Legal discourse and the cultural intelligibility of gendered meanings

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This paper considers the methodological challenges that ‘post-modern’ approaches to gender (Cameron 2005) pose for the field of language and gender. If we assume that gender cannot be ‘read off’ the identities of speakers, but rather is a social process by which individuals come to make cultural sense, then how do we best investigate this process? As Stokoe (2005) and Stokoe and Smithson (2002) have argued, it is problematic within such frameworks to conduct research that pre-categorizes individuals as women and men, since it is individuals’ constitution as women or men that should be the issue under investigation. Indeed, for Butler (1990: 145), to understand ‘identity as a practice . . . is to understand culturally intelligible subjects as the resulting effects of a rule-bound discourse’ (emphasis in original). This suggests that we attend to cultural norms of intelligibility (i.e. the ‘rule-bound discourse’) and their effects. Following Blommaert (2005) and Woolard (forthcoming), in this paper I investigate a speech event, a courtroom trial dealing with sexual assault, where understandings of social identities and categories (i.e. ‘norms of intelligibility’) are not only evident in the local talk of speakers and hearers, but also in the recontextualizations of this local talk by powerful institutional representatives (i.e. judges). By examining such recontextualizations of courtroom talk, gender is not ‘read off’ the identities of individuals (i.e. courtroom participants) but rather investigated as it appears in the cultural sense-making frameworks of judges. Moreover, given that judges are the ultimate interpreters of the linguistic representations of courtroom talk, this paper also demonstrates some of the social consequences associated with the performance of culturally intelligible and unintelligible gendered identities.

KEYWORDS: Gender, participation structure, conversation analysis, legal discourse, pragmatics

INTRODUCTION

Theoretical debates over the nature of gender and its social construction, originating in feminist work of the 1990s, have in recent years informed research in sociolinguistics generally, and language and gender studies more specifically. Cameron (2005) has termed this shift in language and gender studies, the
'post-modern’ turn, and has identified a number of theoretical tenets associated with it. In particular, ‘post-modern’ feminist approaches to language and gender, according to Cameron (2005), adopt a constructionist approach to meanings, arguing that the categories of sex and gender are not ‘natural’ but are always understood (i.e. acquire their meanings) in relation to the kinds of discourses about gender that circulate in a given time and place. Additionally, such approaches emphasize the performative aspect of gender (Butler 1990), that is, the idea that gender is something that individuals do – in part through linguistic choices – as opposed to something that individuals are or have (West and Zimmerman 1987). Within ‘post-modern’ approaches to language and gender, then, gender is not a set of permanent traits residing in an individual but rather a property of behaviours and practices that become symbolically associated with cultural constructs of femininity and masculinity. From this perspective, according to Bohan (1997: 39), ‘gender . . . is not an actual free-standing phenomenon that exists inside individuals . . . Rather, “gender” is an agreement that resides in social interchange; it is precisely what we agree it to be.’ Indeed, as Gal (1995: 171) argues, categories of ‘women’s speech’ and ‘men’s speech’ ‘along with broader ones such as feminine and masculine’ (emphasis in original) are not empirical categories but symbolic-ideological ones. And, as symbolic-ideological constructs, they become cultural resources for the enactment of gender: linguistic practices and other kinds of social practices, culturally coded as feminine or masculine, are continually drawn upon in the ‘doing’ of gender, and according to Butler (1990: 49), ‘congeal over time to produce the appearance of substance, of a “natural” kind of being.’ Cultural norms make certain performances of gender seem natural; in Butler’s words, they seem to ‘congeal over time.’ These same cultural norms render other gendered identities inappropriate or unintelligible, and often subject to social and physical sanctions and penalties (e.g. ostracism, homophobia, gay bashing, the ‘fixing’ of intersexed infants). The ‘post-modern’ view of gender, not surprisingly, has shifted the focus of research in the field of language and gender away from documenting differences in the language of women and men to investigating the way that linguistic resources contribute to the constitution of individuals as gendered. Because we assume that gender does not reside in individuals, Stokoe (2005) and Stokoe and Smithson (2002), following Kulick (1999), have argued that it is problematic, within these newer approaches, to pre-categorize groups of people as women and men and then investigate how women ‘do femininity’ and men ‘do masculinity.’ Such pre-categorization means that analysts begin their research already knowing the identities ‘whose very constitution ought to be precisely the issue under investigation’ (Kulick 1999: 6). For Stokoe and Smithson (2002), then, language and gender research that assumes the existence of identities whose emergence is supposedly ‘the issue under investigation,’ confounds a so-called ‘post-modern’ approach with a gender dualism approach. Thus, there are difficult methodological questions that emerge from a ‘post-modern’ view of
gender. If we are to assume that gender cannot simply be ‘read off’ the identities of speakers (Stokoe 2005; Stokoe and Smithson 2002), but rather is a practice by which individuals become culturally intelligible/unintelligible, then how do we go about investigating this practice? Butler (1990: 17) argues that the coherence of gendered subjects does not depend on the actual features of individuals (what she calls the ‘logical or analytic features of personhood’), but rather upon ‘socially instituted and maintained norms of intelligibility.’ This suggests that we attend to the ‘norms of intelligibility’ that define and regulate normative constructions of gender (Cameron 1997). But whose cultural norms and whose assessments of intelligibility do we attend to? Cultural norms are neither homogenous within a culture or community nor are they static.

PARTICIPANTS AND NORMS OF INTELLIGIBILITY

In order to address these methodological questions, I draw upon a principle of conversation analysis – attending to participants’ knowledge of the social order – although in ways that may depart from many conversation analysts’ use of such a principle. Central to an ongoing debate within discourse analysis is the question of whose cultural knowledge – analysts’ or participants’ – comes to inform the analysis of data. In one particular manifestation of this debate, a 1997 article appearing in Discourse & Society (Schegloff 1997) provoked a series of rebuttals, counter-rebuttals and other articles debating the relative merits of Critical Discourse Analysis (CDA) vs. Conversation Analysis (CA) (e.g. Billig 1999; Schegloff 1998, 1999; Stokoe and Weatherall 2002; van Dijk 1999; Weatherall 2000; Wetherell 1998). In very general terms, this debate concerns the way in which analysts invoke ‘the socio-political’ in their analyses: critical discourse analysts are criticized for providing textual interpretations that reflect their own cultural knowledge and political commitments, while conversation analysts are criticized for ignoring all but the most blatant aspects of the sociopolitical context in their analyses of interactions. Schegloff (1997: 167), for example, accuses critical discourse analysts of ‘theoretical imperialism,’ because, he claims, they allow their own political concerns to dominate their analyses and, crucially, fail to attend to the concerns of participants in interactions. For a conversational analyst such as Schegloff, without evidence that conversational participants are themselves demonstrably orienting to a feature of the context, investigators risk imposing their own a priori analytic and cultural constructs upon interactions. Feminist analysts, for instance, might be predisposed to ‘hear’ the workings of unequal power relations in interactions between men and women: such a ‘hearing’ is unwarranted for Schegloff, however, if it is not evidenced by the interactional participants themselves. While CA’s attention to participants’ understandings of social identities and categories helps to avoid the ‘theoretical imperialism’ Schegloff ascribes to CDA, the narrow notion of participant often adopted within CA imposes limits on whose participants’ interpretations can be considered relevant in an interaction (Blommaert 2005; Ehrlich 2002, 2006;
Woolard forthcoming). Blommaert (2005: 56), for example, makes the point that certain aspects of a speaker’s identity (e.g. gender or ethnicity) may not be made relevant by the immediate conversationalists in an interaction at the moment they are interacting (what conversation analysts would consider the participants in the interaction) but may indeed be made consequential for these immediate participants by ‘later re-entextualizations of that talk by others.’ In many institutional contexts, there is a shifting of discourses across contexts whereby ‘talk’ originally produced in one setting will be written, summarized, reworded and reframed by participants not directly engaged in the original ‘talk.’ Crucially, this reframing process often involves participants whose interpretations of the original talk ultimately become the ‘official story’ of the institution.

