Witness Cross-Examinations in Non-Stranger Assault Crimes: An Appraisal Analysis[1]

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Abstract. "It has been said that the victim of a sexual assault is actually assaulted twice – once by the offender and once by the criminal justice system[2]". In the U.S. court system, the principal player is the defense lawyer who cross-examines the complaining witness. The literature to date has not linguistically examined the extent to which the actual questioning differs from questioning in similar cases. Thus, we ask: other than the fact that the crime is so personal, what is different about the language of sexual and non-sexual assault trials? We obtained one transcript of three types of trial (sexual assault by a male on a female; non-sexual assault by a male on a female; and non-sexual assault by a male on a male) and analyzed the cross-examinations using Appraisal Analysis (Martin and White, 2005), which identifies a speaker or writer's stance toward another person or proposition. The findings revealed similar strategies; however, while all three lawyers effectively and legally discredit the witness, there are subtle differences in the judgements they imply. Of course, we cannot generalize the findings from these three cases to claim distinctions between the cross-examination strategies used in sexual and non-sexual assault cases. However, our main goal in this initial study is to demonstrate the usefulness of Appraisal Analysis as a tool for achieving a more nuanced understanding of the use of stance markers during cross-examination. It may be that it is this strategy that inhibits many women from pursuing rape cases in court; if so, Appraisal Analysis would be a useful tool for future research on a larger data set.

Keywords: Revictimization, assault trials, witness cross-examinations, Rape Shield Laws, Appraisal Analysis.

Resumo. "Diz-se que a vítima de abuso sexual é, efetivamente, abusada duas vezes – a primeira pelo agressor e a segunda pelo sistema de justiça penal" (Estado v. Sheline, 955 S.W.2d 42, 44 (Tenn. 1997).). No sistema judicial dos Estados Unidos, o elemento principal é o advogado de defesa, responsável pelo contra-interrogatório da testemunha da acusação. Até ao momento, nenhum estudo analisou linguisticamente em que medida o próprio interrogatório diverge de interrogatórios em casos semelhantes. Por conseguinte, perguntamos: para além do facto de o crime ser tão pessoal, quais as diferenças entre a linguagem utilizada

em julgamentos de abuso sexual e de agressão não sexual? Com base em transcrições de três julgamentos de tipo diferente (abuso sexual de uma mulher por um homem, agressão não sexual de uma mulher por um homem e agressão não sexual de um homem por outro homem), analisámos os contra-interrogatórios à luz da Análise da Avaliatividade (Martin and White, 2005), que identifica a postura de um falante ou de um escritor face a outra pessoa ou proposição. Os resultados revelam estratégias semelhantes; contudo, embora os três advogados descredibilizem a testemunha eficaz e legalmente, existem diferenças subtis nas avaliações implícitas. Naturalmente, não é possível generalizar os resultados com base nestes três casos e defender que existem distinções nas estratégias de contra-interrogatório utilizadas em casos de abuso sexual e de agressão não sexual. Contudo, o nosso principal objetivo neste estudo exploratório é demonstrar a relevância da Análise da Avaliatividade como ferramenta para uma compreensão mais rigorosa da utilização de marcadores de postura no processo de contra-interrogatório. É possível que seja esta a estratégia que inibe muitas mulheres de levar casos de violação a tribunal e, se for esse o caso, a Análise da Avaliatividade será uma ferramenta útil a aplicar em estudos futuros utilizando conjuntos de dados mais vastos.

Palavras-chave: *Revitimização, julgamento de casos de agressão, contra-interrogatório de testemunhas, legislação de proteção em casos de violação, Análise da Avaliatividade.*

Introduction

This article reports a study comparing the transcripts of three cases: one alleges a sexual assault by a man against a woman; a second alleges physical, but non-sexual violence by a man against a woman in a domestic violence case; the third is an assault by a man against a man that was also non-sexual. In all three cases, the accuser knew the defendant.

Much has been written about the reasons that women who have been sexually assaulted do not come forward more frequently. We accept as a point of departure the many reports of women feeling revictimized when they accuse an individual of rape. As one judge stated: "It has been said that the victim of a sexual assault is actually assaulted twice – once by the offender and once by the criminal justice system."[3] In the U.S. court system, the principal player in the revictimization narrative is typically the defense lawyer who cross-examines the complaining witness (Matoesian, 1993; Taslitz, 1999). It is the lawyer's job to discredit the accuser, whether by portraying her as promiscuous, as ashamed to have consented, or simply as an out-and-out liar.

In the 1970s and 1980s, rape shield laws were passed in order to protect witnesses from having their prior sexual history introduced as evidence, making this type of explicit condemnation of one's moral propriety unavailable to defense lawyers. However, despite widespread implementation of these laws, much discussion has arisen about their lack of efficacy in actually shielding witnesses from revictimization (see e.g. Anderson, 2002; Capers, 2013).

Missing from the discussion have been systematic comparisons of the cross-examination techniques in rape cases and similar cases that do not involve sexual assault, and any systematic approach to measuring the likely impact of a particular cross-examination technique. This article begins to fill these gaps by coding the questions asked during the cross-examination in each case using Appraisal Analysis (Martin and

White, 2005), which reveals a speaker or writer's underlying stance toward another person or proposition.

Specifically, we coded linguistic elements in the transcripts such as the number and types of questions (e.g. *yes/no*, open-ended), the linguistically expressed feelings about or judgements against the witness (e.g. that the witness lacks propriety), and the underlying narrative that the questions were intended to imply (e.g. that the witness was unreliable).

One cannot draw conclusions about the differences between sexual and non-sexual assault cases by examining only three cases. Rather the goals of this case study are first, to demonstrate that this method of analysis can be a valuable tool in assisting individuals in law enforcement agencies, sexual assault counseling services, and prosecutors' offices to understand more deeply what inhibits so many women from pursuing rape cases, and second, to help witnesses work through the decision with a fuller understanding of how and why the system produces the difficulties it does.

Sexual Assault and the Legal System's Failures to Curtail It

The Socio-Legal Context

While there are various social and legal definitions of what constitutes sexual assault, we adopt the definition used by the U.S. Department of Justice: "attacks or attempted attacks generally involving unwanted sexual contact between a victim and offender" (Planty *et al.*, 2013: 2). While not all sexual assault involves force, there is a clear exercise of power – physical and/or psychological – by one person, most often a male, over another, most often a female (Conley and O'Barr, 2005).

Because rape is such a personal crime, "few legal issues have been the focus of such intense political, social, and scholarly debate" (Conley and O'Barr, 2005: 15). In 2006, the National Institute of Justice reported that 17.6% of surveyed women and 3% of surveyed men have been raped at some point in their lives; that equals one in every six women and one in every 33 men. The FBI reported that 84,376 rapes occurred in 2012. However, a report by the Federal Bureau of Justice Statistics covering the period from 1995-2012 (Sinozich and Langton, 2014) reported that 80% of student victims and 67% of non-student victims who acknowledged having been raped stated that they did not notify law enforcement authorities. Based on other studies, it has been estimated that the number of actual rapes is at least ten times the number of reported ones (Rashad, 2011).

One of the primary reasons given for the low rates of reporting is fear that coming forward will lead to revictimization: the reliving of the assault in a courtroom, where, frequently, the victim is blamed for the sexual encounter or represented as a liar who fabricated the entire incident (Matoesian, 1995; Taslitz, 1999; Conley and O'Barr, 2005).

Historically, the prosecution of rape required the victim to demonstrate beyond a reasonable doubt that she or he did not give consent to the sexual encounter and that she or he had resisted to the utmost (Ehrlich, 2001; Tiersma, 2007). If the accuser was not able to present herself as a credible victim, the defendant was likely to be acquitted (Estrich, 1987). When asked to assess a witness's credibility, jurors were told to examine, among other things, her background and whether she was capable of recalling the events accurately and of making informed decisions about the event (Taslitz, 1999; Ehrlich, 2001).

The main way defense counsel instilled doubt about a witness's credibility in a jury was to introduce the witness's prior sexual history.

When cases of rape were prosecuted under these conditions, convictions were rarely obtained, especially in cases of acquaintance rape, which is far more common in the U.S. than is rape by a stranger (Estrich, 1987; Rashad, 2011). Between 2005 and 2010, 78% of "rape or sexual assault victimizations" involved a partner, family member, friend, or acquaintance. More specifically, 34% were committed by an intimate partner (Planty *et al.*, 2013: 4).

