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## 17. Perpetuating—and Resisting—Rape Myths in Trial Discourse

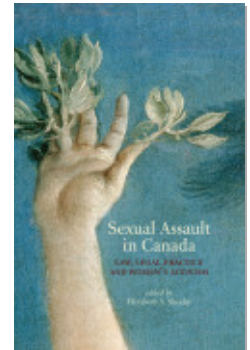
### Published by

Sheehy, Elizabeth A.

Sexual Assault in Canada: Law, Legal Practice and Women's Activism.

University of Ottawa Press, 2012.

Project MUSE. <https://dx.doi.org/10.1353/book.20786>.



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## 17. Perpetuating — and Resisting — Rape Myths in Trial Discourse<sup>1</sup>

*Susan Ehrlich*

*In this chapter, Susan Ehrlich focuses on language to track how linguistic and rhetorical devices in direct and cross-examination are deployed by lawyers in sexual assault trials to shade the narrative rendering of the event. She argues that we must pay attention to the language and everyday practices that shape how sexual assault is adjudicated. Recalling the chapters by Julia Tolmie and Laura Robinson in Part I, where acts that fully met the legal definition of sexual assault were nonetheless successfully recast in high profile trials as “just sex” or “unwanted sex,” Susan’s analysis shows how rape myths continue to be re-enacted through linguistic strategies despite decades of progressive law reforms. Her work echoes the spirit of the Garneau Sisterhood from Part I by laying the groundwork for women who testify as complainants and Crown attorneys to anticipate and disrupt these regressive narratives.*

Feminist critiques of the law have often cited the rape trial as exemplifying much of what is problematic about the legal system for women. Carol Smart, for example, argues that the rape trial is illustrative of the law’s *juridogenic* potential: that is, frequently the harms produced by the so-called remedy are as negative as the original abuse.<sup>2</sup> Other legal theorists have created terms for the rape trial — “judicial rape”<sup>3</sup> and “rape of the second kind”<sup>4</sup> — in order to make visible the *re-victimization* that women can undergo once their complaints of rape enter the legal system. What is perhaps surprising about these kinds of claims is the fact that they persist, in spite of widespread reform of

- 1 This chapter is a revised version of a chapter that appeared in Malcolm Coulthard & Alison Johnson, eds, *The Routledge Handbook of Language and the Law* (London: Routledge, 2010) 265.
- 2 Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 161.
- 3 Sue Lees, *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996) at 36.
- 4 Greg Matoesian, “Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial” (1995) 29 *Law & Soc’y Rev* 676.

sexual assault and rape statutes in Canada and the United States over the last four decades. For example, legislation in the 1970s through the 1990s in Canada and the United States abolished, among other things, marital exemption rules, which made it impossible for husbands to be charged with raping their wives; resistance rules, which required that complainants show evidence that they physically resisted their attackers; and recent complaint rules, which obligated complainants to make prompt complaints in order that their testimony be deemed credible. In addition, rape shield provisions were introduced, restricting the conditions under which complainants' sexual histories could be admissible as evidence.

So, given this kind of reform, why do rape trials continue to defy the law's statutory objectives? Following John Conley and William O'Barr, I suggest that the rape trial's failure to deliver justice to raped women lies *not* in the details of rape and sexual assault statutes, but rather "in the details of everyday legal practices."<sup>5</sup> And, because *language* plays a crucial role in everyday legal practices, this chapter demonstrates how *linguistic analysis* can reveal some of the discriminatory qualities of rape trials as well as how they have been contested.

### THE ADJUDICATION OF RAPE CASES

In her book-length study of well-known American acquaintance rape trials, Peggy Sanday<sup>6</sup> comments on the discrepancy that often exists between "law-as-legislation" and "law-as-practice."<sup>7</sup> On the one hand, Sanday praises recent rape statutes in the states of New Jersey, Illinois, Washington, and Wisconsin that deem sexual aggression as illegal in the absence of what she terms the "affirmative consent" of complainants. On the other hand, Sanday points to the failure of such statutory reform in the context of sexist and androcentric cultural stereotypes: "although our rape laws define the line [between sex and rape] ... these laws are useless if juror attitudes are affected by ancient sexual stereotypes."<sup>8</sup> Within the Canadian context, Elizabeth Comack makes similar observations about judges' attitudes: despite the widespread re-

5 John Conley & William O'Barr, *Just Words: Law, Language, and Power* (Chicago: University of Chicago Press, 1998) at 3.

