

Lexical Characteristics and Agency in American Rape Trials: A Critical Discourse Analysis^(*)

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Abstract

Cross-examinations of rape complainants in American trials have been in question for decades for their perceived grueling nature. Many scholars have argued that a Critical Discourse Analysis (CDA) of rape trials can uncover the power asymmetry and ideological frameworks existing in legal practices. Therefore, this paper aims to employ a CDA approach to analyze the legal-linguistic interactions between opposing lawyers and rape complainants. Cross-examination data were obtained from two American rape cases that were well-publicized. The paper primarily focused on exploring lexicalization and agency and their use by cross-examiners in the rape cases. The Critical Discourse Analysis revealed that agency and lexicalization were strategically employed by cross-examiners to ideologically frame the rape incidents, and to either eliminate or obscure the agency of the defendant's from committing sexual aggression. Finally, based on the findings, the study provides future recommendations and further areas of research.

Keywords: American rape trials, cross-examinations, rape complainant, lexicalization, agency

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المخلص:

كانت الاستجابات لمشتكيات الاغتصاب من قبل محاميي الخصم في المحاكمات الأمريكية موضع تساؤل منذ عقود بسبب طبيعتها المرهقة للمشتكيات. جادل العديد من الباحثين بأن تحليل الخطاب النقدي (CDA) لمحاكمات الاغتصاب يمكن أن يكشف عن عدم تناسق القوة والأطر الأيديولوجية الموجودة في الممارسات القائمة. لذلك، تهدف هذه الدراسة إلى استخدام نهج تحليل الخطاب النقدي لتحليل التفاعلات اللغوية بين المحامين المتعارضين ومشتكيات الاغتصاب. تم الحصول على بيانات الاستجابات من حالات اغتصاب أمريكيتين تم الترويج لهما إعلامياً بشكل جيد. ركزت الورقة البحثية في المقام الأول على استكشاف الخصائص المفرداتية (lexicalization) والفاعلية (agency) واستخدامهما من قبل المحامين. كشف تحليل الخطاب النقدي أن الخصائص المفرداتية والفاعلية تم توظيفهما بشكل استراتيجي من قبل محاميي الخصم لتأطير حوادث الاغتصاب أيديولوجياً، وإزالة فاعلية المدعى عليه أو حجبه عن ارتكاب الاعتداء. أخيراً، بناءً على النتائج، تقدم الدراسة توصيات مستقبلية ومجالات أخرى للبحث.

الكلمات المفتاحية: محاكمات الاغتصاب الأمريكية؛ الاستجابات، مشتكيات اغتصاب، المفرداتية، الفعالية.

1. Introduction

An area that received considerable critical attention in adversarial legal settings is the cross-examination of rape victims in rape trials. According to Kebbell et al. (2007), rape victims describe cross-examination as a demeaning, distressing and humiliating experience (Kingi & Jordan, 2009). Rape complainants feel re-victimized by cross-examination in adversarial courtroom settings (Matoesian, 1995, 2001), because the fundamental goal of cross-examination is to discredit the evidence and the witness or complainant providing it (i.e., the rape victim); therefore, by definition questioning the credibility and truthfulness of rape victims' stories is inherent in the process. Ehrlich (2001, 2010) argues that even though there have been judicial and legislative reforms concerning rape trials throughout the 1970s and 1990s in the US and Canada (e.g., abolishing marital exemption rules), rape trials continued failing in delivering justice to the rape victims. Ehrlich postulated that such "failure" lies not in the details of rape and sexual assault statutes but rather "in the details of everyday legal practices" (2010, p. 265).

Another dimension which contributes to the complexity of rape trials is the fact that trial discourse in itself is a very complex genre of legal

discourses (Coulthard, Johnson & Wright, 2017). Generally speaking, trials are regarded as a form of institutional talks which are characterized by power asymmetry in favor of members of the represented institution, such as lawyers, judges, etc. (Freed, 2015). This power asymmetry could be manifested in trials; for instance, in how lawyers with their degree of familiarity of the law and legal practices –versus the unfamiliarity of witnesses and complainants as laypeople– to easily manipulate the questioning techniques or legal technicalities to serve their case (Drew & Heritage, 1992). Thus, rape trials could be perceived as somewhat more intricate and multilayered trial discourse given the additional socially and culturally sensitive issues they touch upon, such as sex, gender, and consent. Though many legal reforms have taken place in adversarial legal systems from the 1970s to the 1990s in the US and Canada, Ehrlich (2001) believes that the rape trial still defies the law statutory objectives, which led her to the conclusion that the failure of rape trials to deliver justice to the victims lies not in the statutes of rape and sexual assaults, but rather in the “details of everyday legal practices” (Conley & O’Barr, 1998, p.3).