In recognition of the dual problems of women not coming forward and of their credibility being impugned when they did, starting in the 1970s and 1980s, rape shield laws were passed in order to exclude evidence regarding the victim's reputation and past sexual behavior not related to the current case. Below is the federal version of the rule:

> **Rule 412 Sex-Offense Cases: The Victim**
> **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
> **(1)** evidence offered to prove that a victim engaged in other sexual behavior; or
> **(2)** evidence offered to prove a victim's sexual predisposition.
> **(b) Exceptions.**
> **(1)** *Criminal Cases.* The court may admit the following evidence in a criminal case:
> **(A)** evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
> **(B)** evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
> **(C)** evidence whose exclusion would violate the defendant's constitutional rights.[4]

As one can see, the federal rape shield law (also a model for the rape shield laws of various states) has an exception that at least partially nullifies the rule in cases of non-stranger rape: the victim's sexual experience with the accused can be offered as evidence of consent (exception B). Of course, the law does have at least some force – the sexual experience of the victim with others may still not be admitted to prove consent. Nonetheless, a person claiming to have been raped by an acquaintance with whom she has been intimate continues to fight an uphill battle. For this and related reasons, the rape shield laws have been criticized as ineffective (see e.g. Anderson, 2002). Throughout this time, legal reform has been called for in order to strengthen the protection of a witness from the process of revictimization in court. For example, Lininger (2005) presents a host of proposals, which range from narrowing the admissibility of prior sexual experience between the accuser and defendant, to giving the accuser standing to object to questions from defense counsel.

Yet, women continue to experience revictimization when they enter the legal system, and thus, many continue to refrain from doing so (Zydervelt *et al.*, 2016). This should not be surprising, for introducing a woman's past sexual history, as personal as that is, constitutes only one of many ways that a defense lawyer can attempt to discredit the complaining witness.

Prior Assessments of Linguistic Strategies in Rape Cases

Interdisciplinary research by sociolinguists and linguistic anthropologists (e.g. Matoesian, 1993, 1995; Conley and O'Barr, 2005; Ehrlich, 2001, 2007) suggest that the lack of efficacy of such laws lies in the need for a more nuanced understanding of the ways in which non-controversial cross-examination strategies affect such witnesses. Ehrlich (2001) demonstrated how presuppositions of selected propositions can be utilized by defense attorneys to create negative ideological frames about the witness. For instance, in the question: "*Uhm did it occur to you that you could lock the door so that they may not uh return to your room?*" it is presupposed that the witness had the opportunity to lock the door but chose not to, positioning her as an active participant in the decision to engage in sexual contact (78).

In such literature, various linguistic tools have been used to assess the effect of cross-examination strategies in the revictimization process. For instance, in his work on the William Kennedy Smith rape trial, Matoesian (1993, 1995) utilized Conversation Analysis to identify the ways in which the discourse structure unfolds between the lawyer and the witness. Conversation Analysis (CA) analyzes sequences of action in a given context such as the formulation of question types, preferred and dispreferred responses, overlaps, politeness markers, topic introductions, pauses, and discourse markers (Pomerantz and Fehr, 1997).

Later work by Conley and O'Barr (2005) supplemented Matoesian's findings by highlighting the imbalance of power in the discursive strategies leading to revictimization. Specifically:

> [C]ourtroom specific rules have the consequence of empowering lawyers linguistically over the witnesses they examine. For example, if a witness strays in answering a question, the lawyer has considerable leeway to interrupt and bring the witness back to the point of the question. ...Witnesses, however, have no comparable power to demand that lawyers ask questions that they deem relevant to the issue at hand. From the outset, the structural arrangements for talking in court do not privilege all speakers in the same way. This imbalance of power is present in all courtroom dialogue. However, its consequences are most extreme during cross-examination, when lawyers examine the opposition's witnesses (21).

Given this inherent imbalance of power, they used Critical Discourse Analysis (CDA) to examine the ways in which the abuse of power, dominance, and inequality are enacted and reproduced in the courtroom. CDA examines, for example, what roles each participant plays and how power is traditionally associated with particular roles; which topics are selected and recycled and who controls the selection of such topics; and what assumptions are implicit in the discourse (van Dijk, 2001). Conley and O'Barr concluded that power is central to the uniqueness of rape trials because in such an institutionalized context, patriarchal dominance is traditionally supported; this, in turn, creates what they term a sexual double bind wherein women are irrational and unbelievable if they are too emotional, but not victims if they are too logical and not emotional enough, which in combination contribute to their revictimization (see also Hildebrand-Edgar and Ehrlich, 2017).

Using other variants of discourse analysis, Ponterotto (2007) and Leung and Gibbons (2007) show how the players in a trial – including the judge – create an environment which, although contested, is an uninviting one to an individual who has recently been a victim of violence and is now asked to permit challenges to both her honesty and her personal moral values.

The Critical Need for Further Research

We see two serious gaps in the literature on revictimization. First, while the research to date contributes to our understanding of how witnesses may be left feeling that the justice system has subjected them to abusive treatment on the heels of their having been assaulted, it has not examined whether the actual questioning by counsel in these cases reflects anything other than normal defense strategies. That is, there are no controlled studies comparing the language used in the cross-examination of witnesses claiming to be sexual assault victims with that of those claiming to be victims of other crimes. The one notable exception is a study from Australia, wherein Brereton (1997) compares cross-examination in rape and assault cases with respect to various legal points addressed (failure to flee, credibility, intoxication); however, he does not analyze differences in the linguistic strategies used to adduce the information. Brereton found more similarities than differences in the strategies in the two types of cases:

> Some significant differences were identified in the treatment of assault and rape complainants, particularly in relation to questioning about sexual history, and the amount of time which rape complainants spent in the witness box. However, the comparative analysis also highlighted substantial similarities in the cross-examination strategies used by defence counsel in the two types of trial, despite the very difficult 'fact situations' which were involved. The assault complainants were just as likely as the rape complainants to be subjected to attacks on their character and credibility, and to be asked questions about such matters as their drinking behaviour and emotional and mental stability. If there were inconsistencies in a complainant's evidence, defence counsel attempted to exploit these inconsistencies, regardless of whether rape or assault was alleged. If an assault complainant failed to act as 'expected', or had not reported promptly to the police, he or she was just as likely as a complainant in a rape trial to be cross-examined about these matters. In short, most of the tactics which were used by defence counsel appear to have been standard 'tools of trade' for lawyers, rather than unique to the setting of the rape trial (259).

The current study seeks to create a paradigm for corresponding research focused on linguistic strategies employed in rape cases by comparing the cross-examination of witnesses in three non-stranger assault cases: one a sexual assault by a man against a woman; one a domestic violence case by a man against a woman; and the third an assault by one man against another. Ultimately, the goal of this and future studies will be to determine whether there are systematic differences in the way lawyers approach the three kinds of cases.

The second gap in the literature is a nuanced understanding of how moral judgements – those that were supposedly barred through rape shield laws – are still expressed

in such contexts and an examination of how such judgements manifest in comparable cases of non-sexual assault. Appraisal Analysis is designed to address such questions.

Appraisal Analysis (Martin and White, 2005), which assesses a speaker or writer's underlying stance, can reveal expressions of authorial attitudes – including personal feelings and judgements about others – and enrich our understanding of previous scholarship that has alluded to, but not systematically tested, such expressions of judgement between a defense attorney and a complaining witness.

It is hypothesized that strategies in each case will fall within the normal range of cross-examination strategies and, in the case of sexual assault, such strategies will be used in ways that avoid introducing a witness's prior sexual history but still reveal judgements of morality against the witness. However, since in this preliminary study we look only at one token of each type of case, our goal here is to demonstrate the efficacy of the analysis and to display its preliminary insights.

Cross-Examination Strategies

Before we present the study, we must first discuss relevant aspects of cross-examination since it is the interactions during cross-examination that comprise the study's data. U.S. law students are trained in trial practice techniques and cross-examination is among the most important of them. Rules of evidence permit only "direct questions" on direct examination, but also allow "leading questions" on cross-examination. The distinction is embodied in Rule 611 of the Federal Rules of Evidence, and is also more or less universal in the evidence law of the state court systems as well.[5] Roughly, direct questions are *wh*-questions. Their key feature is that they do not suggest the answer to the question:

- Where were you on Thursday at 3:00 AM?
- How many times have you climbed the wire fence to enter into the school yard?

Leading questions, in contrast, are more typically *yes/no* questions. They do suggest the answer and can utilize a variety of linguistic structures and paralinguistic features to convey their status as a question, including the use of *wh*-question format, a statement followed by a tag question, and a statement with rising intonation, respectively:

- Weren't you in Cleveland on Thursday at 3:00 AM?
- You had never met the defendant before, had you?
- You've never been there?

Sophisticated lawyers have a good intuitive sense of the range of tools available to them in achieving the goals of cross-examination. The difference in form permits the cross-examiner to achieve total control of the exchange between lawyer and witness. As Steven Lubet's well-respected trial advocacy book[6] states: "The essential goal of cross-examination is control. ... [Y]our object on cross-examination is to tell your client's story" (Lubet, 2013: 97). Lubet further advises lawyers to write an effective paragraph that summarizes the story the lawyer wishes to bring out through the cross-examination.

> It should be a simple matter to convert the text into a cross-examination plan. You merely need to take each sentence and rephrase it into a second-person question. In fact, it is often best to leave the sentence in the form of a declaration, technically making it a question through voice inflection or by adding an interrogative phrase at the end (86).