Following Blommaert, then, I propose to investigate an institutional speech event, a courtroom trial involving sexual assault, where participants’ understandings of social identities and categories (i.e. norms of intelligibility) are not only evident in the local ‘talk’ of the trial discourse (e.g. by lawyers and witnesses) but also in judges’ ‘later re-entextualizations’ of this talk, in the form of judicial decisions and rulings at various judicial levels. Indeed, investigating this type of speech event is one way of addressing the methodological questions posed above. First, gender is not ‘read off’ the identities of participants (e.g. witnesses), but rather is interrogated as it appears in the cultural sense-making frameworks of judges – also participants in this speech event (see also Stokoe and Smithson 2002). Second, because trial verdicts are often appealed to higher judicial levels, many trials include judges’ rulings from various judicial levels. Thus, there is the potential for analysts to have access to a variety of ‘re-entextualizations’ of the local talk of the trial discourse, under the assumption that different judges may have different assumptions about gender informing their interpretations of that talk. Third, since judges are the ultimate and most powerful interpreters of trial talk, their rulings can potentially reveal the sanctions and penalties associated with the performance of illegitimate gendered identities. Capps and Ochs (1995: 21) argue that adjudicators in legal settings never determine the truth of a case; rather, ‘on the basis of divergent versions of events, [adjudicators] construct a narrative that is plausible and coherent in their eyes.’ While there are many factors contributing to the determination of plausible and coherent narratives, I am suggesting that a crucial factor in the sexual assault trial analyzed here was the cultural intelligibility – or lack thereof – of the trial participants’ performances of gender. Thus, the various judges’ re-entextualizations of the trial discourse provide a window onto the cultural ‘norms of intelligibility’ that regulated and defined their understandings of gender and ultimately became consequential to the outcome of the case.

In the remainder of this paper I analyze re-entextualization practices (Blommaert 2005: 62) – the shifting of texts across contexts – in a Canadian criminal trial dealing with sexual assault. While much courtroom language ostensibly occurs between lawyers and witnesses – that is, it is dyadic – the participant structure of the trial is in fact more complex than this. Given that
the primary target of courtroom interactions between lawyers and witnesses is a third-party, overhearing recipient — a judge and/or jury — trial talk has been more accurately characterized as multi-party (Drew 1985; Cotterill 2003). Indeed, one way of conceptualizing this multi-party structure is by appealing to Goffman’s (1981: 136) notion of the ‘gathering,’ that is, ‘the full physical arena in which persons present are in sight and sound of one another.’ (See also Cotterill, 2002, 2003, for a discussion of trial discourse articulated within Goffman’s terms.) Goffman (1981) argued that the two-person, face-to-face, speaker-hearer model is too crude a construct to account for significant aspects of talk-in-interaction given that speakers will alter how they speak and/or what they say ‘by virtue of conducting their talk in visual and aural range of non-participants’ (Goffman 1981: 136). These ‘non-participants,’ according to Goffman, can include unratified recipients, such as bystanders or eavesdroppers, as well as ratified recipients, such as judges and juries in the courtroom context. For Levinson (1988), who elaborates on Goffman’s framework, judges and juries are ‘ratified recipients’ and the ‘indirect target’ of trial talk.

For my purposes here, what is important is Goffman’s recognition that participants who are not actively and directly participating in an interaction may nonetheless exhibit understandings of many of its properties and influence its outcome. Woolard (forthcoming), for example, drawing upon Goffman’s participation framework, shows how identities of Barcelona teenagers ‘are differently diagnosed and reinforced by bystanders than by themselves and their interactional partners’ and, subsequently, how the bystanders’ categorizations ‘create constraining conditions for [the teenagers’] future identity displays.’ In a similar way, I am interested in how ratified indirect recipients of talk, that is, judges in trial contexts, display their understanding of identities in ways that have powerful effects on those directly participating in the talk. Indeed, for Drew (1985: 134), a proponent of CA, it is this feature of courtroom talk that ‘complicates the investigation of properties of talk whose effect cannot easily be observed in naturally occurring data’ (i.e. the courtroom talk itself). Rather than viewing the issue of third-party recipiency as complicating investigations of courtroom discourse, I am suggesting that it expands our notion of ‘participant’ in speech events and, in so doing, expands our access to the way that cultural norms may regulate the performance of authorized and unauthorized identities.

**DATA**

The data analyzed here come from a Canadian criminal trial involving sexual assault: Her Majesty the Queen v. Ewanchuk, 1995. The accused in this case was charged with sexual assault. He was acquitted by the trial judge and this acquittal was upheld by the Alberta Court of Appeal (a provincial court). Upon appeal to the Supreme Court of Canada, the acquittal was overturned and a conviction was entered for the accused. In what follows, I analyze data from four stages of the case: (1) the 1995 trial discourse; (2) the 1995 judicial decision of the trial
judge; (3) the 1998 judicial decision of the Alberta Court of Appeal; and (4) the 1999 judicial decision of the Supreme Court of Canada.

**Details of the case**

Her Majesty the Queen v. Ewanchuk involved a sexual assault that took place during a job interview between the accused (also referred to as the defendant) and the complainant (also referred to as the plaintiff), a 17-year-old woman who ultimately charged the man with sexual assault. The accused was a carpenter and wished to hire individuals who would sell his work for him. While the complainant suggested that her job interview be held in a mall, the accused expressed a preference for more privacy and proposed instead that the interview take place in his van. The interview was conducted in a polite, business-like fashion, according to the complainant’s testimony. During the interview the complainant left the door of the van open because she was hesitant about discussing the job offer in his vehicle. After the job interview, the accused invited the complainant to see some of his work in his trailer, which was attached to the van. According to the complainant’s testimony, the trailer was enclosed and about five feet wide and fifteen feet long. It was high enough for both the complainant and the accused to stand up in. Again, the complainant said that she purposely left the trailer door open out of fear of being alone with the accused in a confined space, but the accused ignored her efforts and closed and locked the door. The accused initiated a number of incidents with the complainant that involved sexual touching, with each incident becoming progressively more intimate than the previous. The complainant said that she complied with many of his requests out of fear that any resistance would prompt the accused to become more violent. However, when his touching progressed to the complainant’s breast, she used her elbows to push him away and said ‘no.’ The accused resumed his sexual touching and began to massage the complainant’s inner thigh and pelvic area, at which point the complainant again said ‘no.’ The accused resumed his advances by grinding his pelvis into hers, touching her vaginal area and placing his penis on the complainant’s pelvic area under her shorts. He stopped after the complainant said ‘no’ a third time. After these incidents, the accused opened the door of the trailer at the complainant’s request and the complainant left the trailer. Her departure occurred two and a half hours after she had first met the accused outside of his van. The complainant later charged the accused with sexual assault.