Notable studies of the rape trial discourse (e.g., Drew, 1992; Matoesian, 2001; Ehrlich, 2001, 2010) investigated the cross-examination of rape complainants in adversarial settings (i.e., United Kingdom and United States); they have concluded that cross-examinations for complainants can be classified as *rape of the second kind* (Matoesian, 1995) because of its gruesome and coercive nature. Ehrlich (2001, 2010) elaborates that language plays a very crucial role in everyday legal practices, thus a linguistic analysis of rape trials can reveal the discriminatory qualities that characterize it as well as the way to contest such qualities. It is, therefore, the aim of the current paper to analyze some of the linguistic patterns of rape trial discourse in American legal settings to further explore if the current legal practices are discriminatory against female complainants.

2. Literature Review and Background Information

The issue of questioning rape complainants in the legal discourse has been the subject of many criticisms, more specifically, in adversarial legal contexts. To properly address the rape trial discourse, this literature review will present the most important theoretical assumptions of the topic such as the notion of institutional discourses and the rape trial discourse across the adversarial legal system.

2.1. Rape Trials as an Institutional Discourse

Recently, there has been a growing literature on how legal professionals use language as a tool of “power and domination” in institutional settings (Tiersma, 2009, p. 27). While legal discourse is as a type of institutional discourse, it can be subcategorized in its own right into other types of institutional discourses, each serving varied communicative activities and purposes, such as legislative writing, contract writing, courtroom interactions, lawyer-client consultation, witness examinations, etc (Bhatia, 1993).

Institutions often constitute their little worlds and construct their own kind of reality; thus institutional discourse produces asymmetrical relationships which can lead to inequality and injustice (Tracy & Robles, 2009). For example, the question-answer sequences used in legal settings for eliciting the participants’ stories are often different from the narrative structure these participants (e.g., witnesses) may prefer for presenting their account of the events. Thus, the result is that these narratives “can get mangled at the boundaries of powerful institutions” (Linde, 2001, p. 520). Subsequently, rape trials become exemplary institutional discourse in terms of how rape complainants, as vulnerable witnesses, may face a line of questioning—typically in cross-examinations—which reflects asymmetrical power dynamics.

2.2. Framing in Rape Trials

For the rape victim, the trial becomes a second traumatic experience due to the grueling nature of cross-examinations, where the victim is

obliged to relive the violent experience of both the physical and psychological trauma while answering the cross-examiner sordid questions to give an objective accounts of the event. These problematic aspects may not be present in direct-examinations where the complainants are being examined by friendly lawyers. As postulated by Ellison (1997), in adversary legal proceedings, there is an “irreconcilable conflict” between preserving the dignity of complainants while using cross-examinations as a method for testing the evidence in rape trials (p. 6). Ellison elaborated that rape complainants usually report that the questioning style during their cross-examinations, in adversarial justice systems, is character assassination.

As explained by Ehrlich (2007), a recurring theme in courtroom language—especially in rape trials—is how litigants’ voices are being silenced by the hegemonic discourse of the law. That is, as Conley and O’Barr (1998) previously noted that the mechanics of cross-examination “simultaneously reflect and reaffirm men’s power over women” (p. 37). Matoesian (1993) reiterated that cross-examiners have the discursive power to reproduce rape by revictimizing rape complainants in courtrooms. Ehrlich (2001) extended this argument by explaining that questions not only can effectively revictimize rape complainants, but they execute major ideological work. Ehrlich discusses how “language is the primary vehicle through which cultural and institutional ideologies are transmitted in legal settings” (p. 5). There is a belief that linguistic devices (i.e., questions) in institutional settings can be instrumental in structuring and constraining the interpretive perspectives in discourse, particularly, the notion of framing. In other words, the linguistic practices in rape trials play a primary role in framing events. A notable example of how language can be used as a framing tool in institutional settings is Levinson’s (1992) analysis of an excerpt of a female complainant who is being cross-examined. Through the linguistic analysis, Levinson showcases how the lawyer was able to frame—through questioning techniques— the witness from a rape victim to a girl who was looking for “*sexual adventures*” (p. 381).