6 Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* (New York: Doubleday, 1996).

7 Carol Smart, "Feminism and the Law: Some Problems of Analysis and Strategy" (1986) 14 *Int'l J Soc L* 109.

8 *Ibid* at 285.

form to Canadian sexual assault law in the 1980s and 1990s, Comack argues that “judicial decisions continue to reflect traditional cultural mythologies about rape.”<sup>9</sup>

Comack’s claims are supported by research on the language of sexual assault trial judgments. For example, in investigating judges’ decisions in Canadian sexual assault trial cases between 1986 and 1992, Linda Coates, Janet Bavelas, and James Gibson found judges to have extremely limited “interpretive repertoires” in the language they deployed in describing sexual assault. In describing “stranger rapes,” judges employed a language of assault and violence; however, in describing cases where perpetrators were familiar to the women they assaulted and often trusted by them, the language judges used was often that of consensual sex. For example, the unwanted touching of a young girl’s vagina was described as “fondling” in one trial judgment; in another, a judge described a defendant as “offering” his penis to his victim’s mouth.<sup>10</sup> Thus, in spite of the fact that 1983 statutory reforms in Canada explicitly reconceptualized sexual assault as a crime of violence, many of the judges adopted a language of erotic, affectionate, and consensual sex when describing non-stranger rape.

These kinds of results give empirical substance to Sanday’s and Comack’s claims about the “ancient sexual stereotypes” and “traditional cultural mythologies” that inform the adjudication of rape cases. They are also illustrative of the legal system’s differential treatment of stranger rape versus acquaintance rape — a phenomenon also documented within the American legal system by legal scholar, Susan Estrich. Estrich, in her book *Real Rape*,<sup>11</sup> makes the argument that the legal system takes the crime of rape seriously in cases where the perpetrator is a stranger and, in particular, an armed stranger “jumping from the bushes” and attacking an unsuspecting woman. By contrast, when a woman is forced to engage in sex with a date or an acquaintance, when no weapon is involved and when there is no overt evidence of physical injury, the legal system is much less likely to arrest, prosecute, and convict the perpetrator. One could argue that in these latter kinds of cases, when there is no physical evidence and/or corroboration that rape has occurred, it is much easier for judges and jur-

9 Elizabeth Comack, *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999) at 234.

10 Linda Coates, Janet Bavelas & James Gibson, “Anomalous Language in Sexual Assault Trial Judgments” (1994) 5 *Discourse & Soc’y* 189.

11 Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987).

ies to invoke their own (potentially problematic) ideas about male and female sexuality. As Peter Tiersma<sup>12</sup> points out, consent can be communicated indirectly (eg, through silence), with the result that, in situations where a man has not physically hurt or overtly threatened a woman, judges and juries must *infer* whether a woman has consented to sex or not. And, in line with Sanday's and Comack's comments above, Tiersma acknowledges that "these inferences may rest on questionable or offensive ... assumptions." For instance, Tiersma cites a recent US case "in which a Texas judge determined that a woman's request that a man use a condom was evidence of consent, despite the fact that he had threatened her with violence."<sup>13</sup> In the words of Carla da Luz and Pamela Weckerly, "caution [was] construed as consent" by this particular judge.<sup>14</sup>

The remainder of this chapter has two goals. First, I consider research that has investigated the discourse of rape trials and demonstrated that the kinds of questionable cultural assumptions discussed by Sanday, Comack, and Tiersma (among others) are not only evident in the attitudes of some juries and judges: they also circulate within trials. In particular, defence lawyers in criminal rape trials have been shown to draw strategically upon cultural mythologies surrounding rape as a way of impeaching the credibility of complainants. Second, I consider research that explores the possibility that the kinds of cultural mythologies drawn upon by judges, juries, and defence lawyers in rape trials can be contested. In fact, I suggest that, because of its *adversarial* nature, the rape trial provides a unique forum for investigating ways that dominant notions of sexual violence are reproduced discursively *as well as* ways they might be resisted and challenged.