**1995 TRIAL DISCOURSE**

Like other types of institutional discourse, courtroom discourse has been the subject of much research over the past two decades – research that, among other things, has highlighted its asymmetrical character. As others have noted about courtroom discourse (e.g. Atkinson and Drew 1979; Conley and O’Barr
1998; Walker 1987), differential participation rights are assigned to participants depending on their institutional roles; that is, questioners in legal contexts have the right to initiate and allocate turns by asking questions of witnesses but the reverse is not true. Atkinson and Drew (1979) have labelled this type of turn-taking system pre-allocation, referring to the fact that the types of turns participants can take are predetermined by their institutional role and are institutionally sanctioned. The claim is that the relative rigidity characteristic of turn-type pre-allocation bestows considerable conversational power and control upon the participant who is sanctioned to ask questions (Hutchby and Wooffitt 1998).

Adversarial dispute resolution, of which trials are a notable example, requires that two parties come together formally, usually with representation (e.g. lawyers), to present their (probably different) versions of the dispute to a third party (e.g. judge, jury, tribunal) who hears the evidence, applies the appropriate laws or regulations, and determines the guilt or innocence of the parties. Lawyers have as their task, then, convincing the adjudicating body that their (i.e. their client’s) version of events is the most credible. Apart from making opening and closing arguments, however, lawyers do not themselves testify. Thus, through the posing of questions, lawyers must elicit from witnesses testimony that will build a credible version of events in support of their own clients’ interests, in addition to testimony that will challenge, weaken and/or cast doubt on the opposing parties’ version of events. Atkinson and Drew (1979: 70) note that while trial discourse is conducted predominantly through a series of question-answer sequences, other actions are accomplished in the form of such questions and answers. For example, questions may be designed to accuse witnesses, to challenge or undermine the truth of what they are saying, or, in direct examination, to presuppose the truth and adequacy of what they are saying. To the extent that witnesses recognize that these actions are being performed in questions, they may design their answers as rebuttals, denials, justifications, etc.

Because the (varying) versions of events that emerge in trial discourse are determined to a large extent by the questions that lawyers ask of witnesses (e.g. their controlling of topics, their selective reformulating of witnesses’ responses, etc.), Cotterill (2002: 149) argues that courtroom narratives are best characterized as ‘dual-authored texts,’ ‘with the emphasis on the voice of the lawyer as the primary and authoritative teller.’ Gibbons (2003) notes that Bulow-Moller (1991) goes so far as to say that the primary communication in trial discourse is between the lawyer and the judge (and/or the jury) and that ‘witnesses are the means used to communicate counsels’ portrayal of events’ (cited in Gibbons 2003: 96). While the extent to which witnesses are controlled by lawyers may vary depending on the kind of questioning involved (i.e. direct examination versus cross-examination) and the kind of witness involved (i.e. lay witness versus expert witness), there is no question that the institutionally sanctioned, pre-allocated role of lawyer as questioner and witness as answerer has significant implications for the co-constructed nature of courtroom narratives.
In contrast to the adversarial, combative nature of cross-examination, direct examination, i.e. the questioning of one’s own witness, has been characterized by both legal practitioners and scholars as supportive and cooperative (e.g. Barry 1991; Maley 1994; Woodbury 1984). According to Cotterill (2003: 129), direct examination ‘represents an initial, dominant narrative statement, which is then responded to, challenged and sometimes subverted in cross-examination questioning.’ Because the emphasis in direct examination is on developing new information, open-ended questions tend to be more frequent in direct examination. Moreover, Woodbury (1984: 211) suggests that open-ended questions have a strategic function as well: they allow witnesses to construct extended narratives that ‘give an authentic ring to testimony’ and convey to third-party recipients (e.g. judge and/or jury) that lawyers are trusting of their witnesses. Put somewhat differently, presupposing the truth and adequacy of a witness’s testimony, as opposed to challenging and subverting it, requires that a lawyer create the impression of encouraging and facilitating a witness’s narrative. Indeed, Harris (2001: 68) argues that lawyers must exercise a high degree of control over all witnesses, but that the strategies required to do this differ depending on whether the witness is ‘friendly’ or ‘hostile.’

In the direct examination of the plaintiff in the Ewanchuk case, the Crown attorney (i.e. the lawyer representing the state) typically began her turn by asking a broad Wh-question, such as ‘What happened then?’, to which the plaintiff provided an answer that described an event or a series of events. Immediately following such an answer, the lawyer would ask a more narrow Wh-question, specifically a Why-question, that attempted to elicit the plaintiff’s motivation for performing a particular action that she had described. For example, in (1) below, the Crown attorney begins by asking a broad Wh-question about the events that transpired once the plaintiff reached the defendant’s van. The plaintiff’s answer is followed by a more narrow Wh-question – a Why-question inquiring about the plaintiff’s reasons for suggesting that she and the defendant talk inside the mall, as opposed to in his van.

1. Q: Was he inside the van or trailer when you first got there?
   A: I believe he was inside the van, but – he might have stepped out to meet me.
   Q: What happened once you got there?
   A: I asked him if we could go inside the mall, have a cup of coffee and talk about whatever.
   Q: Why did you want to go inside the mall to talk?
   A: Because it was – it was a public place. I mean, we could go in and sit down somewhere and talk.

According to Woodbury (1984: 211), the narrow Wh-questions that follow broad Wh-questions in direct examination serve a narrative function. Since it
is important that lawyers and witnesses co-construct 'a coherent and maximally detailed account' for the sake of third-party recipients. Woodbury maintains that narrow Wh-questions allow witnesses to elaborate on details that contribute to the coherence of the narrative. But, what is it that determines the kinds of details that will be elicited by lawyers and, concomitantly, the kinds of narratives that will emerge? Why, for example, does the Crown attorney in the Ewanchuk case follow up her broad Wh-questions with a particular kind of narrow Wh-question: Why-questions that probe the plaintiff’s reasons for performing certain actions in the series of events under question? In order to make sense of the Crown attorney’s pattern of questioning exemplified in (1), it is useful to consider Atkinson and Drew’s (1979) work on cross-examination in courtroom discourse. Atkinson and Drew (1979: 136) note that witnesses often display their recognition that a series of questions is leading to a ‘blame allocation’ by producing ‘justification/excuse components in answers.’ Put somewhat differently, witnesses will provide defenses and justifications in their answers even though the questions asked of them ‘do not actually contain any blame-relevant assessments of witnesses’ actions’ (Atkinson and Drew 1979: 138). And, according to Atkinson and Drew, the production of such justifications and defenses is indicative of witnesses’ understanding that a series of seemingly straightforward questions is, in fact, leading to attributions of blame. With respect to Why-questions specifically, Atkinson and Drew make the following comments:

We have noted that, because of the pre-allocation system for examination, witnesses cannot be assured of opportunities for giving explanations for their actions, given that they have no control over the production of ‘why’ questions . . . . Hence witnesses may give answers to ‘why’ questions apparently prematurely (before they have been asked), so as to ensure that they do get to give the reasons for actions – and thereby possibly rebut anticipated charges – despite whatever intentions counsel may have. (Atkinson and Drew 1979: 187)

Given that ‘blame allocations’ from cross-examining lawyers may concern witnesses’ actions or lack of action, Atkinson and Drew suggest that witnesses may provide answers to Why-questions (i.e. explanations for actions or lack of action) ‘prematurely’ in an attempt to forestall certain kinds of accusations. In the same way that witnesses may provide explanations for their actions (i.e. answers to Why-questions) prematurely, I am suggesting that examples like (1) above show that lawyers may also anticipate critical assessments of their witnesses’ actions from opposing lawyers, and thus will design their questions (i.e. why-questions) to elicit ‘apparently premature’ or preemptive explanations and justifications for such actions.

Consider examples (1) – (5) below (example (1) is repeated here): all contain a Why-question from the Crown attorney asking why the complainant has performed a particular action. The answers elicited by these questions (italicized in the examples) provide certain kinds of explanations: the complainant’s actions were meant as strategies to discourage the accused’s sexual advances.
1. Q: Was he inside the van or trailer when you first got there?
   A: I believe he was inside the van, but he might have stepped out to meet me.
   Q: What happened once you got there?
   A: I asked him if we could go inside the mall, have a cup of coffee and talk about whatever.
   → Q: Why did you want to go inside the mall to talk?
   A: Because it was – it was a public place. I mean, we could go in and sit down somewhere and talk.

2. Q: What happened then?
   A: He said, Why don’t we just talk inside the van here. And he sat into his driver’s seat, and I opened the door, and I left the door open of the passenger seat and I sat down there.
   → Q: And why did you leave the door open?
   A: Because I was still very hesitant about talking to him.

3. Q: What happened after you agreed to see some of his work?
   A: He went around to – no, first, he said, Okay, I’d like to pull the van into the shade. It was a hot day, and there was cars that were parked under the shade for an shade of a tree, I believe, and he got out, and he went and he stepped inside, and he said, Come on up and look. So I stepped up inside, took about two steps in, I didn’t, like, walk around in it. And then he went to the door, closed it, and locked it.
   (some intervening turns)
   Q: Had you expected him to lock the door?
   A: Not at all. I left the door completely wide open when I walked in there for a reason.
   → Q: And what was that reason?
   A: Because I felt that this was a situation that I shouldn’t be in, that I – with anybody to be alone in a trailer with any guy with the door closed.

4. Q: Did you talk about other things while you were sitting in front of the van?
   A: Yes. He asked – we talked a little bit more on a personal level.
   Q: What do you mean by that?
   A: I believe I told him that I was living on my own. Well, not totally on my own. There was about three other people living there and that I had a boyfriend.
   → Q: Why would you tell him those things?
   A: Because I felt that he should know because I just – I felt – I felt that he might feel a little more threatened if I had said that.

5. Q: What happened after you talked about your personalities?
   A: We were still mentioning a lot of personal things. Like I was still mentioning that I had a boyfriend. I believe I said his name.
   Q: What was his name?
   A: His name was Allan.
   (some intervening turns)
Q: Why were you mentioning your boyfriend Allan?
A: Because, like I said, I felt like if he ever – if – it might prevent him from going beyond any more touching.

In example (1), when asked why she suggested going inside the mall, the complainant explains that it was a public place. (Presumably, sexual advances are less likely to occur in public places.) In examples (2) and (3), when asked why she left the doors open to the front of the van and the back of the van, respectively, the complainant explains that she was ‘hesitant’ about talking to the accused alone ‘with the door closed.’ In examples (4) and (5), when asked why she was mentioning her boyfriend, Allan, the complainant explains that she wanted the accused to feel ‘threatened’ and that she wanted to ‘prevent him from going beyond any more touching.’ Clearly, what the Crown attorney succeeds in eliciting in asking these particular Why-questions is a sense that the complainant is not passive, but rather is actively attempting to create circumstances that will discourage the accused’s sexual advances.

Examples (6)–(9) are somewhat different from (1)–(5), as the Crown attorney does not ask questions about actions intended to discourage and/or prevent the accused’s sexual advances, but rather asks about actions that could be construed as preambles to consensual sex.

6.
Q: Did he say anything when he locked the door?
A: He didn’t say anything about the door being locked, but he asked me to sit down. And he sat down cross-legged.
Q: What did you sit on?
A: Just the floor of the trailer.
→ Q: Now, why did you sit down when he asked you to sit down?
A: Because I figured I was in this trailer, the door was locked, he was not much more than this stand is away from me here, probably only a couple of feet away from me. I felt that I was in a situation now where I just better do what I was told.

7.
Q: And what happened then?
A: He told me that he felt very tense and that he would like to have a massage, and he then leaned up against me with his back towards me and told me to rub his shoulders and I did that.
Q: And up to the time he told you he was tense and wanted a massage, had the two of you talked about you giving him a massage?
A: I believe all he had said right before that is that he liked to have them, and he was tense feeling and that was all.
Q: Had you ever offered to give him a massage?
A: No.
Q: Did you want to give him a massage?
A: No.
(some intervening turns)
Q: If you didn’t want to give him a massage at that point in time, why did you touch his shoulders?
A: I was afraid that if I put up any more of a struggle that it would only egg him on even more, and his touching would be more forced.

8.
Q: And what happened then?
A: Then he asked me to turn around the other way to face him, and he said he would like to touch my feet or he would like to massage my feet, so I did. And he was just touching my feet.
Q: Did you want him to massage your feet?
A: No.
Q: Why did you turn around?
A: Because I guess I was afraid. I was frozen. I just did what he told me to do.
Q: Did he ever ask you if you would like him to massage his feet – your feet?
A: No, he just said, Turn around I’m going to.
Q: What happened after you turned around?
A: He was massaging my feet, but he didn’t stay there. He was moving up my leg more toward my inner thigh, my pelvic area, and then he’d move back again, and then he’d move back up again, and I just sat there, and I didn’t do anything. I didn’t say anything. I knew something was going to happen, and I didn’t want to fight. I didn’t want to struggle. I didn’t want to scream, because I felt that that would just egg him on more.