2.3. The Role of Lexicalization

Lexis and lexical choices play a pivotal role in the questioning of rape complainants, as Ponterotto (2007) noted, cross-examiners can create a web of association through their use of lexical items that negatively depict the complainant's behavior. Earlier, Van Dijk (1998) has explained how important it is the analysis of meanings expressed or assigned to surface structure by discourse participants (e.g., lawyers). He further noted that meaning and interpretation are distinguishable. That is, hearers and speakers may assign different meanings (i.e., interpretations) to the same expression, or the same expression may mean different things in different contexts. Hence comes the importance of lexicalization since opinions can be codified and conventionalized in the lexicon. Lexical choices can have ideological implications, which is the case in the legal adjudication of rape complainants as Ponterotto (2007) explained. She reported that lawyers' use of repertoire of lexical choices which was loaded with implicit accusations such as insinuating sexual promiscuity, complicity, and excess and intoxication. She provided examples of how adverbs such as *Voluntarily* and *casually* were used to insinuate complicity in the sexual encounter. While dynamic verbs such as *had sex*, *partied*, and *smoked* were used to insinuate promiscuity. She also noted that cross-examiners used quantifiers such as *two* and *three*, and intensifying phrases such as *filled with* and *a night of* to insinuate excess and intoxication.

2.4. The Power of Agency

One grammatical representation that was seen as equally important as lexicalization in legal settings is agency, especially in sexual assault cases where agency is accompanied with responsibility. Ehrlich (2001) defines an agent as "the willful initiator of an event that is depicted as having consequences for either an object or animate patient" (p. 39). Ehrlich, additionally, elaborated that critical discourse analysts are interested in how agentive positionings are encoded by different syntactic variations (e.g., Sykes 1988; Van Dijk 1988). Henley et al. (1995, p. 5),

in their study of agency and the language used in reporting sexual violence, described how different agency formulations can have different perspectives of the same event as in the following sentences:

1 In the U.S. a man rapes a woman every 6 minutes.

2 In the U.S. a woman is raped by a man every 6 minutes.

3 In the U.S. a woman is raped every 6 minutes.

4 In the U.S. a woman's rape occurs every 6 minutes (added by Ehrlich, 2001)

Example 1 presents the actor (i.e., a man) who is the agent of the process/verb (i.e., rapes) and the example also presents the patient (i.e., woman) who is the affected party by the process of rape. Example 2 mitigates the agency of *a man* by shifting the attention to *woman* through using the passive voice. Examples 3 and 4 eliminate agency altogether by deleting *a man* and the sentences become agentless passive constructions. Additionally, in example 4, the verb *rape* is nominalized (i.e., rape occurs) allowing not only for the deletion of agency, but also the abstraction of the process of rape.

Ehrlich (2001) explained that manipulating agency in the legal discourse of sexual assault—though not sufficiently investigated—is crucial, since the only goal of the defense legal team is to deny non-consensual sexual acts committed by the defendant. Hence, the defense's goal in adversarial adjudication is to obscure and eliminate the agency of the defendant in performing sexual aggression against the will of the complainant. Ehrlich then contended in her study of agency in sexual assault cases that the aforementioned goal is achieved through what she refers to the *grammar of non-agency*.

Passivization

Within the studies of discourse analysis, writers and scholars in different areas have explored the manipulation of the agency by using the passive voice in the representation of oppressing and oppressed groups (Henley et al., 1995). The argument is that the passive voice has two

main functions; first, it can be manipulated to deprive subordinates of their agency, and second, it can be used to mitigate or delete the agency of dominant groups for negative acts.

Henley et al. (1995) elaborated that passive voice can be also manipulated in the news reporting of sexual assault of women by leaving in the male preparators in the background. In their study, it was concluded that sexual assault crimes were often reported on in the news by the use of active voice and were often agentless by truncating the perpetrators. The same line of reasoning was previously echoed by Penelope (1990), whereby she explained that English as a language allows the suppression of agents who commit particular acts, and in such instances, the writer/speaker's usual intended goal is to deny or coverup the responsibility of the "real" agent. She continued to express that passive voice structures are commonly used in the *patriarchal universe of discourse*, by omitting the agency of men of who commit sexual violence against women.

In the legal context of rape and sexual assault adjudication, Ehrlich (2001) studied the use of passive voice in a selected adversarial rape trial, and she concluded that the defendant (i.e., male perpetrator) used non-agent linguistic structures when providing his testimony. By doing so, Ehrlich explained, notions of sexual violence against women can be belittled and diluted, and accordingly can rightly affect the adjudicators' decisions. Likewise, Ehrlich (2001) extended that counselors and cross-examiners can reconstruct and reshape events of sexual assault by strategically using passive structures.

Nominalization

Simply put, the term nominalization refers to "turning something into a noun" (Comrie & Thompson, 1985, p.1). Critical Discourse analysts have contended that nominalization along with passivization have significant ideological functions such as the deletion and obscuring of agency and the abstracting of processes (Billig, 2008). Fairclough (2003) explained that nominalization through abstraction and generalization can

obscure agency, and therefore responsibility accordingly. That is why Fowler et al. (1979) emphasized that nominalization (and passivization) when used by official speakers/writers (i.e., institutional settings), it lends itself to ideological use.