Suggestions include adding a tag such as "right" or "correct" at the end of some sentences or using rising intonation to make them questions, creating what Eades calls "pseudo-declarative questions" (2016: 74). Lubet warns: "The cardinal rule of cross-examination is to use leading questions. The cardinal sin is to abandon that tool" (2013: 107).

As important as the form of cross-examination is its function. Different books state it differently, but there is general agreement on the substance. One student training book suggests four reasons for cross-examining a witness:

1. Effective impeachment of damaging testimony;
2. Eliciting concessions on the historical merits that support your theory and theme;
3. Using an opposing witness to rehabilitate the credibility of one of your witnesses; and
4. Using one opposing witness to impeach the other. (Carlson and Imwinkelried, 2010: 294–295).

Lubet's list (2013: 83) is somewhat more detailed, but along the same lines. Fontham (2008) distinguishes between offensive cross-examination, through which opposing witnesses may agree with facts that the lawyer wishes to bring out as part of her own case, and defensive cross-examination. The defensive version has two purposes: discrediting testimony by demonstrating that it is not accurate, and "destroying the witness's credibility" (417).

Most often, the witness being cross-examined is unfriendly to the cross-examiner's case. It is very unlikely that this witness will cooperatively accede to all that the questioner would like to prove or disprove. Therefore, it is essential for the cross-examiner to identify some limited goals, keep as much control of the interaction as possible, and then sit down as quickly as possible. And there are plenty of tricks of the trade. Among them are to move around from one topic to another to make it harder for the witness to rely on a chronological narrative to thwart the cross-examiner's version of the facts; ask innocent-sounding questions that can establish facts that the witness will not believe to be controversial, but which will help the case later; and always be prepared to confront the witness with contradictory evidence if the witness attempts to avoid conceding what the lawyer is already able to prove.

Throughout all of this aggression, skilled lawyers know the difference between being tough and being rude. The cross-examination often takes place with a businesslike, conversational tone that keeps both the lawyer and the lawyer's client credible as individuals who are simply trying to demonstrate that the opposing party's position is weak.

Methodology

Appraisal Analysis is situated within the theoretical framework of Systemic Functional Linguistics (SFL) (Halliday, 1978), which approaches language as a social practice that is the result of its systematicity and its functionality (Martin, 1997). Specifically, the systems of language provide sets of choices in how meaning is constructed and the functions of language provide motivations for language form and structure (Halliday, 1978).

The three metafunctions identified by Halliday that allow speakers and writers to convey different kinds of meaning are the ideational, textual and interpersonal. The interpersonal metafunction – that with which this research is engaged – can be examined

through linguistic manifestations of stance – a speaker or writer's underlying attitudes about or commitments to a person or proposition (Biber *et al.*, 1999). Appraisal is a discourse analytic framework that allows close analysis of these linguistically-manifested stances by uncovering meaning across whole texts (Martin and Rose, 2003), that is, a prosody of interpersonal meaning (Halliday and Hasan, 1976). Collectively, the Appraisal systems – *attitude, engagement, and graduation* – approach the linguistic resources in texts as systematic constructions of interpersonal meaning (Martin and White, 2005).

Attitude

Attitude investigates how feelings are linguistically encoded within a discourse and includes categories of emotion (*affect*), ethics (*judgement*), and aesthetics (*appreciation*). Simply, the system of attitude examines how speakers or writers explicitly and implicitly express personal feelings about self, others, and objects, respectively.

Affect encodes a speaker's positive and negative emotions of happiness (e.g. *I'm thrilled*), security (e.g. *I'm safe*), and satisfaction (e.g. *I'm content*) that relate to self. Judgement encodes a speaker's positive and negative ethical evaluations of others' behaviors in terms of categories of social esteem: i.e., their normality (e.g. *you're unpredictable*), capacity (e.g. *she's accomplished*), and tenacity (e.g. *he's cowardly*), and categories of social sanction: i.e., their veracity (e.g. *they're discrete*) and propriety (e.g. *she's greedy*). Appreciation encodes a speaker's aesthetic evaluations of things, phenomena, or processes (e.g. *this weather's terrible*) (Martin and White, 2005).

Codings within the system of Attitude can be explicitly inscribed and/or implicitly invoked. Inscribed attitudes denote particular meanings, whereas invoked attitudes connote other meanings based on shared social experiences. For example, the meaning of *happy*, as in *I feel happy*, denotes a positive affect. Whereas, while the individual meaning of the words in the query *What were you wearing?* does not carry positive or negative attitude in a denotative sense, given a shared social understanding of particular contexts, it could connote a positive or negative attitude. In terms of a friend asking about another friend's attire at a wedding event vs. a defense attorney asking about a complaining witness's attire on the evening of a reported sexual assault, the former query could connote or invoke a positive attitude and the latter query a negative one. Occasionally, both inscribed and invoked meanings can be interpreted in the discourse, as often occurs with sarcastic comments, especially in writing when tone and other paralinguistic cues are absent. For example, in a line of questioning in Case 2 about how the witness's actions have affected the public image of the defendant, the defense counsel's final question – "Would you agree you've taken care of that now?" – could be coded as positive capacity if the meaning of "taken care of" demonstrates positive ability on the part of the witness, or negative propriety if the meaning is intended to imply maliciousness. (Given the fact that the question was withdrawn, the latter interpretation, in this case, is most likely the correct one.) In such cases, double codings can be utilized to reveal both forms of denotative and connotative meaning in context (Martin and White, 2005). These will be outlined in the analysis below.

Engagement

Engagement illustrates how speakers or writers dialogically position themselves with respect to their audience or to propositions within the discourse (Martin and White, 2005).

Utterances can be either *monoglossic* or *heteroglossic.* Monoglossic utterances reference no other viewpoints aside from the speaker or writer's and assume the audience is in alignment with the speaker. Such utterances include bare assertions that are taken to be factual (e.g. $E=mc^2$). Heteroglossic utterances, in contrast, do reference other viewpoints – they refer to, reflect, and/or negotiate the stances of those who came before, and at the same time anticipate forthcoming stances of new audiences (Bakhtin, 1981), ultimately opening the door to debate, discussion, and a negotiation of power.

Heteroglossic utterances can *expand* to allow other voices to participate in the discourse. Expanding utterances acknowledge statements made by others, either by entertaining them as possible truths accepted by the speaker or writer (e.g. *it is possible that you are correct*) or by attributing them as the truths of others (e.g. *You previously stated that…*). Alternatively, as in the case where disalignment is expected, utterances can contract to close off debate by disclaiming (e.g. *that never happened*) or proclaiming (e.g. *the facts of the matter are…*) the truth of an utterance. This includes utterances presented as bare assertions but presented to an audience that is assumed to be in disalignment with the speaker – as is often the case in cross-examinations, wherein the defense attorney is naturally positioned against the complaining witness.

Graduation

Finally, authors can intensify or downplay the strength of their utterances through the system of *Graduation* (Martin and White, 2005). Within the system of Attitude, speakers utilize graduation to demonstrate greater or lesser degrees of positive or negative feelings; within the system of Engagement, speakers utilize graduation to intensify or diminish their level of involvement or investment in the discourse.

Such *amplifications* or *downgradings* can occur in a variety of ways. For example, speakers can use lexical intensification (e.g. *I'm terribly sorry!*), literal or semantic repetition (e.g. *It was such a long, drawn-out, protracted play!*), and quantification (e.g. *The whole world was there!*).

Procedure

In order to capture prosodic meaning, that is, meaning that is spread throughout the discourse, all utterances made by each defense lawyer in the complaining witness cross-examinations were examined. That amounted to 434 in Case 1, 844 in Case 2, and 68 in Case 3. Categorizations of question types are reported as raw frequencies and as percentages of the total number of occurrences.

After categorizing the defense counsels' questions in the three cases, each utterance was then coded for positive or negative manifestations of attitude (specifically, affect and judgement), engagement (expansions and contractions), and graduation (lexical intensification, repetition, and quantification). Finally, patterns of such codings within each cross-examination were identified (e.g. all tokens that were coded as instances of negative normality, contracted utterances that utilized similar syntactic structures, and topics that were frequently repeated were grouped together) and are reported below.

In order to validate the results found in this study, a test of inter-rater reliability was performed. The initial coding was performed by one of the authors (Gales). Subsequently, three linguistics graduate students[7] trained in Appraisal Analysis were asked to code a random sampling of the initial coding as well as verify attitudinal markers that

were double-coded for inscribed and invoked meaning. The results provided a 94% rate of consensus.[8]

The analytic systems of Appraisal provide a more nuanced examination of interpersonal stance and the positioning of social participants, allowing us to move beyond the mechanics of conversational structures and manifestations of institutionalized systems of power, with the potential of reflecting underlying ways that language may be utilized to revictimize victims of sexual assault.

Case Studies

The analyses that follow were performed on the cross-examinations of witnesses in three non-stranger assault cases: sexual assault, non-sexual domestic violence, and non-sexual assault and attempted murder. All identifying information has been changed.