9.
Q: And what happened when he reached to hug you?
A: He just did, and I, at this time, I was trying really hard not to cry. I had been wiping my eyes when he was on top of me when he couldn’t see me, and I just – I just responded by just lightly putting my arm on him when he hugged me because I was afraid that he would think I was really scared, and that I would leave there telling people.
Q: And why were you worried about him thinking that?
A: Because I didn’t think that he would stop there, that it would get worse, and it would be more brutal.

In examples (6) – (9), the Crown attorney asks why the complainant complies with the accused’s requests: in (6), why she sits down when asked; in (7), why she begins to massage the accused when asked; in (8), why she turns around to face the accused when he asks to massage her feet; and, in (9), why her fear of the accused leads her to reciprocate his hug. In response to these questions, the complainant says a variety of things: that she was afraid; that she felt she should do what she was told; that she feared if she didn’t comply with the accused’s requests or if she put up a struggle that she would ‘egg him on even more,’ ‘his touching would be more forced’ and ‘it would be more brutal.’ Indeed, such responses reflect strategies that many victims of sexual violence employ to prevent more prolonged and extreme instances of violence. As researchers on violence against women have asserted, submitting to coerced sex or physical abuse can be ‘a strategic mode of action undertaken in preservation of self’
(Lempert 1996: 281). That is, if physical resistance on the part of victims can escalate and intensify violence, as some research shows (e.g. Dobash and Dobash 1992) and many women (are instructed to) believe, then submission to coerced sex is undoubtedly the best strategy for survival. Significant about the Crown attorney’s questioning in (6) – (9) is the fact that her Why-questions allow the complainant’s actions to be revealed as strategies of resistance, rather than as precursors to consensual sex. In fact, all of the Crown’s Why-questions highlighted in examples (1) – (9) function to elicit responses that emphasize the complainant’s active deployment of strategies meant to resist the accused’s escalating sexual violence.

In what sense can these Why-questions of the Crown attorney be seen as eliciting explanations that anticipate the ‘blame allocations’ of the defense lawyer? Until the 1950s and 1960s in the United States, the statutory requirement of utmost resistance was a necessary criterion for the crime of rape (Estrich 1987); that is, if a woman did not resist a man’s sexual advances to the utmost then the rape did not occur. While the ‘utmost resistance standard’ is no longer encoded in legal statutes in the U.S. or Canada, the adjudication of sexual assault cases often relies on such a principle. Moreover, defense lawyers in acquaintance rape trials have been shown to strategically deploy the ‘utmost resistance standard’ in their questioning of complainants as a way of undermining their charges of sexual assault (Ehrlich 2001). Indeed, I am suggesting that the Crown attorney’s questioning strategies in the Ewanchuk case, particularly her use of Why-questions designed to elicit reasons and explanations for the complainant’s actions, anticipated and attempted to pre-empt a ‘blame allocation’ from the defense – that the complainant did not resist her perpetrator of sexual assault sufficiently and therefore engaged in consensual sex.6 Put another way, the complainant’s actions were contextualized within a gendered sense-making framework that acknowledged the potential structural inequalities that characterize male–female sexual relations and the effects of such inequalities on women’s strategies of resistance. By contrast, the trial judge and the Alberta Court of Appeal court, as will be seen below, contextualized the complainant’s actions within an alternative sense-making framework – one in which the complainant’s behaviour was not construed as resistance – and thus coerced sex became intelligible/understandable as consensual sex.


As stated above, the trial judge’s decision to acquit the accused in this case was appealed to the Alberta Court of Appeal, where the acquittal was upheld, and then to the Supreme Court of Canada, where the acquittal was unanimously overturned and a conviction was entered for the accused. A striking feature of these decisions is the varying ways that judges at different judicial levels represented the ‘facts’ of the case.
The ‘facts’: Representations of consensual versus coerced sex

Consider the following excerpt from the trial judge’s decision, at a point when the judge is describing the ‘facts’ of the case:

10. B [the complainant] told A [the accused] that she was an open, friendly and affectionate person; and that she often liked to touch people. A told B that he was an open, friendly and affectionate person; and that he often liked to touch people. A and B talked. They touched each other. They hugged. They were sitting on the floor of the trailer and they were lying on the floor of the trailer. A told B that he would like a body massage, and B gave A a body massage. For the body massage, A sat in front of B so that B could massage A’s back. They later exchanged places so that A could give B a body massage. B later lay on her back, and A gave B a foot massage. After the foot massage, A massaged B’s bare legs and he massaged her bare inner thighs. During this period of two and one half hours, A did three things which B did not like. When A was giving B a body massage, his hands got close to B’s breasts. B said ‘No’, and A immediately stopped. When B and A were lying on the floor, A rubbed his pelvic area against B’s pelvic area. B said ‘No’, and A immediately stopped. Later on A took his soft penis out of his shorts and placed it on the outside of B’s clothes in her pelvic area. B said ‘No’, and A immediately stopped. During all of the two and one half hours that A and B were together, she never told A that she wanted to leave. When B finally told A that she wanted to leave, she and A simply walked out of the trailer. (from Reasons for Judgment (Moore, J., C.Q.B.A.), November 10, 1995).

These same ‘facts’ are confirmed by the Alberta Court of Appeal court in its support of the trial judge’s ‘doubts about consent.’

11. Yet, if review of the evidence that supports the trial judge’s doubts about consent in this case is called for, it may be found in the following. The advances that are now said to be criminally assaultive were preceded by an exchange of consensual body massages, partially on the floor of the trailer, hugs and assurances of trust and restraint . . . Beyond that (and somewhat inconsistent with an appellate profile of Ewanchuk as a relentless sexual predator) every advance he made to her stopped when she spoke against it. (from Reasons for Judgment of the Honourable Mr. Justice McClung, February 12, 1998).

In general, these descriptions of what transpired between the accused and the complainant – with the exception of the descriptions of the three times that the complainant said ‘no’ – represent the sexual activity as consensual, mutual and reciprocal. Indeed, the appeal court states quite explicitly that the hugs and the body massages were reciprocal (i.e. ‘an exchange’) and ‘consensual’ (in italics above). The trial judge uses reciprocal constructions such as ‘they touched each other’ and ‘they hugged’ in line 4 of example (10), to describe the touching and hugging activity, followed by sentence sequences that emphasize the reciprocal
nature of the body massages in lines 6 – 8 (i.e. ‘A told B that he would like a body massage, and B gave A a body massage. For the body massage, A sat in front of B so that B could massage A’s back. They later exchanged places so that A could give B a body massage.’). Particularly striking is the fact that both judges represent as consensual and reciprocal events that the Crown attorney and the complainant depicted as coerced sex. That is, on many occasions – and this is exemplified in examples (6) – (9) above – the complainant said she complied with the accused’s wishes out of fear that his violence would otherwise escalate. Yet, the judges represent these events as ones that the complainant engaged in freely and without coercion. For example, in line 4 of example (10), the trial judge states that the complainant and the accused hugged using a reciprocal construction (i.e. ‘They hugged’) whereas in example (9) above the complainant says that she responded to the accused’s hug out of fear, i.e. ‘because [she] was afraid that he would think [she] was really scared’ which in turn would lead to even greater brutality. Likewise, in line 6 of (10), the judge states simply that the complainant gave the accused a body massage in response to his request (i.e. ‘A told B that he would like a body massage, and B gave A a body massage’); yet in example (7) above, the complainant says that she agreed to massage the accused only because she ‘was afraid that if [she] put up any more of a struggle that it would only egg him on even more and his touching would be more forced.’ Finally, we see that in lines 9 – 10 of (10), the judge states that the accused massaged the complainant’s bare legs and inner thighs, as if this were a consensual act (i.e. ‘After the foot massage, A massaged B’s bare legs and he massaged her bare inner thighs.’); but in example (8) above, the complainant says that she complied with the accused’s massages because she didn’t want to ‘egg him on more.’ In sum, despite the fact that the complainant conveyed in her direct testimony that she had little choice but to comply with the accused’s sexual advances, the decisions of the trial court and the Alberta Court of Appeal court failed to qualify or modify the sexual advances in such a way. Indeed, there is a sense in both of these decisions that the complainant’s consent was freely given.