In the adjudication of sexual assault cases, Ehrlich (2001) noted, in her analysis of an adversarial rape trial, that nominalizations were used hand in hand with passivization to delete the agency of male perpetrators, so for example, the cross-examining lawyer embedded in his questioning nominalization such as *insertion* or *fondling*. Such nominalized forms do not only delete the agency of the defendant in committing sexual aggression acts, but they reified these acts into an abstract process. Accordingly, nominalization can be utilized strategically by adjudicators and cross-examiners in rape trials to either delete or obscure the agency of the defendants in committing the sexual assault acts against the will of the rape complainants.

Examining the literature, it is apparent that a critical discourse analysis (CDA) of rape trials, specifically of cross-examinations, can uncover some of the ideological work and power asymmetry embedded in the questioning of rape complainants by opposing lawyers. Therefore, the current study will utilize a CDA to investigate whether cross-examinations of rape complainants are ideologically framed, and whether they reflect power asymmetry in favor of members of the institutional discourse (e.g., lawyers).

3. Method

3.1. Data

Two cross-examinations of rape complainants were extracted from two American Rape trials, which were broadcasted on Law & Crime Network. The cross-examinations that are conducted by opposing lawyers, were transcribed into question-answer series for the purpose of this study's analysis. The two rape American rape trials were well-publicized in the US media and both cases are relatively recently (i.e., 2016 to 2019). The first case of the analysis is known publicly as the

Vanderbilt rape case which refers to a rape case in Nashville, Tennessee, United States, which involves four former Vanderbilt University male students, who were tried in 2016 and convicted with aggravated rape of a twenty-one year old female student in 2013. The second rape case is known as the Kellen Winslow Jr., a former male NFL player, who was tried in 2019, San Diego, California, and pleaded guilty for raping an unconscious female teen back in 2003.

3.2. Analytical Framework and Data Analysis

The current study utilized a qualitative micro-analysis of the two selected cross-examinations by employing the tools of critical discourse analysis. This CDA was utilized to uncover any ideological frameworks or power asymmetries within the cross-examination questions of rape complainants. It is believed that the mechanics of cross-examination reflect and reaffirm men's power over women (Conley & O'Barr, 1998) and Ehrlich (2001) expressed that this discursive control can be analyzed using Critical Discourse Analysis tools.

The paper primarily focused on two tools of CDA, lexicalization and agency. "Opinions may be conventionalized and codified in the lexicon" as Van Dijk (1998, p. 205) suggests; therefore, the study closely investigated the data for any use of insinuating vocabulary or lexical formulations/repetitions which are used to convey a particular negative meaning and may have a certain implication in the course of questioning the rape complainant; for examples, words that insinuate the complainant's intoxication, promiscuity, or consent during her alleged rape, which could ideologically frame the rape incident into another narrative that suits the opposing lawyer.

Another linguistic feature which is key in analyzing the cross-examination data is agency. Agency suggests accountability (Billig, 2008); therefore, CDA scholars have explored the role of nominalization (e.g., turning a verb into a noun) and passivation (i.e., using passive voice instead of active voice) in forming the ideological framework by deleting or backgrounding agency within a text (Fowler et al. 1979).

In rape trials, it is essential to see how question-answer series may convey/delete agency and how it may be particularly used by cross-examiners to put forth any ideological framework. Therefore, the study investigated the role of nominalization and passivization in deleting or foregrounding the agency of defendants in linguistic instances where the prosecutors questioned the rape complainants about the alleged sexual assault details. More precisely, the analysis scrutinized whether opposing lawyers used active voice structures that foregrounds the agency of the defendants or passive voice and nominalized structures that mitigate the agency of the defendants from committing the sexual offence.

4. Findings

4.1. Lexicalization

Lexical choices were found to serve major ideological work in the analyzed cross-examinations. There was a repertoire of lexical choices that was utilized to ideologically frame events that would either suggest that complainant was to blame due to her alcohol intoxication or suggest the complainant's complicity in the sexual encounter. Highlighting certain lexical choices coupled with selectively reformulating those lexical items emphasized the discursive control lawyers exerted over the complainant; it is the lawyer who introduces the terms/words and the one who redefines them. The following analyzed excerpts are examples of how defense lawyers (i.e., opposing lawyers), through the use of lexical choices/items, were able to reconstruct the events of the rape incident in some instances by introducing, (re)formulating or (re)defining certain lexical choices.

(1) Winslow

Q: Okay. **But you told him, you definitely told him blacked out, right?**

A: **I did not say that I blacked out.** I just said I can't I remember going to a bathroom and we keep on sitting on a couch and waking up to what was happening. I didn't say exactly what was happening. I just said

what was happening.

Q: Okay. But in relating that information to sergeant Emic, **you're basically saying that you blacked out?**

A: **I did not use that specific word though.**

Q: That was your intent?