### QUESTIONS IN TRIAL DISCOURSE

Adversarial dispute resolution, of which trials are a notable example, requires that two parties come together formally, usually with representation (eg, lawyers), to present their (probably different) versions of the dispute to a third party (eg, 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,

12 Peter Tiersma, "The Language of Consent in Rape Law" in Janet Cotterill, ed, *The Language of Sexual Crime* (Basingstoke, UK: Palgrave Macmillan, 2007) 83.

13 *Ibid* at 93.

14 Carla M da Luz & Pamela C Weckerly, "The Texas 'Condom-Rape' Case: Caution Construed as Consent" (1993) 3 *UCLA Women's LJ* 95.

convincing the adjudicating body that their (ie, their client's) version of events is the most credible. Apart from making opening and closing arguments, however, lawyers do not themselves testify. Rather, it is through the posing of questions that lawyers 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. J Maxwell Atkinson and Paul Drew 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.<sup>15</sup>

Atkinson and Drew have called the question-answer turn-taking system characteristic of the courtroom, *turn-type pre-allocation*, to indicate that the types of turns participants can take are predetermined by their institutional roles.<sup>16</sup> In courtrooms, for example, lawyers have the right to initiate and allocate turns by asking questions of witnesses, but the reverse is not generally true; witnesses are obligated to answer questions or run the risk of being sanctioned by the court. An important dimension of this type of asymmetrical turn-taking, according to Drew and John Heritage, is the fact that it provides little opportunity for the answerer (typically a lay person) to initiate talk and thus allows the institutional representative "to gain a measure of control over the introduction of topics and hence of the 'agenda' for the occasion."<sup>17</sup> Within the context of the courtroom, researchers have argued that the interactional control of questioners (ie, lawyers) is most pronounced during cross-examination when the use of leading questions allows cross-examining lawyers to impose their version (ie, their clients') of events on the evidence.<sup>18</sup> As John Gibbons points out, one way that

15 J Maxwell Atkinson & Paul Drew, *Order in Court* (Atlantic Highlands, NJ: Humanities Press, 1979) at 70.

16 *Ibid.*

17 Paul Drew & John Heritage, "Analyzing Talk at Work: An Introduction" in Paul Drew & John Heritage, eds, *Talk at Work: Interaction in Institutional Settings* (Cambridge: Cambridge University Press, 1992) 3 at 49.

18 See Conley & O'Barr, *supra* note 5.

cross-examining lawyers manage to construct a version of events that serves the interests of their own clients is by “includ[ing] elements of this desired version ... in the questions.”<sup>19</sup>

While a number of researchers have developed taxonomies of questions used in the courtroom,<sup>20</sup> for the purposes of this chapter I elaborate on Hanna Woodbury’s taxonomy of question “control”<sup>21</sup> because it categorizes questions according to questioners’ ability to “control” information, or in Gibbons’ words above, according to questioners’ ability to include “elements of the[ir] desired version of events” in questions. Indeed, for Woodbury, control refers “to the degree to which the questioner can impose his (sic) own interpretations on the evidence.”<sup>22</sup> Thus, within Woodbury’s continuum of control, broad wh- questions, such as *And then what happened?*, display little control because they do not impose the questioner’s interpretation on the testimony: there is no proposition communicated to a judge and/or jury other than the notion that “something happened.” By contrast, yes-no questions display more control than wh- questions within Woodbury’s taxonomy. For example, the yes-no question with a tag, *You had intercourse with her, didn’t you?*, contains a substantive proposition — ie, “the addressee had intercourse with some woman” — that is made available to a judge and/or jury, irrespective of the addressee’s (ie, witness’s) answer. Indeed, for Conley and O’Barr, controlling questions, in Woodbury’s sense, have the effect of transforming cross-examination “from dialogue into self-serving monologue.” That is, even if a controlling question with damaging content is answered in the negative, Conley and O’Barr argue that “the denial may be lost in the flow of the lawyer’s polemic.”<sup>23</sup>

In my own work, I have expanded Woodbury’s taxonomy of “control” to include questions with presuppositions — questions that I argue are even more controlling than the kinds of yes-no questions exemplified above.<sup>24</sup> That is, on one analysis, a question always contains a variable

19 John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* (Oxford: Blackwell Publishers, 2003) at 98.

20 See, for example, Brenda Danet *et al*, “An Ethnography of Questioning” in Roger Shuy & Anna Shnukal, eds, *Language Use and the Uses of Language* (Washington, DC: Georgetown University Press, 1980) 222; Sandra Harris, “Questions as a Mode of Control in Magistrates’ Courts” (1984) 49 *Int’l J Soc Lang* 5; Anne Graffam Walker, “Linguistic Manipulation, Power and the Legal Setting” in Leah Kedar, ed, *Power Through Discourse* (Norwood, NJ: Ablex, 1987) 57.