In previous work on the language of Canadian sexual assault trial judgements, Coates, Bavelas and Gibson (1994) noted that judges recognized resistance on the part of complainants only when it took the form of persistent physical struggle. Coates, Bavelas and Gibson (1994: 195) elaborate: ‘The language of appropriate resistance seemed to us to be drawn from male–male combat between equals, where continued fighting is appropriate, rather than from asymmetrical situations... where physical resistance would lead to little chance of success and a high probability of further harm.’ While the excerpts from the judges’ decisions above do not seem to deem physical struggle as the only appropriate form of resistance, they do seem to require that resistance at least take the form of verbal refusal. For example, based on lines 10 – 17 of example (10), it seems that verbal refusals are the only indicators or signals that the trial judge recognizes as resistance on the part of the complainant. That is, although the Crown attorney is successful in eliciting testimony (for example, (1) – (9) above)
that depicts the complainant as attempting to discourage and resist the accused in a variety of ways, including submitting to coerced sex, the trial judge appears to perceive her resistance only on the three occasions that she said ‘no’ to the accused.

Unlike the decisions of the trial judge and the Alberta Court of Appeal, in the Supreme Court of Canada decision there are many descriptions of the ‘facts’ of the case that represent the complainant as complying with the accused’s requests/demands out of fear that any resistance on her part would cause the accused to become more violent. Consider (12) and (13) below, both of which constitute the ‘facts’ of the case as described by two different groups of Supreme Court judges:

12. At some point the accused said that he was feeling tense and asked the complainant to give him a massage. The complainant complied, massaging the accused’s shoulders for a few minutes . . . . The accused then asked the complainant to turn and face him. She did so, and he began massaging her feet. His touching progressed from her feet up to her inner thigh and pelvic area. The complainant did not want the accused to touch her in this way, but said nothing as she was afraid that any resistance would prompt the accused to become violent. Although the accused never used or threatened any force, the complainant testified that she did not want to ‘egg [him] on.’ (p. 7, 1999 decision of the Supreme Court of Canada, Her Majesty the Queen v. Ewanchuk).

13. The accused then proposed that they proceed to his trailer. Shortly after entering the trailer, the complainant agreed to massage lightly the accused. However, she testified that she did not want to give him a massage but she was afraid, considering that she saw and heard the accused lock the door of the trailer and that the accused was almost twice her size. The accused then asked the complainant to come in front of him so that he could return the favour. He started massaging the complainant and brought his hands close to her breasts. The complainant pushed him away with her elbows and said ‘no.’ He then told the complainant to turn around in order to massage her feet. Again out of fear, she complied. (p. 21, 1999 decision of the Supreme Court of Canada, Her Majesty the Queen v. Ewanchuk).

In order to illustrate the contrast between the ‘facts’ as depicted by the trial judge as opposed to the Supreme Court of Canada, consider in particular the language used to describe the massage activity. In lines 5 – 6 of example (10), the trial judge states ‘A [the accused] told B [the complainant] that he would like a body massage, and B gave A a body massage’ whereas in (12) above, the italicized excerpts show the complainant complying with the accused’s request for a massage. Likewise, in line 8 of example (10) the trial judge describes the foot massage as freely consented to by the complainant – ‘B later lay on her back, and A gave B a foot massage’ – yet
the italicized portion of example (13) from the Supreme Court decision states that the complainant ‘complied’ with the foot massage ‘out of fear.’ To summarize, then, what gets represented in the language of consent and reciprocity in the trial judge’s decision—and the Alberta Court of Appeal decision—is translated into the language of compliance and submission in the Supreme Court of Canada decision.

Variation in judicial decision-making

How do we make sense of the varied ways that judges interpreted and represented the ‘facts’ of the Ewanchuk case? According to some basic tenets of pragmatics, the process of interpretation or meaning-making is radically underdetermined by linguistic evidence. That is, interlocutors go beyond the linguistic evidence of texts by drawing inferences, and such inferences necessarily involve general interpretative principles (e.g. Grice 1975) and the mobilizing of extralinguistic contextual factors. In a persuasive account of the way that linguistic forms are endowed with meaning in the course of social and political practices, McConnell-Ginet (1988, 1989, 2002) demonstrates how interlocutors’ cultural assumptions are an important part of this inferential process. She argues, for example, that an utterance such as ‘You think like a woman’ functions as an insult in many contexts of Western cultures, not because there is anything in the literal meaning of the utterance that identifies it as an insult, but because the idea that women have questionable intellectual abilities is thought to be a widespread cultural assumption (McConnell-Ginet 1989). By contrast, in the context of a community where interlocutors are known to share feminist values, this same utterance could be interpreted as a compliment. As this example makes clear, different interpretations of a single utterance can be a function of the different cultural assumptions that interlocutors bring to bear on the process of meaning-making. Indeed, according to McConnell-Ginet’s (2002) theoretical framework, words are relatively empty of meaning: they are invested with meaning ‘as part and parcel of the shaping and reshaping of social and political practices’ (McConnell-Ginet 2002: 149).

In a similar way, we can view the variation in these judicial decisions (Trial judge and Alberta Court of Appeal versus Supreme Court of Canada) as a function of the different cultural sense-making frameworks that the judges brought to bear on the interpretation of the ‘facts’ of the case. Indeed, other aspects of the trial judge’s and the Alberta Court of Appeal decisions provide insight into the gendered assumptions that informed the finding of consensual sex rather than sexual assault. More specifically, in acquitting the accused, the trial judge relied on the defense of ‘implied consent’; the Alberta Court of Appeal upheld both the acquittal and the defense. For both of these courts, then, the complainant was considered to have implied consent; moreover, the Alberta Court of Appeal defined ‘implied’ consent as ‘consent by conduct.’ If consent is indicated by ‘conduct,’ then one of the questions that arises from these decisions concerns the kind of conduct
that these courts deemed as signaling consent. Both the trial judge and the Alberta Court of Appeal court found that the complainant was a ‘credible witness’ (from the trial judge, Moore) and that she was genuinely afraid of the accused: ‘Certainly the complainant was afraid of Ewanchuk as the trial judge found’ (from the Court of Appeal judge, McClung). However, both judges also commented in their decisions that she did not communicate her fear to the accused. Consider the follow excerpt from the trial judge’s decision:

14. All of B’s [the complainant’s] thoughts, emotions and speculations were very real for her. However, she successfully kept all her thoughts, emotions, and speculations deep within herself. She did not communicate most of her thoughts, emotions and speculations . . . . Like a good actor, she projected an outer image that did not reflect her inner self. B did not communicate to A by words, gestures, or facial expressions that she was “frozen” by a fear of force. B did not communicate that she was frozen to the spot, and that fear prevented her from getting up off the floor and walking out of the trailer. (from Reasons for Judgment (Moore, J., C.Q.B.A.), November 10, 1995)

The picture that emerges from this description of the complainant is one of passivity; that is, a woman who ‘successfully ke[eps] all her thoughts, emotions, and speculations deep within herself’ and does not ‘communicate most of her thoughts, emotions and speculations’ is clearly not initiating sexual activity nor, arguably, is she responding in any active way to the man’s sexual advances. And, on the basis of this type of ‘conduct,’ the trial judge and the Alberta Court of Appeal acquitted the accused, suggesting that the complainant’s conduct implied consent. In considering how cultural sense-making frameworks might inform this kind of interpretation, it is useful to think about normative ideas about consensual sex. I am suggesting that, by ruling that a woman who is emotionless and ‘frozen’ in her demeanor implies consent, the trial judge and Alberta Court of Appeal judges invoked cultural norms about women’s passivity and lack of agency in the course of ‘normal’ heterosexual sex. As Cameron and Kulick (2003: 36) remark about such societal assumptions, ‘the denial of sexual agency to women means that saying ‘yes’ to sex (or initiating it) is disapproved of. Nice girls should demur coyly in order to demonstrate that they are not sluts or nymphomaniacs, but this is a ritual, formulaic gesture and men should not be deterred.’ For my purposes here, the crucial point is that these kinds of cultural norms are part of the social context informing the judges’ interpretations and representations: if women’s lack of sexual agency is considered to be part of ‘normal’ heterosexual sex, then the interpretation and representation of the sexual activity as consensual and reciprocal, in spite of passivity and lack of agency on the complainant’s part, makes a certain kind of sense.8 Put somewhat differently, the language of compliance and submission (with respect to the complainant’s behaviour) was culturally unintelligible to the trial and appeal courts and, as a result, was transformed into the language of consent and reciprocity.
The Supreme Court of Canada, as stated above, overturned the acquittal of the accused and entered a conviction in its place. Particularly noteworthy about the Supreme Court’s decision was the finding that ‘implied consent’ is not a permissible defense to the charge of sexual assault. Consider the following excerpt from the decision:

15. The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is not third option. If the trier of fact accepts the complainant’s testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of actus reus [absence of consent] of sexual assault is proven. No defence of implied consent exists in Canadian law. Here, the trial judge accepted the complainant’s testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as ‘implied consent’. This conclusion was an error. (Her Majesty the Queen v. Ewanchuk, Supreme Court of Canada, 1999, p. 2).

From this excerpt, we see that, according to the Supreme Court, the trial judge erred in accepting the complainant’s testimony (i.e. that she did not consent) while, at the same time, concluding that the accused could have construed the complainant’s behaviour as communicating consent. What is especially interesting about the ‘error’ ascribed to the trial judge, and by extension to Alberta Court of Appeal court, is the Supreme Court’s opinion, exemplified in (16) below, that the error was not grounded in ‘findings of fact’ but rather in ‘mythical assumptions:

16. The question of implied consent should not have arisen. The trial judge’s conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said ‘no’ on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women’s sexual autonomy and implies that women are in a state of constant consent to sexual activity. The majority of the Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. (Her Majesty the Queen v. Ewanchuk, Supreme Court of Canada, 1999, p. 4).

In a sense, then, the Supreme Court’s argument is similar to my own: the judges’ (i.e. from the trial and the Alberta Court of Appeal) interpretations of the facts of the case were filtered through cultural assumptions – what the Supreme Court referred to as ‘inappropriate myths and stereotypes’ – that transformed the complainant’s compliant and submissive behaviour into behaviour that signaled consent to the accused. Put in McConnell-Ginet’s terms, the linguistic forms of
both the trial and the statutory law surrounding sexual assault seemed to be ‘relatively empty of meaning’ for the trial judge and the Alberta Court of Appeal court. That is, the gendered assumptions (e.g. the idea that women are passive in the course of ‘normal’ heterosexual sex; the idea that ‘women are in a state of constant consent to sexual activity’) guiding these judges’ interpretations of the ‘facts’ were so powerful that their decisions had little to do with the complainant’s testimony or Canadian law. To cite once again the decision of the Supreme Court, ‘this case is not about consent, since none was given. It is about myths and stereotypes’ (p. 22).

The fact that that the Supreme Court characterized the rulings of the trial court and the Alberta Court of Appeal as informed by ‘myths and stereotypes’ suggests that there were other kinds of cultural assumptions informing the Supreme Court ruling. In particular, from excerpt (16), we can surmise that the Supreme Court judges believe that women have ‘sexual autonomy’ and that they are not ‘in a state of constant consent to sexual activity.’ And, in line with the argument being developed here, such cultural assumptions informed the Supreme Court’s interpretation of the case: in particular, the complainant’s submitting to unwanted sex was understood by the Supreme Court as motivated by fear; and, her so-called passive behaviour was not understood as a signal of consent.

CONCLUSION

I began this paper by considering the methodological challenges that ‘postmodern’ approaches to gender pose for the field of language and gender. If we assume that gender cannot be ‘read off’ the identities of speakers, but rather is a social process by which individuals are ‘made to make cultural sense’ (Bucholtz 1999: 7), then how do we best investigate this process? As Stokoe (2005) and Stokoe and Smithson (2002) have argued, it is problematic within such frameworks to conduct research that pre-categorizes individuals as women and men since it is individuals’ constitution as women or men that should be the issue under investigation. Indeed, for Butler (1990: 145), to understand ‘identity as a practice . . . is to understand culturally intelligible subjects as the resulting effects of a rule-bound discourse’ (emphasis in original). This suggests that we attend to cultural norms of intelligibility (i.e. rule-bound discourse) and their effects (emphasis mine). Following Blommaert (2005) and Woolard (forthcoming), I have investigated a speech event – a sexual assault trial – where understandings of social identities and categories were not only evident in the local talk of speakers and hearers, but also in the re-entextualizations of this local talk by powerful institutional representatives (i.e. judges). In this way, gender was not ‘read off’ the identities of individuals but rather investigated as it appeared in the cultural sense-making frameworks of judges.