A: Okay.

Q: I mean, well, I'm saying, yeah, there's **a period of time where you don't remember anything**, right?

A: Correct.

Q: And there's a period of time, there's a bit of time, before that you were, where you remember everything, right?

A: Aha, yes.

Q: So the period in between **you're letting this officer know that you blacked out?**

A: Okay

Q: I'm asking you, was that your intent?

A: Yes.

In Example (1), the lawyer is reintroducing what the complainant has stated in a former statement to the police, and then he reformulates it using a seemingly interchangeable synonym to insinuate a certain fact about the case. Specifically, the lawyer elicits a confirmation from the complainant that she had told the police that she blacked out on the night of her incident (line 1). The complainant then clearly replies that she “*didn't say I blacked out*”, and then she proceeds to give an extended answer to what she said to the police. The lawyer continues to challenge the complainant by rephrasing the same question (line 5), in a restrictive question form (i.e., declarative) loaded with the lawyer's statement, “*you're basically saying that you blacked out?*”. The witness insists again that she did not “*use that specific word*” (line 6). The lawyer then

continues to contest the witness by asking her if that was her intent. When the witness does not give a precise answer, the lawyer resorts to defining what a blackout means in her case (lines 9-13) and then he rephrases the same question for the third time (line 14), “*you are letting this officer know that you blacked out?*”. The complainant finally positively confirms the lawyer’s proposition (line 16), when he asks her if that was her intent (i.e., to let the officer know she blacked out). The lawyer’s insistence of repeating the same words “blacked out” three times in his line of questioning, and strategically defining what it means when the complainant resists his questions, explicitly highlights the complainant’s drug intoxication and hence her lack of reliability as a witness. This example also shows how the lawyer was able to reconstruct the complainant’s testimony through reformulating what “*blacked out*” meant in the complainant’s case.

(2) Winslow

Q: But you know...you know personally from your own experience **that three was kinda your limit**, right?

A: Yes.

Q: And two or three drinks. **Two or three beers** is kind of what you would do when you're at sort of parties?

A: Yes.

Q: Is that fair for me to say?

A: Yes.

Q: Okay. So that's, more or less, what you're basing the memory on, right?

A: Yes.

Q: But you know also, well, you know, **what more than three beers does to you**, I take it?

A: Yes.

Q: Especially back when you were 17?

A: Yes.

Q: So you know that evening, right, you would recall whether or not, you were, like, **I use the term “sloppy drunk”**, right?

A: Mmm. I'm sorry. Can you ask the question again?

Q: Yeah. **I mean you know what a “sloppy drunk” is like, right?**

A: Yes.

Q: Yeah. **You weren't a sloppy drunk?**

A: No.

Q: You **weren't falling over?**

A: No.

Q: **You weren't, you know, slurring your words?**

A: No.

Q: **People weren't saying, you know, Miss Doe, you know you're wasted.** Nobody told you that today, did they?

A: Not that I know of. No.

Q: Because you weren't?

A: Yes

Extract (2) is an optimal example of how lexical choices can be strategically used by the cross-examiner to put forth a certain narrative or to reconstruct the events of the rape incident. The example starts by the defense lawyer asking the complainant on the alcohol limit she can bear before turning into a state of intoxication (lines 1-17). To start with, the lawyer strategically repeats the words “two” and “three” multiple times to insinuate an excess in drinking or intoxication, but most importantly the line of questioning gets more combative when the defense lawyer introduces the term “*sloppy drunk*” (lines 14-15). While the lawyer introduces the term, he uses the most restrictive question type (i.e., tagged declarative). When the complainant seems to be confused by the question, she asks the lawyer to repeat the question again. In this

instance, the lawyer checks the understanding of the complainant of the term, and he then proceeds on a series of controlling (e.g., declaratives and tagged declaratives) questions that are embedded with different interpretations of what the term “*sloppy drunk*” means (lines 21-25). What is interesting is that these aforementioned interpretations seem to be alternative lexical choices to sloppy drunk, such as “*falling over*”, “*slurring your words*”, and “*wasted*”. The intention of reformulating the term “*sloppy drunk*” in different ways seems not to check for the comprehension of the complainant of what the term means, but is done purposely to insinuate that either the complainant had too much to drink and therefore she cannot be a reliable witness, or as the lawyer suggests in the last question-answer sequence (lines 28-29) that she was not, in fact, sloppy drunk and in such a case insinuating her complicity. The lawyer by employing these lexical choices is establishing two condemning narratives of the rape complainant; either as an intoxicated “*sloppy drunk*” or a complicit party who was aware and sober at the time of the alleged rape.