Sexual Assault

The first analysis is of a 2007 cross-examination of the complaining witness in a sexual assault case herein called *The Commonwealth of Virginia v. Waters and Johnson.* The complaining witness, Ms. Irving, stated she began the evening at a series of downtown restaurants and nightclubs with a group of friends; she remained after the others had left in order to spend more time with a particular acquaintance, Jack. After losing contact with Jack, Ms. Irving approached the two defendants, Mr. Waters and Mr. Johnson in the nightclub, and was told by them that they were friends of Jack's, at which point she left with the two defendants. They went back to one of the defendants' apartments, where she claims she was raped by both of them.

Domestic Violence Non-Sexual Assault

The second case analyzed is a 2014 cross-examination of the principal prosecution witness in a domestic violence assault hearing which we have renamed *Barbara Wilson v. Ryan Jones.* Ms. Wilson and Mr. Jones had been together for approximately four years, but had recently separated at the request of Mr. Jones. On the night in question, the alleged victim, Ms. Wilson, arrived at Mr. Jones' home after he had texted her that he was crying and depressed. Upon her arrival, Mr. Jones asked Ms. Wilson to leave. However, Mr. Jones continued talking, so Ms. Wilson remained. After approximately ten minutes, Ms. Wilson states that Mr. Jones grabbed her by the neck, started to strangle her, and then slammed her head into a wall several times.

Non-Sexual Assault and Attempted Murder

As a final point of comparison, a third case was examined – a 2004 cross-examination of a male principal prosecution witness in a non-sexual assault and attempted murder case herein called *The People of the State of New York v. Juan Garcia.* In this case, the alleged victim, Mr. Alvarez, ran into the defendant, Mr. Garcia, in the street near where Mr. Alvarez worked and Mr. Garcia lived. While they had never had an altercation before, on this day, they both testified that they gave each other an aggressive look and a physical fight ensued. After the fight, Mr. Alvarez claims the defendant walked away and then returned with a gun. Although Mr. Alvarez did not see Mr. Garcia shoot him since he was walking in the other direction, he claims that Mr. Garcia then shot him in the back three times.

Limitations

The following limitations of the data set must be noted. For initial purposes, the three cases were selected because of their similarity as non-stranger assault crimes; however, in each case, the cross-examining attorneys are male. The complaining witnesses in the sexual assault and domestic violence cases were females, while the principal prosecution witness in the non-stranger assault case was male. Differences in gendered performance, expectations, and social norms must be taken into account (Ehrlich, 2001).

Additionally, the non-stranger sexual assault transcript was from a pre-trial hearing where questions are not as confined as they might otherwise be during the actual trial because there is no jury present at the hearing. That said, rape shield laws still apply and the question of how a witness is cross-examined by the defense attorney can still be investigated.

Finally, given the fact that there were no recordings of the hearings, interruptions per question type could only be preliminarily investigated due to the fact that distinctions between interruptions and overlaps, length of pauses between interrupted turns, and other paralinguistic cues such as rising intonation could only be examined based on how they were transcribed.

Future research will examine cases that take gender into account from both attorney and witness perspectives, investigate cross-examinations performed during the trial as opposed to at a pre-trial hearing, and include cases with recordings of the hearings, if possible. However, these data were deemed sufficient as a case study for the purpose of assessing the applicability of Appraisal Analysis as a tool for revealing more nuanced attitudinal meaning in witness cross-examinations.

Analysis

The following analysis provides a brief overview of the question types and interruptions per type and the results of the Appraisal Analysis, specifically regarding the categories of Attitude, Engagement, and Graduation.

Question Types

For comparison purposes, the total number of question types was counted. Although the legal system regards all *wh*-questions as non-leading, in reality, some are more open-ended than others. For example, "who did you see first?" can, in context, be asked with regard to as few as two possibilities. We have drawn such a distinction here to determine whether the degree of open-endedness differs by case type.

Thus, question types were divided into three categories: *yes/no* leading questions (e.g. *Did your phone fall on the ground and break at one point?*), limited *wh-* direct questions (e.g. *Who did you speak to first?*), and open-ended *wh-* direct questions (e.g. *When you were walking to the car, what was the conversation?*). A felicitous response to a *yes/no* question would be a *yes* or *no*; a felicitous response to a limited *wh*-question would be a one- or two-word short answer; a felicitous response to an open-ended *wh*-question would be a multiple word narrative response.

The raw frequencies of question types from each transcript are presented in Table 1. Figure 1 presents the percentages of each within the total number of questions.

Question Type	Case 1	Case 2	Case 3
Yes/no	385	699	52
Limited *wh-*	35	104	14
Open-ended *wh-*	14	41	2
Total Qs	434	844	68

Table 1. Raw Frequencies of Questions by Type.
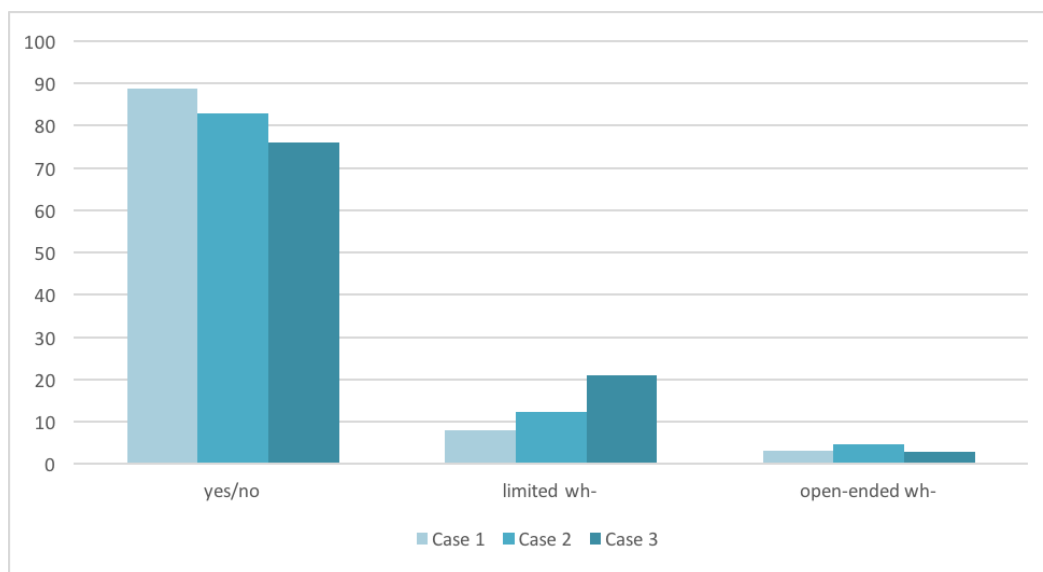
Figure 1. Percentage of Questions by Type.

The results demonstrate that questions that require *yes/no* responses comprised the majority of question types (88.7%, 82.8%, and 76% in Cases 1, 2, and 3, respectively). This is unsurprising since these are prototypical leading questions. Their preponderance is consistent with the advice given by trial practice manuals previously discussed. Limited *wh*-questions (8%, 12.3%, and 21%) and open-ended *wh*-questions (3.2%, 4.8%, and 3%) were much less common.

The limited *wh*-questions, as mentioned previously, may also reflect classic cross-examination techniques if either the question has only one credible answer and the witness is likely to recognize this fact and give that answer, or if it makes no difference what the answer is because the defense counsel can make his point regardless of the response. Both functions of limited *wh*-questions can be seen in Example C1.1 in questions (72,5) and (72,9-10), respectively. (Examples are marked by Case number: C1 (sexual assault), C2 (domestic violence assault), C3 (non-sexual assault). Questions and Answers are referenced by page(s),line(s) from the respective transcripts.)

Example C1.1: Functions of *wh*-questions   [9]

```
Q  (72,3):     And at this point the video's still going on?
A  (72,4):     Yes.
Q  (72,5):     And what video was it again?
A  (72,6):     It was a Jay Z documentary, or something on Jay Z.
Q  (72,7):     Had you seen it before?
A  (72,8):     No.  I'd watched Jay Z's stuff before but –
Q  (72,9-10):  And at this point, how much of the champagne did you
               drink?
A  (72,11):    Just a sip or two.
Q  (72,12):    But you had ...  you love champagne?
A  (72,13):    Yes.
```

In Q(72,5), it is clear that the video had been previously referenced, so there was only one possible credible answer. In Q(72,9-10), regardless of the witness's answer, the presupposition inherent in the question is that the witness drank champagne, which ultimately supports the lawyer's narrative that attacks the witness's credibility and propriety.

In case 3, the division of *yes/no* and limited *wh*-question is the most dramatic (*yes/no* = 76% vs. limited *wh*- = 21%), but upon closer inspection, the function of the limited *wh*-questions follows the patterns listed above. For example, in Examples C3.1 and C3.2, the questions posed require very brief responses for which the witness knows there is only one logical answer.