21 Hanna Woodbury, “The Strategic Use of Questions in Court” (1984) 48 *Semiotica* 197.

22 *Ibid* at 199.

23 Conley & O’Barr, *supra* note 5 at 26.

24 Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (London: Routledge, 2001).

or unknown quantity, which the addressee of a question is being asked to supply.<sup>25</sup> For example, the addressee of the yes-no question with a tag exemplified above, *You had intercourse with her, didn't you?*, has the ability to disconfirm the proposition (ie, “the addressee had intercourse with some woman”) contained within the declarative part of the question. By contrast, presuppositions cannot be denied with the same effectiveness or success. Consider, for example, the question in (1):<sup>26</sup>

- (1) Lawyer: When you were having intercourse with her the first time, did you say anything to her then?

In uttering this question, the lawyer takes for granted (ie, assumes) that the witness has had intercourse with some woman and is asking about speech events that might have taken place during the intercourse. What is important for my purposes is that this presupposition continues to be taken for granted (ie, remains in evidence) even if the addressee answers the question in the negative. Thus, in contexts where cross-examining lawyers attempt to include elements of their own client's version of events in their questions, presuppositions are even more powerful than the declaratives of yes-no questions in controlling evidence. The contrast among the kinds of propositions made available and/or presupposed by the question -types discussed here can be seen in (2) and (3). The question -types are ordered from less “controlling” to more “controlling.”

- (2) Yes-No questions without presuppositions, eg, *You had intercourse with her, didn't you?*

Proposition made available (but denied if question answered in the negative): the addressee had intercourse with some woman.

- (3) Yes-No questions with presuppositions, eg, *When you had intercourse with her, you said something to her, didn't you?*

Proposition made available (but denied if question answered in the negative): the addressee said something to some woman when having intercourse with her.

25 John Lyons, *Semantics* (Cambridge: Cambridge University Press, 1977).

26 This question is adapted from Atkinson & Drew, *supra* note 15 at 211.



Proposition presupposed: the addressee had intercourse with some woman.

### THE POWER OF QUESTIONS TO CONTROL INFORMATION IN RAPE TRIALS

A central argument of this chapter is that the problematic cultural assumptions typically brought to bear on the adjudication of rape trials are also evident within the discourse of rape trials; in particular, defence lawyers invoke cultural mythologies surrounding rape as a way of undermining the credibility of complainants. In this section, I demonstrate how these kinds of cultural myths are encoded within the “controlling” questions of defence lawyers when cross-examining complainants, in particular, within the presuppositions and declaratives of the lawyers’ yes-no questions.

The specific kinds of cultural assumptions discussed in this section involve what Sanday might call “an ancient sexual stereotype” — an outdated statutory rule within sexual assault and rape law called the “utmost resistance” standard.<sup>27</sup> Until the 1950s and the 1960s in the United States, the statutory requirement of utmost resistance was a necessary criterion for the crime of rape; that is, if a woman did not resist a man’s sexual advances to the utmost, then rape did not occur.<sup>28</sup> While, as noted above, this standard is no longer encoded in rape statutes in the United States and Canada, it does circulate within the discourse of rape trials. The following examples come from a Canadian acquaintance rape trial<sup>29</sup> in which the accused, Matt (a pseudonym), was charged with sexually assaulting two different women, Connie and Marg (pseudonyms), in their university residences three nights apart. (Matt was convicted of sexual assault in the case involving Marg, on the basis of corroboration from witnesses, and acquitted in the case involving Connie.) Although both complainants described their experiences as sexual assault, in the examples that follow, the defence lawyer represents the women’s behaviour as lacking in forceful and direct resistance. Because the complainants’ actions do not seem to meet the standard of resistance deemed appropriate by the defence lawyers, I

27 See for discussion Ehrlich, *Representing Rape*, *supra* note 24 and Susan Ehrlich, “Coercing Gender: Language in Sexual Assault Adjudication Processes” in Janet Holmes & Miriam Meyerhoff, eds, *The Handbook of Language and Gender* (Oxford: Blackwell Publishers, 2003) 645.