(3) Vanderbilt

Q: Okay. I was gonna ask her has she ever drank before. She kind of testified that she essentially, uh, she'd never felt that way before, so I was just asking if she ever drank before. Have you ever drank before?

A: I had before that. Yes.

Q: Okay. **Would you consider yourself an experienced drinker or are still experiencing?**

Prosecution: Objection, your Honor.

Judge: She drank before.

Extract (3) is another example of how lawyers can strategically use certain lexical choice to not only reconstruct the events of the incident with what matches the narrative that best serves their client, but to also affect the jury’s decision mainly by embedding the questions with

ideological framework (i.e., complainant drank too much, and she is equally responsible as the defendant). In Line 4, the lawyer poses an alternative question in which she asks the complainant whether she identifies herself as an “*experienced drinker*” or “*still experiencing*”. The problem with such alternative question formulas is that they may be leading questions, offering only

two options for the complainant to choose from, and as in the example above, both of those options might not come in favor of the complainant. Both options are equally damaging to the complainant; portraying her as an experienced drinker and thus might have been totally conscious at the time of the incident, or the other option that she is still experiencing, and therefore she might have been intoxicated at the time of the incident and not a reliable witness to the events which took place. The opposing counselor is aware of the gravity of such a linguistic depiction of the complainant which is why she opted for an objection. The judge also indicated that there might be no need for asking such questions since the witness stated previously that she drank before and on the night of her assault.

(4) Vanderbilt

Q: Okay. So on that night you all started at your room, right? I apologize, June 22nd, 2013, right before you went out to Tin Roof? That's what we are right now.

A: Um. In June the night of June 22nd, those exact people I mentioned, we were in like the dining area of my apartment, not in my room.

Q: Okay. And when I say your room, I apologize. You guys were in an apartment not like a dorm room, okay?

A: Right.

Q: **And you all were pre-gaming?**

A: That it's kind of a **slang term**. I'm sitting...

Q: **You know what the term means?**

A: We had a couple drinks before going out.

Q: Okay. But I'm asking. **Did you know what the term means?**

A: I know what it means to me. It may not mean the same thing to everybody.

Q: Well. **That's fine. Just pre-gaming, drinking before you go out?**

A: We had a couple drinks before we went out.

In Extract (4), the defense lawyer in the Vanderbilt case continues to use lexical choices that insinuate an excess in drinking or intoxication on the part of the complainant. To illustrate, the defense lawyer introduces the term *pre-gaming* (line 8), and then when the witness is confused or perhaps shocked by the term, explaining that it is a slang term, the lawyer then asks the complainant of whether she knows what the term means (line 10). The complainant responds that she had a couple of drinks before going out, but she does not answer the lawyer on whether she knows what the term means. When the witness gives a seemingly evasive answer, the defense lawyer then repeats the same question of whether the complainant knows what the term means (line 12). The witness still gives a evasive? answer in which she does not want to answer if she knows the term or not (line 13). In the final question (line 14), the lawyer repeats the term “*pregaming*” along with another interpretation, “*drinking before you go out*”. The lawyer’s use of “*pregaming*” (Merriam-Webster, n.d.) as a term, which is the practice of getting drunk before attending a party/event typically done by college students (Merriam-Webster, n.d.), was not haphazardly done, instead she knew the effect of describing the complainant’s behavior as *pregaming* on the night of her assault might have adverse effects on her overall testimony as a credible one. The complainant’s answers (in lines 11 and 15) to the lawyer’s challenging questions, that she “*had couple of drinks*” before going out with the

defendant, may have confirmed that the complainant engaged in a “pregaming” practice, which may also indicate her drinking excess. This lexicalization instance is a powerful example of how it can be embedded with rape myths. Depicting the complainant as an experienced drinker or irresponsible college student who pre-games might seemingly justify the defendant’s sexual assault.

Through the performed analysis, it is evident that highlighting certain lexical choices coupled with selectively reformulating those lexical items emphasized the discursive control lawyers exerted over the rape complainants. Additionally, in the following section, the role of agency will be further explored to see how defense lawyers may practice their discursive control to either mitigate or obscure the accountability of the male defendants from committing the sexual aggression against the female complainants.

4.2. Agency

Analysis of the American cross-examinations revealed that opposing lawyers relied on passive and nominalized structures when questioning the rape complainants about the details of the alleged sexual offence. It was observed that such construction either mitigate or eliminate the defendant’s agency altogether and shift the blame away from the defendant as the doer of the sexual offence, as exemplified in the following excerpts.

(5) Vanderbilt

Q: But you didn't feel **you had been sexually assaulted?**

A: My whole body really hurt.

Q: Okay.

A: But I mean but the shoulder was what my focus was mostly on, and also the injury on my knee just cuz I had you know blood and that stuff. So I didn't...I didn't have a reason to pay attention to specifics of other areas as much at that instance.