Example C3.1: Functions of *wh*-Questions
```
Q  (41,3-4):  You say you were working at that supermarket, how
              long had you been working there?
A  (41,5):    About six months.
```

Example C3.2: Functions of *wh*-Questions
```
Q  (43,18):  How far away was he from you at that time?
A  (43,19):  Very close.
```

Thus, in each of the three cases, questions posed by lawyers that require controlled responses (i.e., *yes/no* and limited *wh*-questions) equal roughly the same percentages when combined: 96.7%, 95.1%, and 97%, respectively, as seen below in Figure 2.

Therefore, even though limited *wh*-questions are not technically classified by legal training manuals as "leading questions", their frequencies and functions – that of limiting the witness's response – occur at a similar rate in all three cases, with open-ended *wh*-questions therefore occurring at a similar rate as well: 3.2%, 4.8%, 3%. Thus, as previously noted, the breakdown of question types adheres to recommended trial practice procedures of primarily asking leading (or controlled) questions as opposed to direct open-ended questions upon cross-examination.

Also in line with standard trial manuals (Lubet, 2013), interruptions were a frequent manner of controlling the witness's narrative. A preliminary analysis of interruptions as transcribed by the court reporter reveals that the defense counsel interrupted the witness's responses as follows: Case 1 (10.5%) vs. Case 2 (2.7%) vs. Case 3 (0%). In 87% of the instances, interruptions occurred when the witness was answering a *yes/no* question,
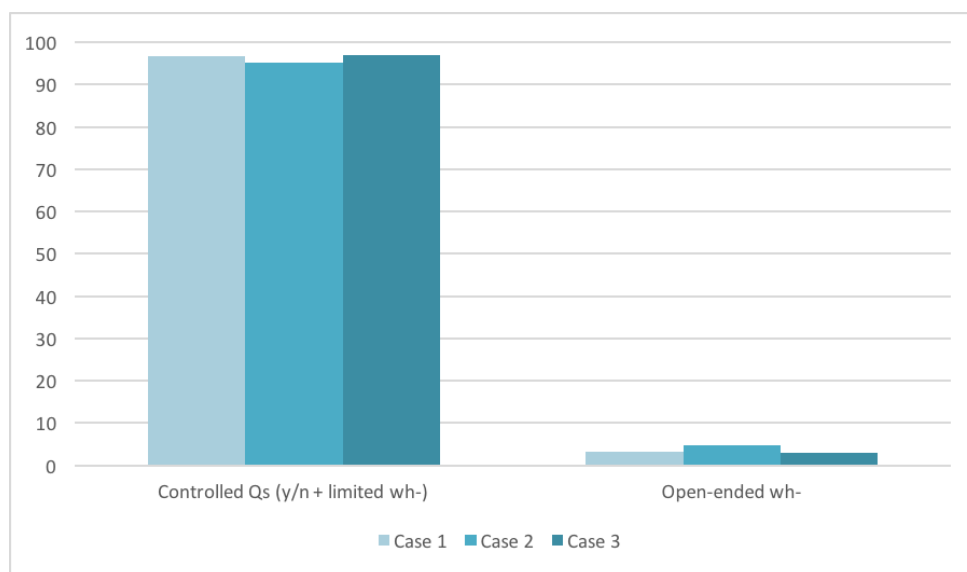
Figure 2. Percentage of Controlled vs. Open-ended Questions by Type.

as seen in Example C1.1 above. This is not a surprise because witnesses frequently take license to explain their *yes/no* answer and lawyers often take issue with the witness's expansion beyond what was asked. Additional interruptions occurred when the defense counsel desired to further his narrative, as seen in Q(99,16) in Example C1.2 below and when the witness simply did not respond to the *yes/no* question in a felicitous manner, as seen in Q(75,11) in Example C2.1 below.

Example C1.2: Interruption that furthers the Narrative

```
Q  (99,9-11):   So is it a fair statement that on one of those two
                days a week that 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?
A  (99,12-13):  No; that's unusual.  I don't drink that – and I
                rarely do shots.  I'm not supposed to do shots.
Q  (99,14):     You're not supposed to?
A  (99,15):     It's a rule for myself, cause –
Q  (99,16):     You've laid down that rule?
A  (99,17):     Yes.
Q  (99,18-19):  That's because of bad experiences when you do do
                shots.  Is that –
A  (99,20):     Yes; yes.
```

Example C2.1: Interruption of an Infelicitous Response

```
Q          (75,7-9):    You and your nine-year-old son came without him
                        knowing you were coming, did you not?  And you came
                        straight into his bedroom?
A          (75,10):     Mr.  Green –
Q          (75,11):     Is that true?
A          (75,12-14):  – I have been at this [place], at [places] with him
                        for four years.  Every single [event].  I always
                        come in Thursday or Friday, okay?
The Court  (75,15-17):  Ma'am, it's going to be helpful if you answer the
                        questions that Mr.  Green asks of you when he asks
                        them of you.
```

While the difference in the number of interruptions may reflect nothing more than styles of the individual lawyers, such a difference should be examined in additional cases that contain recorded data. An examination of potential differences in number, form, and function of interruptions in such institutional contexts may provide more insight into their use in standard and non-standard cross-examination strategies.

Appraisal Analysis

In order to explore the attorneys' stances toward the witnesses, all three systems of Appraisal Analysis were used: Attitude – how speakers feel about self, others, and objects; Engagement – how speakers position themselves in relation to others; and Graduation – how such stances are amplified or downplayed (Martin and White, 2005).

Attitude

Within the first Appraisal system, Attitude, language reflecting two categories was examined: affect (the speaker's feelings about self) and judgement (the speaker's feelings about others). Future analyses may also benefit from an additional analysis of appreciation, the speaker's feelings about things or processes (e.g. in assault cases, it may involve descriptions of the crime).

In terms of Affect, there were no markers found in Cases 1 or 3 and very few markers in Case 2. Those in Case 2 generally served the purpose of apologizing for a misunderstanding, as in Example C2.2, or framing a question, as in Example C2.3. (Bolding indicates stance markers of interest.)

Example C2.2: Apologizing Affect

```
Q  (86,4-5):  You didn't text him and ask him what he was doing?
A  (86,6):    I said "How are you?"  There's a big difference.
Q  (86,7):    Oh I'm sorry.  All right.  [...]
```

Example C2.3: Framing Affect

```
Q  (102,10-11):  I see.  I'm curious, why didn't you ever tell Mr.
                 Jacobs that?
```

Interestingly, the defense counsel in Case 2 occasionally employed sarcasm – which can be double-coded here as negative affect and negative judgement – to implicitly convey his frustration with and explicitly condemn the witness's testimony, as seen in Example C2.4.

Example C2.4: Sarcasm as Negative Implicit Affect and Explicit Judgement

```
Q  (134,16-17):   Why don't you just call a press conference and say
                  every damn thing you think will harm his reputation?
```

While instances of affect were rare to non-existent in all three cases, instances of judgement revealed several interesting findings. As previously noted, judgement can be broken down into two main categories: judgements of *social esteem*, which relate to societal assessments of someone's *normality*, *capacity*, and *tenacity* (e.g. judgements that admire or criticize as shared by members of a social network), and judgements of *social sanction*, which relate to more institutionalized assessments of *veracity* and *propriety* (e.g. judgements that praise or condemn as sanctioned by religion or codified in law). Rape shield laws were enacted specifically to protect complaining witnesses from being subjected to *explicit* (i.e., inscribed) attacks on their propriety. Interestingly, Case 1 contains numerous instances expressing judgements of negative social esteem – judgements that could still affect a jury by *implying* (i.e., invoking) condemnations of propriety while avoiding crossing the lines drawn by rape shield laws.

For example, as seen in Examples C1.3, C1.4, and C1.5, the lawyer used language that explicitly demonstrated that the witness was ignorant about basic facts of life (negative normality), was generally incapable of making wise life decisions due to the amount of alcohol she had consumed earlier in the evening (negative capacity), but was capable of making informed decisions later in the evening as she was sobering up (positive capacity).

