the courts have not moved to implement such a radical procedural change.

*Chose Not to Go Home*

The above interactions contain the first two of the sub-narratives of consensual sex constructed in this defence, Party Girl and No Prior Knowledge. The attorney proceeds to establish other sub-narratives termed Chose Not to Go Home and Offered No Resistance. This story construction is strengthened by the depiction of the victim as irresponsible with alcohol and a frequent socialiser, the latter portrayal focussing on a tolerance for alcohol which defines the former in terms of carelessness rather than vulnerability. The victim is then portrayed as a ‘sexually available’ woman – a media-made and maintained construction which makes victims complicit in the attacks upon them. The extract below follows fairly quickly in the overall proceedings from the series of polar interrogatives and the array of *‘no’* answers which contribute significantly to the ‘No Prior Knowledge’ sub-narrative:

Mr Leibig. And I’m not asking for your exact address, but around where do you live? What area of Virginia do you live in?

A. Arlington.

Q. And is it near the Glebe Road, 395?

A. Yes, I’m sure I referenced that.

Q. And when you - - you guys walked back to the car after Quick Pita; right?

A. Yes.

Q. And then you went over Key Bridge into Virginia? Yes?

A. I don’t remember going over Key Bridge, I just remember the lights of Georgetown main drag.

Q. So you weren’t paying attention - -

A. I wasn’t paying attention - -

Q. You guys still talking on the way back?

A. Yes.

Q. Singing songs to the radio?

A. Yes.

Q. But you were aware that Arlington, where you live, is closer than Alexandria, where Mr Smith lives, to Georgetown; right/

A. No. Honestly - - I mean, very honestly - - I’m not good with directions, but I - -

Q. You have your own address memorized; right?

A. Yes.

Q. And you know, for example, you know that you live with your sister; right?

A. Yes.

Q. And her husband.

A. Yes.

Q. And you know her cell phone number; yes?

A. Yes.

Q. You did not ask them to drive you home?

A. I referenced going home, I didn’t demand to be driven home if that’s what you’re asking.

Q. You were having a good time at that point and you didn’t want to go to your home; right?

A. I wanted to go - - I wanted to go home but I just very - - you know - - I was drunk. I just wanted to go to bed. You know, they suggested the plan, and so I told them where I lived and they were a little quicker, so - -

Q. No questions about Matt, or anything, at that point?

A. No.

Q. So your plan at that point was that you were going to go to sleep - - you were going to back to their place but you just wanted to go there to go to sleep instead of going to your own house to sleep?

A. That was fine; yes. We were going to eat sandwiches, pass out there, go for the morning versus going out - -

Q. I guess my question is, if you were just going to go back to their place, eat the sandwiches and go straight to sleep, why didn’t you just go home?

(Cross Examination, p.64-6)

This Chose Not to Go Home sub-narrative continues to redefine the event of consensual sex. The attorney makes the point that Georgetown is closer to Arlington, where the victim lives with family, than the Alexandria apartment of Mr Smith. The implication is clear – especially in the attorney’s final question above – that the victim chose the latter destination for a reason other than *‘just’* sleep. When the victim articulates her confusion about directions, not having remembered crossing Key Bridge into Virginia, the attorney quickly rescues this potential threat to his present line of questioning by re-establishing that any confusion has been caused by *‘not paying attention’*, *‘you guys still talking (and) singing songs to the radio’*, rather than any disorientation. Having dispelled the Vulnerable Victim narrative of the prosecution, he is careful not to allow it to be re-introduced. A series of key polar interrogatives complete the rescue, illustrating that even if the victim wasn’t intimately aware of the districts of Washington D.C. and Virginia, she could still have chosen to go home.

*Offered No Resistance*

The culmination of these tactics comes in the Offered No Resistance sub-narrative, which, having established the willingness of the victim to accompany the defendants despite having no real evidence that they were *‘good people’*, and that this decision was made because she was *‘having a good time’* rather than because she was drunk, her frequent socializing giving her a good alcohol tolerance, completes a master-narrative in which the alleged rape is redefined as a choice by an ‘available’ and ‘unrespectable’ woman to have consensual sex:

Mr Leibig. Did you take your shoes off when you got there and sat on the couch?

A. Yes.

Q. And that was right at the beginning.

A. Yes. I mean, I remember going up the stairs without any shoes on.

Q. Could you describe - - when did it first become sexual.

A. When Mr Doe came towards me to kiss me.

Q. Was he sitting in the position that you’ve shown on this exhibit?

A. Yes. And I was back in the corner.

Q. And Mr Smith was on the couch in the middle section?

A. Yes.

Q. And just to check again, this is exhibit P-H-M-5, these are also the positions in which you were sitting when Mr Doe kissed you?

A. Yes.

Q. Okay. And you kissed him back at that point?

A. Yes.

[...]