In the trial discourse analyzed here, the complainant and the Crown attorney co-constructed a version of events whereby the complainant submitted to coerced sex out of fear that her resistance would cause more intense and
prolonged instances of violence. While the Supreme Court of Canada interpreted and represented the facts of the case in a way that was compatible with the complainant’s version of events, the trial judge and the Alberta Court of Appeal interpreted and represented the vast majority of the sexual activity as consensual, not as coerced. Particularly striking in these decisions was the contrast between the Supreme Court’s language of compliance and submission (on the part of the complainant) and the trial judge’s and appeal court’s language of consent and reciprocity. How do we account for these widely divergent representations? Drawing upon a theory of pragmatic interpretation that conceptualizes linguistic forms as relatively underspecified in terms of meaning (McConnell-Ginet 1988, 1989, 2002), I have argued that the cultural assumptions (i.e. norms of intelligibility) that the various judges brought to bear on the process of interpretation were radically different. In particular, the trial judge and the Alberta Court of Appeal viewed women’s verbal refusals as necessary to resistance and equated women’s lack of physical responsiveness with consent. Given these cultural assumptions, submission and compliance on the part of the complainant became intelligible as consenting to sex; that is, sexual passivity was interpreted as appropriately feminine and, as a result, the events were understood as normative heterosexual sex. For the Supreme Court judges, by contrast, the so-called passivity of the complainant was not understood as a signal of consent, as they did not view the complainant as in ‘a state of constant consent to sexuality activity.’ Kulick (2003: 149) has made the point that ‘a performative approach to linguistic phenomena does not start or end with identity.’ Rather, a performative approach examines ‘the processes through which some kinds of identifications are authorized, legitimate, and unmarked and others are unauthorized, illegitimate, and marked’ (emphasis mine). By considering how cultural understandings of gender come to inform the interpretation of linguistic forms, this paper has helped to explicate the processes by which certain representations of gender are rendered unintelligible (e.g. women submitting to unwanted sex out of fear) and, as a result, translated into more intelligible interpretations (e.g. women being passive in the course of normative heterosexual sex). Moreover, given that judges are the ultimate interpreters of the linguistic representations of courtroom talk, this paper has also demonstrated some of the social consequences associated with the performance of unauthorized and unintelligible gendered identities.

NOTES

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2. Cameron uses the terms ‘modern’ and ‘post-modern’ cautiously (and with scare-quotes around them), acknowledging that their meanings are variable and highly contested. As Cameron notes, there is little dispute among scholars that there has been a shift in language and gender studies, even though the terminology used to refer to it can vary.

3. Kulick (1999) makes this point in relation to language and sexuality research, and, in particular, the investigation of the talk of gay men.

4. Within CA, the question of whether participants’ ‘orientations’ to social categories require an explicit mention of the category has been discussed extensively (see Stokoe and Smithson 2001, 2002). For example, Schegloff (1997) cites an explicit mention of the word ‘ladies’ as constituting an orientation to gender. For Kitzinger (2000: 171), however, restricting such orientations to explicit references to gender or race or sexuality would be ‘unbearably limiting,’ given that discriminatory social practices are often naturalized by the commonsensical and inexplicit quality of sexist, racist and heterosexist assumptions in talk.

5. My analysis of the trial data was based on the official court transcripts. While court transcripts are not as accurate or detailed as those transcribed by linguists, ethical considerations prevented access to tape-recorded data of the trial. In spite of the somewhat impoverished nature of court transcripts, they do function as the official representation of trials and thus have an influence on outcomes at both trial and appeal levels. First, trial judges often rely on transcripts in writing decisions, especially in long trials or trials that have been interrupted. Second, whenever cases are appealed to appeal courts or the Supreme Court, court transcripts become the only representation that judges rely upon in making their rulings.

6. Not surprisingly, the cross-examining lawyer in the Ewanchuk trial challenged and undermined the narrative co-constructed by the Crown attorney and the complainant, particularly, the idea that the complainant had resisted the sexual advances of the accused. This was achieved primarily through the use of questions that highlighted acts of resistance that the complainant did not perform. Note that this is in stark contrast to the Crown attorney’s questions exemplified in (1) – (9), which focused on acts that the complainant did perform in the face of the accused’s escalating violence.

i. 
   Q: It certainly wasn’t dark inside the trailer?
   A: No.
   → Q: And at no time did you ask to leave, right?
   A: Only –
   Q: At the end?
   A: Before I did leave.
   Q: You know what I’m asking?
   A: Yes.
   → Q: You never asked to leave?
   A: No.
   → Q: You never got up to leave?
   A: No.

ii. 
   Q: Do you remember how you got onto your back? How you laid down?
   A: Because he had come – he had been coming up on top of me.
Q: I see. So as he moved up –
A: And he basically moved himself heavily on top of me which would, therefore, make me move back.
(intervening turn)
Q: – and the two of you just ended up laying one on top of the other, right?
A: Yes.
→ Q: You didn’t say anything at that point? You didn’t say no, stop or don’t do this or anything, right?
A: No.
→ Q: You basically said nothing, right?
A: Yes.
Q: Okay. And then as he was moving in this pelvic area you told us about – moving his pelvis, that’s when you told him to stop, right?
A: Yes.
Q: And he did stop, right?
A: Yes.

In (i) the lawyer focuses on the fact that the complainant did not leave or ask to leave the trailer and in (ii) on the fact that she did not say ‘no’ or ‘stop’ when the accused lay on top of her. Significant about these questions is that they are negative interrogatives (Heritage 2002). In the context of broadcast news interviews, Heritage (2002: 1432) has argued that a negative interrogative can be used ‘to frame negative or critical propositions,’ inviting the addressee to assent to this negative or critical proposition. Thus, by using negative interrogatives in (i) – (ii), not only does the cross-examining lawyer highlight strategies of resistance not pursued by the complainant, he also conveys a negative and/or critical attitude towards the fact that these actions were not performed. And, the complainant ultimately assents to the negatively evaluated representations of her ‘non-actions.’

7. Philips (1998: 123), in her investigation of the discourse of Arizona trial court judges, also discusses the influence that ideology can have on judicial decision-making. She argues that it is a mistake to think of trial court judges ‘as non-ideological, as mere implementers of laws made by others,’ suggesting instead that the law – and judges – are inextricably entrenched in the political and social life of a culture. For Philips, judges are not ‘mere conduits of written law’; rather, ‘they practice politics and exercise power.’

8. In determining the cultural assumptions or cultural sense-making frameworks that inform participants’ (in this case, judges’) interpretations of texts, the analyst unavoidably draws upon her own knowledge, as a member of the culture, of wider social and cultural discourses. So, for example, in claiming that the trial and Alberta Court of Appeal courts were influenced by certain kinds of beliefs about normative heterosexual sex, I am drawing upon my own cultural background knowledge and assumptions in the course of the analytic process. Like the judges, my interpretation of data (like that of all analysts) is not based on linguistic evidence alone, but is informed by the social context, including cultural knowledge and assumptions.

9. While it is of course the case that the Supreme Court judges were guided by Canadian sexual assault law in making their ruling, I am suggesting here that they were not merely adhering to the law. Rather, I am suggesting that the same kinds of cultural assumptions that inform Canadian sexual assault law (e.g. that women are sexually autonomous) are also held by the Supreme Court judges and indeed informed their ruling.
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