28 Estrich, *supra* note 11.

29 *R v Ashton* (18 April 1995) Ontario Court, General Division, Toronto Ontario [unreported trial transcript on file with the author]. This analysis comes from my 2001 book: *Representing Rape*, *supra* note 24.

suggest that these types of representations have the effect of calling into question the complainants' allegations of sexual assault.

Many of the questions (shown in italics below) asked by the defence lawyer identified options that the complainants could have pursued in their attempts to resist the accused; moreover, these options were consistently presented as reasonable options for the complainants to pursue. Examples (4) and (5), for instance, show the cross-examiner suggesting that "seeking help" was a reasonable option for Connie.

- (4) Q: And I take it part of your involvement then on the evening of January 27th and having Mr A come back to your residence that you felt that you were in this comfort zone because you were going to a place that you were, very familiar; correct?

CD: It was my home, yes.

Q: *And you knew you had a way out if there was any difficulty?*

CD: I didn't really take into account any difficulty. I never expected there to be any.

Q: I appreciate that. *Nonetheless, you knew that there were other people around who knew you and obviously would come to your assistance, I take it, if you had some problems, or do you know? Maybe you can't answer that.*

CD: No, I can't answer that. I can't answer that. I was inviting him to my home, not my home that I share with other people, not, you know, a communal area. I was taking him to my home and I really didn't take into account anybody else around, anybody that I lived near. It was like inviting somebody to your home.

Q: Fair enough. And I take it from what you told us in your evidence this morning that it never ever crossed your mind when this whole situation reached the point where you couldn't handle it, or were no longer in control, to *merely* go outside your door to summons someone?

CD: No.

- (5) Q: What I am suggesting to you, ma'am, is that as a result of that situation with someone other than Mr A, you knew what to do in the sense that if you were in a compromising position or you were being, I won't use the word harass, but being pressured by someone you knew what to do, didn't you?

CD: No, I didn't. Somebody had suggested that, I mean, I could get this man who wasn't a student not be permitted on campus and that's what I did.

Q: What — *but I am suggesting that you knew that there was someone or a source or a facility within the university that might be able to assist you if you were involved in a difficult situation, isn't that correct, because you went to the student security already about this other person?*

CD: Yeah, okay. If you are asking if I knew about the existence of student security, yes, I did.

The italicized sentences in examples (4) and (5) are “controlling” questions in Woodbury’s sense. That is, in producing such questions, the defence attorney communicates certain propositions to the judge and jury in the declarative portion of the yes-no questions, specifically, that Connie knew there were university resources available to women who found themselves in difficult situations. The italicized questions in (4) and (5) also contain presuppositions. The predicate, *know*, is a factive predicate, which means that it presupposes the truth of its complement. Thus, in uttering the three italicized questions above, the defence lawyer presupposes that “there was a way out,” “there were other people around who knew Connie,” and “there were resources at the university to help those in difficult situations.” Indeed, due to the presupposed nature of these propositions, even if Connie had denied her knowledge of the availability of help, what is communicated by the lawyer’s questions is the fact that help *was* available within the university. Note that the final question of example (4) not only identifies an option that Connie could have pursued, it also represents this option as an unproblematic one, given the presence of the word, *merely* — *It never ever crossed your mind ... to merely go outside your door to summons someone?*

So, what are the inferences that a judge and jury might draw from the information communicated by the defence lawyer’s questions? If help was available, and if Connie admits at certain points in the questioning that she was aware of its availability, as we see in the last turn of example (5), then her failure to seek help suggests that she was *not* in “a difficult situation” and that she did not require assistance. Put somewhat differently, Connie’s failure to seek help casts doubt on her credibility, specifically, it calls into question her allegations of sexual assault.