Example C1.3: Negative Normality – Ignorant about basic Life Facts

```
Q  (65,7-8):    But you are aware that [...], where you live, is
                closer than [...], where Mr.  Waters lives, to
                [...]; right?
Q  (65,12):     You have your own address memorized, right?
Q  (65,14):     And you know, for example, you know you live with
                your sister, right?
Q  (65,17):     And her husband?
Q  (65,19):     And you know her cell phone number, right?
Q  (95,16-17):  And at that point you knew that – I mean, you know
                that 911 leads to the police; right?
```

Example C1.4: Negative Capacity – Incapable of Remembering (due to Alcohol)

```
Q  (46,2):      Do you remember that, stumbling?
Q  (56,13-14):  Do you remember telling Detective Garcia that you
                all ate at Fuddruckers?
Q  (58,2-4):    ...but you're not sure, you had not had any
                alcoholic drinks in 4 hours, right?
Q  (58,13-14):  Do you have a specific memory of Johnson being
                behind you but sort of in the middle?
Q  (68,15):     Do you remember saying "I love champagne?"
Q  (74,22):     And you're not sure how long that went on?
Q  (75,4):      Do you remember one way or the other, whether you
                had your arms around him?
```

Example C1.5: Positive Capacity – Capable of Consenting after Sobering up

```
Q  (58,6-7):     So you were sobering up compared to the way you were
                 at midnight?
Q  (68,4-5):     You were a lot more sober than you were at midnight,
                 right?
Q  (72,14-16):   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?
Q  (76,16-17):   You're not as drunk as you were at the club at that
                 point.  You will admit that, right?
```

In each example, the judgements explicit in the repeated line of questioning position the witness as ignorant of facts that "normal" people – jurors, for example – should be aware of, incapable of remembering events of the evening or making rational decisions due to the amount of alcohol she had consumed, yet perfectly capable of making rational decisions and of knowingly granting her consent to the sexual encounter later in the evening. Without introducing the witness's prior sexual history, which would have been illegal, the lawyer successfully painted the witness as someone whose narrative was not to be trusted by invoking implicit judgements of negative propriety, but whose ability to grant informed consent had recovered.

In Cases 2 and 3, where rape shield laws do not apply, different forms of judgement are found. Specifically, in Case 2, explicit judgements of social esteem (positive capacity and negative tenacity) and social sanction (negative veracity and negative propriety) are found and, in Case 3, only explicit judgements of social sanction (negative veracity and negative propriety) are found.

In Case 2, the defense attorney begins the cross-examination by calling attention to the main point of the entire hearing: credibility, as seen in Example C2.5.

Example C2.5: Credibility as Key Issue

```
Q  (69,21-24):   Can you and I agree that, as the Commissioner makes
                 up his decision about this matter, that the real
                 issue here is going to be your credibility versus
                 Mr. Jones's?  Would you agree with that?
```

In order to construct a narrative wherein the witness lacks credibility, the defense counsel followed four primary themes, which relate to the various categories of judgement. As previously discussed, questions related to each theme were strewn throughout the discourse, which has the effect of potentially disorienting the witness and lessening her credibility (Fontham, 2008).

First, in Example C2.6 and C2.7, respectively, the defense counsel positions the witness as being capable of defending herself and of not feeling fear in that she owned her own successful defense business and had made a pilot video for a survivor-style show demonstrating her abilities to defend herself.

Example C2.6: Positive Capacity – Owned a Successful Defense Organization

```
Q  (69,15):        When did you form [defense company name]?
Q  (109,19-20):    Would you agree that you're very well plugged in,
                   as it may be, with [defense company collaborative
                   organization]?
Q  (110,4-5):      Would you say that you're well connected to people
                   in positions of responsibility in [defense company
                   collaborative organization]?
```

Example C2.7: Positive Capacity – Lack of Fear in Actions

```
Q  (139,22-23):    Okay.  Does that sound like a woman afraid of the
                   man she's writing to?
Q  (248,19-22):    Would you agree that the person on that video is
                   depicted is a sort of a very strong, macho woman?
                   I'm not asking you to agree with anything else.
                   Just would you agree that that's what the video
                   shows?
```

Second, in Example C2.8 and C2.9, respectively, the witness is painted as not being dependable because she waited too long to report the alleged incident of domestic violence and had talked to the press and publicized the event prior to reporting it.

Example C2.8: Not Dependable – Delay in Reporting the Alleged Incident

```
Q  (83,24-25):     And you waited to [date] to report it to the [local]
                   police, and to file this complaint, correct?
Q  (111,21-22):    And then why didn't you go to the police
                   immediately?
Q  (137,11-13):    On [date] of this year had you reported what you
                   claim is the assault by Mr.  Jones to any law
                   enforcement agencies?
Q  (144,12-15):    And you will agree with me that is a full four weeks
                   before you come in here and swear to this Court
                   this[sic] you're afraid of him and need a protective
                   order, correct?
```

Example C2.9: Not Dependable – Leaked Information to the Press

```
Q  (84,15-17):     And can you explain why – you knew this was going to
                   be picked up by the media, it was a public document,
                   didn't you?
Q  (93,10-12):     Now, did you forget about her when you swore to the
                   Commissioner that you didn't talk to the media about
                   this?
Q  (95,4-7):       Is it a fair statement that you have discussed
                   this with [name], an AP reporter, your side of what
                   happened, an AP reporter, during the time this has
                   all been pending?
Q  (252,6-7):      So did you on the same date tweet anything about
                   this?
```

Third, in Example C2.10 and C2.11, respectively, the defense counsel positions the witness as being dishonest, claiming that she lied about the current assault, and about being threatened afterward.

Example C2.10: Dishonest – Lying about the Current Assault

```
Q  (87,15-16):         So you didn't mean to suggest that he was
                       intentionally hurting you in [state], did you?
Q  (191,20-21/192,3-4): So is it your testimony that Mr.  Smith and his wife
                       should have been[sic] marks on you?  / And if they
                       have told anyone else differently that would not be
                       true, according to you; is that right?
Q  (97,9-12):          Did you also ask him to lie to the police and tell
                       them that he saw you that day personally?  Is it
                       your testimony under oath that you never asked
                       [name] to tell the police that he saw you the Monday
                       after this event of the [date], and tell the police
                       that he saw you then and saw your injuries?
```

Example C2.11 Dishonest – Lying about being Threatened

```
Q  (121,2-5):     So let's try again.  Is there any – do you have any
                  evidence at all that Mr.  Jones has physically tried
                  to be around you or see you since [date] of this
                  year?
Q  (121,7-9):     So can we agree for the Commissioner that this
                  protective order that you are asking for hasn't been
                  necessary since [date], has it?
Q  (147,3):       There is nothing in here threatening, is there?
Q  (152,21-23):   Now, can we not agree that that is not by any
                  stretch of the imagination any threat to your
                  physical safety?
```

Fourth, in Example C2.12 and C2.13, respectively, the witness is positioned as lacking propriety because she illegally entered the defendant's home and slandered his name in the media in order to ruin his career.

Example C2.12: Lacks Propriety – Illegal Entering of Private Residence

```
Q  (73,6-9):     [...]  I notice it doesn't mention that you entered
                 the home without permission, does it?
Q  (73,15-16):   I thought you believe – I thought you testified
                 earlier that as soon as you arrived he told you to
                 leave?
Q  (82,11-15):   [...]  Do you have any idea why you and your lawyer
                 did not inform whoever was going to review this
                 that this event occurred by you going to his home
                 uninvited with your nine-year-old son?
```

Example C2.13: Lacks Propriety – Slandering Defendant's Name

```
Q  (90,19-25):    And in fact, you had a bunch of answers naming
                  people, [names], knowing as you said so that not
                  only would it probably be repeated by the press, but
                  it would be extremely harmful to him and his working
                  relationship and his profession, [...], correct?
Q  (104,11-12):   Have you used – have you ever used literally the
                  word with him "Destroy Ryan's career"?
Q  (106,22-25):   Did you tell him, quote, "I will destroy him, which
                  speaks beyond getting compensated, not it speaks to,
                  in addition to myself getting compensated, I'm going
                  to destroy his career"?
Q  (111,11-12):   You knew the impact that was going to potentially
                  have on his career, didn't you?
```

Through each theme, the defense counsel constructed a narrative that positioned the witness as someone who lacked credibility. Specifically, explicit positive judgements about her capabilities as a strong, independent woman and explicit negative judgements against her dependability to report a crime and maintain discretion fell under the Appraisal category of social esteem, and explicit negative judgements against her honesty and propriety fell under the category of social sanction. It is interesting to note that there was one line of questioning introduced by defense counsel that was similar to what rape shield laws are meant to protect a witness from – that of having her prior sexual history introduced. In Case 2, as seen in the noncontiguous Example C2.14 below, the defense counsel tried to introduce the witness's prior allegations of domestic abuse with men from previous relationships.

Example C2.14: Introduction of Prior Allegations of Domestic Violence

```
Q              (206,4-5/10):   Isn't it true, ma'am, that this is not
                               the first time that you have alleged a
                               boyfriend or a husband has – has engaged
                               in domestic violence?
Ms. Espinosa   (206,6):        – objection, relevance –
                               [cross-talk about the reason for the
                               objection]
Mr. Green      (207,16-19):    That the reason I raise this is because
                               our contention is is [sic] that this is
                               a pattern she engages in when she has a
                               dispute with a man.  That's the reason.
                               Not whether it did happen, – –
The Court      (208,1-4):      [...]  It is entirely possible for
                               someone to have been abused more than
                               once, and have therefore reported abuse
                               more than once.  And that would have
                               nothing to do with the credibility of
                               this witness.
```

Like protection provided by rape shield laws, this line of questioning was not allowed to be introduced. The objection was sustained.