Q. Did any of your clothes come off in the living room?

A. No, not that I remember.

Q. It is possible that you don’t remember or it is - -

A. No, I remember - - I mean, all - - no, I remember both my shirt and my pants coming off in the bedroom.

Q. You testified about being carried. Who was carrying - - was somebody holding you by your wrists?

A. No, I was - - I just felt like a rag doll, and I remember being in the position of almost a rag doll; you know. So I felt like they were both there kind of carrying me. I don’t remember - - it was dark and I was - -

Q. Did it hurt when they were carrying you?

A. No.

Q. Were you struggling?

A. No. I was a rag doll.

Q. Attempting to get to your feet?

A. No.

Q. Twisting around at all?

A. No.

Q. Just limp?

A. Limp.

Q. Limp like a rag doll.

A. Yes.

Q. Well, let me ask you this, when you were dancing at 1:52 in Club Five you had a lot more energy than a rag doll; right?

A. Yes. I was mustering it up.

Q. And this is three and a half, maybe four hours later. You’re not as drunk as you were at Club Five at that point. You will admit that; right?

A. I felt more drunk then, and more exhausted. I was absolutely exhausted, dead on my feet. I mean, I don’t know what you mean - -

Q. My question was, leaving the fact that it was late night and you were tired inside, you were a lot more sober at 5:15 than you were at 2:00 in the morning when you were dancing in Club Five. Is that fair enough?

A. Fair enough.

[...]

Q. And you do have a memory of that when they were carrying you into the room?

A. Yes.

Q. You have a memory of deciding yourself to have only one or two sips of champagne, even though you loved it?

A. Yes.

Q. Did you help take your shirt off?

A. No.

Q. Where were your arms when your shirt was being unbuttoned?

A. I’m sure they were - - I mean, I don’t - - I mean, just beside me I guess.

Q. Just flat?

A. Yes. I mean - -

Q. Were you on your back on the bed at that point?

A. Yes

[An exchange proceeds of the witness identifying exhibits]

Q. Were you kicking your legs to try to avoid your pants being removed?

A. I didn’t realise my pants were being removed till they were; like a yank of the pants.

Q. Did you try - -

A. And then I was, I mean - -

Q. Did you flex your arm and try to prevent your shirt from being removed?

A. I don’t remember. I mean, I just remember being five minutes behind everything.

Q. But you weren’t scratching at Mr Smith?

A. No.

Q. Or Mr Doe? You weren’t screaming?

A. No.

Q. And you weren’t pushing them away?

[...]

Q. And during this whole time, you weren’t screaming at all?

A. No.

Q. You weren’t fighting physically, you weren’t - -

A. I mean, I was - - yes I was - - I was - -

(Cross Examination, p.74-80)

The defence essentially attaches a sub-narrative to specific sections of the chain of events in his Cross Examination. This chain of events is not a matter of dispute between the parties, but rather Mr Leibig redefines the core elements according to a mitigating master-narrative. The No Prior Knowledge narrative defines the meeting of the participants, while the Chose Not to Go Home narrative takes the victim from the nightclub to Mr Smith’s apartment, the result of a conscious and sober decision. The Offered No Resistance narrative is contained in the fairly lengthy transcript above, and redefines the act of sex as consensual, completing the ‘sexually available woman’ master-narrative of the defence.

The violence that accompanies rape accounts in media discourses – as shown in Articles 1 and 2 above – is entirely absent from this story, and may indeed account for the defence’s reiteration of the *‘limp’* state of the victim. Of course *‘rag dolls’* are pliable and calm, whilst the prosecution have agreed upon this analogy presumably to describe the accuser’s physical vulnerability, the defence demonstrate that it works equally well to describe a willing and non-resistant participant. Rapes are prototypically constructed as violent and traumatic, even in media discourses which attribute blame to the victims. Article 2 above implicates the victim in the sexual element of the incident whilst maintaining a view of a violent interaction, albeit against the victim’s possessions rather than her person. The defence defines the incident above in starkly different terms, essentially appropriating the representation of the news to show what this event is not. Larcombe (2002) summarises the jury expectation of a rape victim:

A case is more likely to have success if it is clearly interpretable as violence: if the assailant is a stranger, if a weapon is used, if the victim/survivor’s resistance is overt and physical injury is sustained and documented.