Q: Okay. And that was on June 23rd, right?

A: Yes.

Q: And when you gave an interview on June 26, **you still didn't feel like you had been sexually assaulted?**

A: That's correct. And just to clarify when I say feel like, I mean like my body...I mean my...I in my mind. I know I did not think that at all at the time.

In Example (5), the defense lawyer is questioning the rape complainant on her physical injury, or lack of, after her sexual assault. What is interesting is the linguistic structural choices the lawyer is using to refer to the complainant's rape. As observed in line (1), the lawyer uses an agentless passive structure to refer to the sexual assault, "*you had been sexually assaulted*". Such linguistic structure deletes the overall agency of the defendant, and therefore the consequences attached to the sexual assault. The lawyer, after a challenging question-answer sequences, embeds the same structure (i.e., agentless passive) again in line 9, when challenging the complainant's lack of physical injury.

(6) Winslow

Q: So you didn't tell, you don't, you didn't tell the, on June 18th when you called the sheriff, you didn't tell him that anything **about anybody videotaping** you, right?

A: I explained to them. That's what I said in my statement. And that's exactly what I told Mr. Dan Owens.

Q: Okay. So it's your memory, now, that you told sergeant Emic on the phone that **you were being videotaped?**

A: No. I know what I said to the sergeant.

Q: Okay.

A: You're asking me those questions. I did not say any of those things.

Q: Okay. You didn't tell him that **you were being videotaped?**

A: I did tell him that I was being videotaped.

Q: Okay. That's what I'm asking. When you called him on the phone you told them **that you were being videotaped?**

A: Yes.

Q: And you did you tell him that you had a previous relationship with Mr. Winslow?

A: I did not get that far.

Q: Okay. So you just told him about, the night, that night that happened?

A: Correct.

Q: And you said that you were, that you were in a, I guess, in a condominium and then you passed out and **you woke up to being penetrated from behind?**

A: I explained to him that we were in a townhouse, and yes, that's what happened.

In Example (6), the lawyer uses a variety of nominalized and passivized structures when asking the complainant about the details of the sexual assault. In the first question, (line 2), the lawyer uses a nominalized structure when he was asking the complainant about whether she told the police she was being videotaped. The lawyer uses the anonymized word (i.e., anybody) then followed by the nominalized gerund structure “*about anybody videotaping you*”. The lawyer could have used active voice structure (e.g., *someone was videotaping you*), but by using the nominalized variation in this question he, first, eliminates agency, and second, turns the process of videotaping the complainant’s sexual assault from a concrete process that is performed by someone into an abstract process with no real agents. The lawyer in a subsequent question (lines 4-5) uses another structure (i.e., agentless passive) to refer to the same incident of filming the complainant’s sexual assault. In this instance, the lawyer uses the passive voice, “*you were being videotaped*”. The same structure was repeated in the following two questions (lines 9 and 11-12). By doing so, the lawyer is

deleting the agency and its accompanying consequences. In the last question (line 19), the lawyer uses another agentless passive structure to describe another segment of the sexual assault, “*you woke up to being penetrated from behind*”. In this instance, the lawyer is eliminating the agency of his client as the one who is doing “*the penetration*” and thus shifting the attention away from the agent to the act being performed.

(7) Winslow

Q: So Miss Doe, we left, we were discussing the second incident, **the night that you were assaulted**. Remember that?

A: Yes.

Q: So we know that you remember everything up to the couch and then you remember **being in the room with Mr. Winslow behind you**, right?

A: Yes.

Q: Okay. So at some point somebody told him to stop and he did stop?

A: Yes.

Q: And right before that, that's when you notice the people **doing the filming**, right?

A: Yes.

In the same trial, the defense lawyer questions the rape complainant about the details of the sexual assault. In Extract (7), the lawyer is seen again to be using nominalized and passivized structures to obscure and eliminate the agency of the defendant. In line 1, the lawyer uses the agentless passive form in, “the night you were assaulted”, thus removing the agency of the defendant. Then in line 4, the lawyer uses nominalization when he refers to the sexual encounter with the defendant (lines 4-5). To illustrate, the lawyer elicits a confirmation from the complainant that she woke up to “*being in the room with Mr. Winslow behind her*”. Turning the sexual act of “being penetrated” as phrased in

(Example 50) to the state of “being in the room” with the defendant “behind her” is not only eliminating agency of the defendant, but in this case is placing the complainant as the agent. Even though the defendant’s name is mentioned in this clause, attention is shifted away from him, as he is no longer an agent in the clause, and instead attention (and responsibility / blame) is directed to the complainant. That is, she is the one in the room with Mr. Winslow behind her. Therefore, such linguistic construction can reshape the events of the case. The lawyer extends his questions to ask her about the segment of the night where she was videotaped by using another nominalized structure, “*you notice the people doing the filming*”. Instead of saying, for example, *the people who were filming you*, he nominalized the verb (film) and turns it into a process (i.e., doing the filming) detached from any context and by consequence eliminating the patient (i.e., the complainant) as an affected party from the process of filming her.