In case 3, explicit judgements of both negative veracity and propriety are used. In each of the noncontiguous questions in Example C3.3, the lawyer is challenging statements that differed from the witness's prior testimony given to the Assistant District Attorney and to statements made by other witnesses. That is, the defense counsel is challenging the veracity of statements made by the witness in previous testimony.

Example C3.3: Dishonest – Lying about Bribe Money and Illegal Communications

```
Q  (46,8-10):    Now, you just testified that Mr.  Gonzalez offered
                 you $10,000 not to come to court to testify against
                 him, right?
Q  (46,17-19):   Today you testified today you had a conversation
                 with Mr.  Garcia, today in the building today,
                 right?
Q  (47,3-4):     Were there correction officers at the time that you
                 say he talked to you again?
Q  (47,7-8):     And they weren't watching that you don't talk to
                 him, he doesn't talk to you?
Q  (47,10):      Did he offer you again today $10,000?
```

In Example C3.4, the lawyer highlights the witness's prior improprieties as a convicted criminal. These examples provide explicit condemnations of the witness's prior criminal history – the kind of explicit line of questioning that is not permissible under rape shield laws.

Example C3.4: Lacks Propriety – Reproachable for being a Convicted Criminal

```
Q  (47,18-19):    ...you admitted that you were convicted of selling
                  drugs, right?
Q  (47-48,25-1):  You were indicted by a Grand Jury of selling drugs?
Q  (48,3-4):      And you were convicted of a felony for selling
                  drugs?
Q  (48,6):        And you received jail?
Q  (48,8):        And the in 1987 you were indicted by a [...]  County
                  Grand Jury?
Q  (48,11):       And that was for felony burglary?
Q  (48,15):       And then your latest conviction for felony was last
                  year?
Q  (48,21-22):    Grand Jury indicted you again for burglary, right?
Q  (48,24):       And you're serving time right now?
```

Thus, the two categories of judgement – *social esteem*, which encodes attitudes of socially codified behavior of normality, capacity, and tenacity, and *social sanction*, which encodes attitudes of legally or morally codified behaviors of propriety and veracity – are utilized in strategic ways across the three cases. Rape shield laws were meant to protect witnesses from explicit judgements of social sanction, specifically regarding the propriety of previous sexual relationships. As was seen in Case 1, the lawyer frequently made explicit judgements of social esteem (e.g. normality and capacity). However, judgements

of social sanction – those that questioned the witness's propriety – were only implicitly invoked.

On the other hand, in Case 2, explicit judgements against the witness's capacity, tenacity, veracity, and propriety were all inscribed in the language of the questions, and in Case 3, only explicit judgements of both negative veracity and propriety were used. While each of the aforementioned lines of questioning fall within the norm of standard cross-examination strategies, such nuanced categorizations demonstrate ways in which witnesses in cases of sexual assault are still implicitly condemned as having a lack of propriety. Further investigations of such invocations of judgements of social sanction vs. social esteem should be examined on a larger data set.

Finally, it should be noted that the two categories of judgement identified in Appraisal Analysis correspond to findings by psychologists who have researched the kinds of information that lead individuals to update their assessments of people (Mende-Siedlecki *et al.*, 2013). Participants in a study were asked how trustworthy and competent a person appeared to them at first glance upon being exposed to a picture of a face. (Research had previously normalized such judgements on this set of faces.) Participants were then presented with a series of behaviors, some of which reflected competence, and some of which reflected morality. Interestingly, participants were most likely to change their assessment of competence upward in light of behaviors that demonstrated a higher level of competence, and were most likely to change their assessments of trustworthiness downward in light of behaviors that were immoral. That is, positive information about competence leads to a positive adjustment in judgement of competence more than negative information about competence leads to a downward adjustment in judgement of competence. Just the reverse is true when it comes to trustworthiness: negative information about morality leads to a negative adjustment in judgement of trustworthiness more than positive information about morality leads to a positive adjustment in judgement of trustworthiness. Lawyers with a good intuitive sense of this asymmetry will know to attack a witness's morality and boost a witness's competence simultaneously when that combination is advantageous. We saw at least some of that distribution of questioning in Case 1.

Engagement

As noted earlier, a speaker can expand his or her stance toward another by demonstrating that he or she is open to other opinions or contributions made by the discourse participant. This technique was demonstrated throughout the three cross-examinations through expanding attributions – language that acknowledged the witness's previous statements, as seen in the noncontiguous utterances in Examples C1.6, C2.15, and C3.5.

Example C1.6: Expanding Attributions

```
Q (68,7-8):    Okay.  When you went to the apartment, you went up
               the stairs, you said?
Q (70,2):      So you said you pretty much sat down right away?
Q (75,15-16):  You testified about being carried.  Who was carrying
               - was somebody holding you by your wrists?
```

Example C2.15: Expanding Attributions

```
Q  (70,7-9):    And you mentioned to the Commissioner that you've
                been involved in a divorce, and now some custody
                issues are going on; is that right?
Q  (140,4-5):   What you have said is, you're criticizing him for
                getting lawyers involved, aren't you?
Q  (219,2-4):   Okay.  And you've testified, have you not, that you
                remained afraid for the next six weeks before you
                reported it?
```

Example C3.5: Expanding Attributions

```
Q  (40,22-23):  You said you worked for Acme Supermarket?
Q  (41,22-23):  And was your testimony that he gave you a look and
                you gave him a look?
Q  (44,3):      And you say it was a revolver?
```

The pervasive use of reporting verbs (e.g. "say", "testify", "mention") attributes the statements to the witness and acknowledges them in a neutral manner on the part of the defense counsel. That is, it is not readily clear whether the counsel aligns or disagrees with the witness's statements. However, when the counsel wishes to demonstrate distance from a witness's statement, reporting verbs are replaced with distancing verbs such as "claim", as seen in Example C2.16.

Example C2.16: Distancing Attributions

```
Q  (89-90,21-1):  The fact is, you sat here today, did you not, and
                   used names and critical comments you claim he made,
                   abusive comments about other people by name that
                   you claim he made, and none of those things have
                   anything to do with whether he assaulted you on the
                   26th, do they?
```

The previous example also introduces a method of *contracting* a statement – i.e., closing off a speaker's stance by demonstrating he or she is not open to other opinions or contributions made by the discourse participant. In Example C2.16 above, the defense counsel begins his statement with "the fact is…", which positions what follows to be a pronouncement of truth from the speaker's perspective. Additional language that contracts the testimony in such a manner is seen in the exchange in Example C1.7 below.

Example C1.7: Contracting the Testimony

```
Q  (79,18-19):  You're not – in fact, you're not sure that Mr.
                Waters ever penetrated you?
A  (79,20):     Correct.
Q  (79,21-22):  It's correct that you're not sure that Mr.  Waters
                ever –
A  (80,1):      That's correct.
Q  (80,2):      – had intercourse with you?
A  (80,3):      Correct.
```

Halliday has pointed out that "we only explicitly declare ourselves to be 'certain' when, in fact, there is some question or debate as to certainty" (1994: 362 in Martin and White, 2005: 133); thus, making this a highly-effective cross-examination strategy.

Another pervasive manner of closing off the discourse by proclaiming utterances to be true – that of using utterances that are syntactically constructed as statements, as opposed to questions – can be seen in the noncontiguous questions in Examples C1.8, C2.17, and C3.6.

Example C1.8: Contracting Questions

```
Q  (52,21-22):   And you talked to them about your French last name,
                 right?
Q  (56,20-21):   And you left; you decided to leave your car
                 downtown?
Q  (58,6-7):     You were sobering up compared to the way you were at
                 midnight?
Q  (66,2-3):     You were having a good time at that point and you
                 didn't want to go home, right?
```

Example C2.17 Contracting Questions

```
Q  (96,16):      These are pictures you took yourself?
Q  (142,9):      Actually ma'am, that's not true, is it?
Q  (144, 12-15): And you will agree with me that that is a full
                 four weeks before you come in here and swear to
                 this Court that you're afraid of him and need a
                 protective order, correct?
```

Example C3.6: Contracting Questions

```
Q  (41,17):      And you had no business dealings with him?
Q  (45,24-25):   At the time you were at the car you were bleeding,
                 right?
Q  (46,2):       The ambulance came, the police came?
Q  (46,15):      You didn't want $10,000?
```

As discussed earlier, proclamations that serve as questions are a norm in cross-examination. In the previous examples, the ways in which the utterances are composed follow the syntactic patterns of a statement as opposed to a question, i.e., subject/verb. What allows these syntactic patterns to be utilized as leading questions during the cross-examination are the tag questions (e.g. "right?", "correct?") and what is often (but not always) transcribed as rising terminal intonation. Although we have no recording of the proceedings, it is noteworthy that the court reporter recorded these statements as questions, suggesting that the intonation made this fact obvious enough. Even if there was no rising intonation, a person sitting in the witness chair is likely to understand a lawyer's statement as an invitation to agree or disagree. Moreover, there were no objections to these utterances as being statements rather than questions – an objection

that would be sustained had the judge believed it to be a legitimate assessment. And while each defense counsel tended to favor one method of contracting questions (e.g. counsel in Case 2 preferred tag questions over rising terminal questions, whereas counsel in Case 3 preferred the reverse), these patterns follow classic advice on controlling a witness during cross-examination (Lubet, 2013).