Examples (6) and (7) show both the judge and the cross-examining lawyer asking Connie and Marg, respectively, why they didn’t utter other words in their various attempts to resist Matt’s sexual aggression. Again, we see an emphasis on the seemingly reasonable options that were not pursued by the complainants.

- (6) Q: And in fact just raising another issue that I would like you to help us with if you can, this business of you realizing when the line was getting blurred when you said “Look, I don’t want to sleep with you,” or words to that effect, yes, you remember that?  
CD: Yes.  
Q: Well, when you said that, what did that mean or what did you want that to mean, not to have intercourse with him?  
CD: Yeah, I mean, ultimately, that’s what it meant. It also, I mean –  
The Court: *You didn’t want to sleep with him but why not, “Don’t undue (sic) my bra” and “Why don’t you knock it off”?*  
CD: Actually, “I don’t want” — “I don’t want to sleep with you” is very cryptic, and certainly as he got his hands under my shirt, as he took off my shirt, as he undid my bra, as he opened my belt and my pants and pulled them down and I said, “Please don’t, please stop. Don’t do that. I don’t want you to do that, please don’t,” that’s pretty direct as well.
- (7) MB: And then we got back into bed and Matt immediately started again and then I said to Bob, “Bob where do you get these persistent friends?”  
Q: Why did you even say that? You wanted to get Bob’s attention?  
MB: I assumed that Bob talked to Matt in the hallway and told him to knock it off.  
Q: You assumed?  
MB: He was talking to him and came back in and said everything was all right.  
Q: Bob said that?  
MB: Yes.  
Q: But when you made that comment, you wanted someone to know, you wanted Bob to know that this was a signal that Matt was doing it again?  
MB: Yes.  
Q: A mixed signal, ma’am, I suggest?  
MB: To whom?  
Q: What would you have meant by, “Where do you get these persistent friends?”  
MB: Meaning Bob is doing it again, please help me.  
Q: *Why didn’t you say, “Bob, he was doing it again, please help me?”*

MB: Because I was afraid Matt would get mad.

Q: You weren't so afraid because you told Bob, "Where do you get these persistent friends?" Did you think Matt would be pleased with that comment because it was so general?

MB: I didn't think about it but I thought that was my way of letting Bob know what was going on.

Connie reports saying *Look, I don't want to sleep with you* at a certain point in the evening and Marg recounts one of several incidents when she attempts to elicit Bob's help (Bob is the pseudonym for a friend of the accused's) by saying *Bob where do you get these persistent friends*. Yet, in the italicized questions above, these expressions of resistance are problematized by the judge and the defence lawyer, respectively. In example (6) the judge asks Connie why she hadn't said *Don't undue (sic) my bra* and *Why don't you knock it off*, and in example (7) the defence lawyer asks Marg why she didn't say *Bob, he was doing it again, please help me*. It is significant that both of the questions that preface the words not produced by the complainants are negative interrogatives (ie, *why not* and *why didn't you say*) — interrogatives that Heritage argues are often used to "frame negative or critical propositions."<sup>30</sup> This means that when the judge and the defence lawyer produce questions of the form "Why didn't you say X," not only are they calling attention to utterances that were *not* produced by the complainants, they are also communicating a negative and/or critical attitude towards the fact that such utterances were not produced. Once again, then, the inferences generated by these questions serve to call into question the complainants' allegations of sexual assault: because they did not express their resistance directly and forcefully, the judge and/or jury might wonder whether they had really been threatened by the accused.

The examples above are illustrative of the way cross-examining lawyers (and, in one case, a judge) use "controlling" questions to create a version of events that supports their own clients' case and undermines the credibility of the opposing side's case. My argument is that the information contained within the declarative portions and the presuppositions of the defence lawyer's questions created a powerful ideological lens through which the events in question came to be understood. More specifically, by repeatedly posing questions that represented the complainants as *not* pursuing "obvious" and "easily-executed"

30 John Heritage, "The Limits of Questioning: Negative Interrogatives and Hostile Question Content" (2002) 34 *J Pragmatics* 1427.

strategies of resistance, the defence lawyer suggested that the complainants' behaviour did not meet the "utmost resistance" standard, thereby undermining the complainants' allegations of sexual assault. From my point of view, what is problematic about the resistance standard invoked by the defence lawyer is the fact that it downplays and obscures the unequal power dynamics that often characterize male/female sexual relations. In excerpt (6), for example, Marg reports enlisting Bob's help in order to end Matt's sexual aggression because she feared that a more direct approach would provoke Matt's anger. The defence lawyer, however, suggests that Marg should have employed more direct words in resisting Matt's violence and characterizes her strategic act of resistance as nothing more than a *mixed signal*. Thus, Marg's act of resistance, which could have been framed as an intelligent and thoughtful response to a man's escalating sexual violence, was instead characterized by the defence lawyer as an inadequate act of resistance.