(Larcombe, 2002:132)

Casual comfort is established by the victim taking off her own shoes, sitting with both defendants on the couch and initially returning the advances of Mr Doe. The victim does not struggle, attempt to get to her feet whilst being carried – which does not hurt her – or *‘twist around at all’*. As in the Chose Not to Go Home interaction above, the witness attempts to offer some resistance to the advocate’s definition of events, but again he quickly regains control of the interaction. The aim of re-introducing the victim’s physical condition in this interaction is to re-affirm again that she has significantly *‘sobered up’* by this time, and hence could have offered resistance if this had been a forced encounter. The attorney, as shown above, reiterates this point consistently. The victim attempts to establish that she *‘felt more drunk then’* but because the attorney acknowledges that she is *‘tired inside’*, she acquiesces as *‘fair enough’* that she must be *‘a lot more sober at 5:15’*. Having reaffirmed this point and consolidating it with two references to *‘memory’*, the array of physical resistance that the victim could have offered is posited one at a time, her constant *‘no’* answer contributing to the consent of sex each time. The victim did not only not resist in this interaction, she did not struggle, attempt to get to her feet, twist around, kick her legs, flex her arm, scream, push, or *‘fight physically at all’*, and she was not hurt. The defence proffers a litany of ways that resistance could have been offered in order to demonstrate the level of compliance in not offering any resistance at all.

Most legal jurisdictions have dispensed with what Tiersma (2007:88) calls the ‘notorious resistance requirement’ in cases of rape, in which the law required proof that a woman had resisted her attacker. However given the a priori semantic scripts relied upon by jurors in court, constructed by characteristics such as those noted by Larcombe (2002:132) above, lawyers continue to equate lack of physical resistance with consent in the rape narratives they construct in Cross Examination of victims. Tiersma (2007:95) points out that consent is essentially a mental state rather than a speech or physical act. Jurors therefore must draw inferences based on testimony as to whether or not a victim consented to sex. Estrich (1987:121-48) notes patriarchal assumptions like the sexual experience of the victim, whether she invited the man to her room, or wore certain clothing as often important inferences in determining consent. In the absence of a speech or physical act of resistance, despite the stipulations of the law, jurors are conditioned by social discourses to assume that victims have consented. Defence attorneys often reinforce this conditioning, whilst the burden of proof places prosecutors at a particular disadvantage. Whilst the law does not require victim resistance in the case of rape, prosecutors are still required to demonstrate that the victim did not consent; it is extremely difficult to demonstrate a mental state to a jury who are likely to draw inferences based on physical or speech acts. This seeming contradiction in legal prosecuting of rape is exploited by the defence. Temkin (2000) conducted in-depth interviews with ten barristers who have tried hundreds of rape cases in Britain. These advocates list a number of strategies aimed at discrediting victims: maligning the victim’s behaviour; maligning the victim’s clothes; maligning the complainant’s sexual character. One barrister commented:

There is a difficulty in properly presenting women with a right to decline sexual intercourse despite the fact that they may have been very drunk or have acted in a sexually explicit way towards the man. It goes down to a number of attitudes which are ingrained in people. There plainly is a perception that women should act in a certain way.

(Barrister 5. Temkin, 2000:232)

Perceptions ‘ingrained in people’ by media constructions of rape victims provide defence attorneys with a range of courtroom reinforcement tactics in rape trials. Inconsistencies in the law and media-made perceptions of rape combine to demonstrate that trial by media can be analytically linked to the 5% conviction rate in rape trials.

1. **Conclusion**

This final section demonstrates the potential tactics of defence attorneys in sexual assault cases. This analysis demonstrates some of the weapons in the barrister’s narrative arsenal, and the link between these narratives and the discourses of the press. ‘Available’ women have been constructed by social discourses as either unlikely victims of rape, or as complicit in the act. Given that the law defines consent as the pivotal point in rape cases, defence barristers will inevitably attempt to convey consent by a master-narrative composed of elements which portray the alleged victim as ‘sexually available’. She chooses to accompany her alleged attackers to their home, despite her own being closer, and offers an inadequate level of physical or verbal resistance to the sexual interaction which ensues. Social discourses historically and ideologically mitigate men from raping ‘sexually available’ women. When ‘respectable women’ are raped, there is trauma and violence and resistance, they do not go willingly to their attackers apartments but are *‘lured’* by neo-Gothic monsters down *‘alleyways’*. The representations of rape and the victims of rape in the press equip this attorney, who is clearly skilled in courtroom Cross Examination and the constructing of complex narratives, to redefine both what this incident is and what it is not.

In reinforcing the process of trial by media in this way, attorneys are also reinforcing media portrayals themselves and we can uncover a self-sustaining network of institutional discourses upholding the ideological hegemony which constructs ‘common sense’ and ‘community values’, the very attributes for which jurors are theoretically coveted by the legal system in the first place. The indictments against Mr Smith and Mr Doe in the case analysed here were dismissed.

The Framework of Jury Isolation which significantly increases the cognitive load of jurors and prompts their enhanced reliance on media-made representations of crime, also renders them susceptible to what Bruner (1990) has called ‘folk psychological scripts’. Scripts can be introduced by attorneys’ ‘narrative mode’ in the legal-lay discourse of the courtroom (Heffer, 2005). These scripts are composed by social discourse interaction with the representations of crime and deviance in the media. Legal professionals reinforce not only the reliance on these media discourses by their appropriation of them at trial, but also strengthen the ideologies which they construct and maintain.

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