Graduation

Within the system of Graduation, where speakers scale up or down their stances, two patterns were found throughout the three cases. Specifically, the defense attorneys used quantitative amplification, as seen in Examples C1.9 and C3.7, and repetition of the question topic, as seen in Examples C1.10 and C2.18.

Example C1.9: Quantitative Amplification

```
Q  (53-54,22-1):  And for the whole night, there was never another
                  conversation about Jack?
Q  (64,8-9):      The whole time at Pita Pit, not one word about Jack;
                  right?
Q  (80,18-19):    And during this whole time, you weren't screaming at
                  all?
```

Example C3.7: Quantitative Amplification

```
Q  (41,15):  And you just knew him from the store?
Q  (41,17):  And you had no business dealings with him?
Q  (41,25):  And that's all that happened?
```

Example C1.10: Repetition of Question Topic – Jack

```
Q  (53,3):      Did you tell them Jack's last name?
Q  (53,5):      They didn't tell you Jack's last name?
Q  (53,7):      Did you tell them where Jack worked?
Q  (53,9):      Did they tell you where Jack worked?
Q  (53,11):     Did they tell you how they knew him?
Q  (53,13-14):  Did they – did you have any conversation at all,
                about anything about how they knew Jack?  Anything
                like that?  No.
```

Example C2.18: Repetition of Question Topic – Request to leave the defendant's home

```
Q  (73,15-16):   I thought you believe - I thought you testified
                 earlier that as soon as you arrived he told you to
                 leave?
Q  (73,18-19):   Yes, and then he asked you to get out of there,
                 didn't he?
Q  (73,23):      All right.  Was it his motor home?
Q  (73,25):      It wasn't your motor home, was it?
Q  (74,2):       It wasn't your motor home, was it?
Q  (74,4-5):     And you know you didn't have any right there, right?
Q  (74,7-8):     And so when he asked you to leave his home, his
                 motor home, did you do so?
Q  (74,10):      Did you do so when he asked you to?
Q  (74,13-14):   [...]  I asked you, when he asked you to leave did
                 you do so right away?
```

The use of quantification (e.g. "never", "whole", "that's all") and topic repetition (e.g. "Jack", "leave", "motor home") has the effect of heightening the qualities and importance of the questions being posed. For example, in Case 1, the use of quantification has the effect of up-scaling the amount of alcohol consumed by the witness, while down-scaling its effects after midnight when she supposedly had the ability to consent to the sexual acts. The repetition of "Jack" as a topic furthered the attorney's narrative by highlighting the fact that the witness makes poor decisions regarding men – without having to introduce her prior sexual history.

Similarly, in Case 2, the repetition of the witness's improper presence in the defendant's home implicitly emphasizes the fact that the alleged abuse, which was supposed to have occurred during that visit, might not have taken place if the witness had removed herself from the defendant's private property at his first request. In Case 3, the relationship between the two participants is downgraded through the use of quantification, thereby placing less emphasis on the defendant's motive for the alleged shooting. In each case, the defense counsel utilizes linguistic strategies that follow standard cross-examination techniques.

Summary of Language Features

Table 2 presents a summary of the similarities and Table 3 presents a summary of the differences in the sexual assault (Case 1), non-sexual domestic violence assault (Case 2), and non-sexual assault and attempted murder (Case 3) cases.

Features	Case 1	Case 2	Case 3
Question Types			
• Controlled	96.7%	95.1%	97%
○ (*Yes/no*)	(88.7%)	(82.8%)	(76%)
○ (Limited *wh-*)	(8%)	(12.3%)	(21%)
• Open-ended *wh-*	3.2%	4.8%	3%
Affect	None	Rare	None
Engagement			
• Attributing Expansions	Frequent	Frequent	Frequent
• Contracting Questions	Frequent	Frequent	Frequent
Graduation			
• Repetition	Frequent	Frequent	Frequent
• Quantification	Frequent	Frequent	Frequent

Table 2. Summary of Similar Language Features.

Features	Case 1	Case 2	Case 3
Judgement			
• Explicit Social esteem	+capacity	+capacity	
	-capacity	-tenacity	
	-normality		
• Explicit (Implicit) Social sanction	(-propriety)	-veracity	-veracity
		-propriety	-propriety

Table 3. Summary of Different Language Features.

Conclusions and Implications

Cross-examination strategies in cases of non-stranger sexual assault, domestic violence, and assault and attempted murder overlap considerably. For example, as seen in Table 2 and discussed in the trial manuals, defense attorneys pervasively use controlled questions (*yes/no* and limited *wh-*questions) provide a professional affectless stance, regularly attribute statements to the witness, close off the floor from expanded narrative responses, and draw attention to desired themes via quantification and repetition.

However, the main difference that should be further explored is the use of implicit and explicit judgements of social esteem vs. social sanction that position the witness in a particular manner. Poignantly, these legal, strategically-appropriate differences in

cross-examination question content and form may add to the process of revictimization of the complaining witnesses in cases of sexual assault vs. those of other types of assault. The difference in cross-examination techniques reflects a primary function of language: ways of framing.

Specifically, people frame discourse in ways that promote their conversational agendas. As previously discussed, one of the primary goals of the cross-examination is to discredit the witness in the eyes of the jury, which most easily occurs by controlling the witness's narrative. Within the Appraisal system, judgements of social sanction (i.e., veracity and propriety), as opposed to those of social esteem (i.e., normality, capacity, and tenacity), provide the most socially negative assessments. With the passage of rape shield laws, a complaining witness's prior sexual history could no longer be used to frame the witness's impropriety. However, as demonstrated above, the witnesses in all three cases were judged using assessments of social sanction – the first implicitly, the second two explicitly.

In the case of the assault and attempted murder (Case 3), direct attacks on the witness's veracity (i.e., that he lied in his testimony) and propriety (i.e., that he was a convicted criminal) were included in the line of questioning. In the case of domestic violence, direct attacks on the witness's veracity (i.e., she lied about the attack), propriety (i.e., she was illegally present in the defendant's home and slandered his name), and tenacity (i.e., she waited too long to report the attack and leaked it to the press) were made, while promotions of the witness's capacity (i.e., she was able to defend herself and not feel fear) were included in the line of questioning. In the case of the sexual assault, direct attacks were included on the witness's normality (i.e., that she was incompetent about basic life facts) and capacity (i.e., that she was incapable of making good decisions based on how much alcohol she consumed, but actively capable later in the evening of making good decisions due to the fact that she had sobered up). Explicitly, the judgements in the sexual assault case are inscribed judgements of normality and capacity – judgements of social esteem that are legal within rape shield law regulations. Implicitly, however, invoked judgements of moral impropriety are legally introduced and frame the witness as what Ehrlich (2001) calls an "ineffectual agent", who is seen to consent to sex due to her active capacity to do so (120). In each case, the common goal of introducing negative judgements of social sanction – whether implicitly or explicitly – to the judge or jury are effectively accomplished by the cross-examining lawyer.

We began this project in order to examine whether lawyers' cross-examination strategies differ in cases of sexual vs. non-sexual assaults. That will remain a continued goal in future research using this analytic paradigm. The answer will suggest possible adjustments in the legal system, whether by creating further evidentiary rules designed to protect the dignity of complaining witnesses, or by encouraging judges to enforce current rules with a different eye.

However, even with this goal in mind, the Appraisal Analyses described in this preliminary study may well lead to the conclusion that differences in the strategies used in cross-examining witnesses in the different kinds of cases may matter less than we had anticipated. Appraisal Analysis suggests that certain kinds of questioning are likely to produce particular emotional reactions because of the stance toward the witness that they contain. If the same stance creates different and more powerful reactions in the context of an alleged sexual violation than in other legal contexts, the system must come

to terms with and address that fact regardless of whether the technique pervades courtroom practice more generally. We hope to develop these thoughts in future work.

Notes

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[2]*State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997).

[3]*State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997).

[4]F.R.Evid. 412.

[5]Rule 611 (b) and (c) read as follows: (b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination. (c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

[6]For discussion of trial advocacy manuals as a source of important information about how the legal system perceives its own goals and values, see Gaines (2016).

[7]The authors wish to thank Veta Greenstone, Natalia Dolbneva, and Aquilas Mathew for their voluntary participation in the inter-rater reliability coding.

[8]N.B.: While one coder differed in a few of the group's overall codings based on invoked vs. inscribed stances, footnotes were included with double-codings that matched those of the group when cultural presuppositions of the statements were taken into account, thereby increasing the inter-rater reliability of the random sample to 100%.

[9]All non-standard language use and errors were retained from the original transcripts. All identifying information has been changed or substituted with [. . .].

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