(8) Winslow

Q: And it was during this period of time. During the, well, let me ask you this, did Mr...did Matt ask you whether **you feel you've been raped** up in the bedroom?

A: In the car.

Q: Okay. So those questions came in the car?

A: Yes.

In this Example (8), the lawyer questions the complainant on whether she was asked by one of her friends, who was present during the night of her sexual assault, if she was raped. In this reported speech, the lawyer uses the agentless passive structure, “*you feel you've been raped*” (line 2). It is apparent by using this structure, the lawyer is eliminating the agency of the defendant, but what is strikingly interesting is that the lawyer is reporting speech that was uttered by another witness; however, this other speaker (i.e., Matt) who asked this question may not have used the same passive structure in his original speech, which the lawyer used. Nonetheless, the lawyer is aware of the linguistic choices and their

ramifications, and that is why he purposely used an agentless passive structure when speaking of the rape incident. In addition to the agentless passivized structure, the lawyer used strategically the word “*feel*”; this lexical choice insinuates that the complainant’s experience of sexual assault might be built subjectively by her emotions and feelings, and not necessarily based on factual evidence that she was raped.

Exploring the role of agency in the selected excerpts, it was observed that shifting the blame away from the defendant/accused is the primary goal of the defense team by relying on two linguistic constructions: nominalization and passivization. Thus, lawyers were seen to construct questions in such a way that would mitigate, obscure, and/or eliminate the agency of the defendant’s in initiating non-consensual sexual acts with the complainants.

5. Discussion and Conclusions

The primary goal of the paper was to investigate, through conducting a CDA that explores the role lexicalization and agency, whether cross-examinations of rape complainants are ideologically framed, and whether they reflect asymmetrical power dynamics in favor of members of the institutional discourse. The following section will report on the most notable findings the paper has reached and will offer new insights for future research endeavors.

5.1. Summary of Main Findings

Conducting critical discourse analysis displayed that, in the selected American cross-examinations of rape trials, defense lawyers actively used lexical choices strategically to not only reshape and reconstruct events of the case but to also reshape the witnesses’ (i.e., rape complainant) own testimony and prior statements. Cross-examiners in the American cross-examinations strategically employed a wide range of lexical items to serve their preferred narratives and in many instances to question the complainants’ behavior and character. This finding comes along the same lines in what Ponterotto (2007) previously discussed of how cross-examiners create a web of association by the use of lexical items to negatively depict the complainants and their behavior. Not only that, but cross-examiners always relied on the subtle meaning differences

of the words they embed in their questioning, which were found to serve major ideological work. Additionally, cross-examiners extensively relied on agentless passive constructions and nominalized constructions in an attempt to obscure the agency and thus the accountability of their defendants in committing sexual aggression acts. This finding comes in agreement with what Ehrlich (2001) formerly described as the *grammar of non-agency*, which is being weaponized by opposing counselors to either mitigate or eliminate the agency of their client (i.e., defendant).

5.2. Practical Implications

Building on the findings of this study, it is important to note that the language of rape trials is a form of institutional discourse, where the lay person (i.e., rape complainant) can be discursively restricted by members of the institutions (i.e., counselors and lawyers). Therefore, it is important that adequate provisions be put in place inside courtrooms to make sure that vulnerable witnesses are not being subjected to a degrading or demeaning line of questioning, especially in the cross-examinations.

5.3. Limitations

Whereas the study deliberately opted for a limited sample size to be able to offer an in-depth qualitative linguistic analysis of the rape cases, by employing the tools of CDA, a larger sample size can better reflect if such linguistic features are generically marked in the American rape trial discourse. It is also noteworthy that while lexicalization and agency were employed in the present study, CDA offers a varied toolkit, where other linguistic features can help in uncovering power asymmetries in the rape trial discourse.

5.4. Future Recommendations

A crucial dimension that should be investigated in future studies is the underlying cultural factors that go in the shaping of cross-examination questions and whether such linguistic features such as lexicalization and agency are observed in different legal settings (e.g., different countries). Therefore, similar research endeavors should be undertaken in different countries which adopt adversarial judicial

procedures, to decide if the findings of this study can be generalized to other adversarial contexts, and not just the American legal system. It is also important to critically analyze other types of cross-examination of vulnerable witnesses, such as children, to see whether similar asymmetrical power dynamics take place.

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