## RESISTING THE CULTURAL MYTHOLOGIES SURROUNDING RAPE

### The Power of Answers to Control Information

A defining characteristic of institutional discourse is the differential speaking rights assigned to participants based on their institutional role. In legal contexts, as we have seen, lawyers (and judges) have the right to initiate and allocate turns by asking questions of witnesses, but the reverse is not generally true; witnesses do not typically ask questions of lawyers and, if they do, they risk being sanctioned by the court. While the claim that "asking questions amounts to interactional control"<sup>31</sup> is a pervasive one in the literature on courtroom discourse, it is not a claim that has gone unchallenged. Based on a study of Aboriginal witnesses in Australian courts, for example, Diana Eades argues that the syntactic form of questions has no predictable effect on the form of witness responses.<sup>32</sup> In a similar way, Greg Matoesian has questioned the assumption that "questions ... are more powerful than answers," suggesting that such an assumption "risks the problem of reifying structure."<sup>33</sup>

31 Diana Eades, *Courtroom Talk and Neocolonial Control* (Berlin: Mouton de Gruyter, 2008) at 37.

32 Diana Eades, "I Don't Think it's an Answer to the Question: Silencing Aboriginal Witnesses in Court" (2000) 29 *Language in Soc'y* 161.

33 Greg Matoesian, "Review of *Language and Power in Court: A Linguistic Analysis of the OJ Simpson Trial* by Janet Cotterill" (2005) 9 *J Sociolinguistics* 621.

Just as we assume questions do more than merely question (for instance in court they may work as accusations, etc.), why presume any less of answers (which may recalibrate the question, produce a new question and so on)? A more detailed consideration of answers and how they function in detail may demonstrate just how powerful they are.<sup>34</sup>

Drew provides precisely this kind of “detailed consideration of answers” in his analysis of a rape victim’s cross-examination.<sup>35</sup> In particular, Drew shows how the complainant (ie, the rape victim) in this particular trial often produced “alternative descriptions” in her answers — descriptions that contested the cross-examining lawyer’s version of events. That is, rather than providing “yes” or “no” answers to the cross-examining lawyer’s yes-no questions, the complainant provided competing descriptions that transformed the lawyer’s damaging characterizations into more benign ones. In (8) below, for example, the cross-examining lawyer, through the use of “controlling” questions, attempts to represent the events that preceded the alleged rape as precursors to a consensual sexual interaction.<sup>36</sup>

- (8) 16 A: Well yuh had some uh (p) (.) uh fairly lengthy  
 17 conversations with the defendant uh: did’n you?  
 18 (0.7)  
 19 A: On that evening uv February fourteenth?  
 20 (1.0)  
 21 W: Well we were all talkin.  
 22 (0.8)  
 23 A: Well *you* knew, at that time that the  
 24 defendant was *interested* (.) in you (.)  
 25 did’n you?  
 26 (1.3)  
 27 W: *He* asked me how I’(d) bin en  
 28 (1.1)  
 29 W: J- just stuff like that

34 *Ibid.*

35 Paul Drew, “Contested Evidence in Courtroom Examination: The Case of a Trial for Rape” in Drew & Heritage, *supra* note 17 at 470.

36 This example is taken from Drew, *ibid* at 486. In the passage quoted, silences are indicated as pauses in tenths of a second and a period in parentheses indicates a micro-pause (less than two tenths of a second).

While the lawyer's questions in lines 16–17 and 23–25 suggest that there was a closeness or intimacy developing between the defendant and the complainant, Drew argues that the complainant's answers, although not containing any "overt correction markers," do not support this version of events.<sup>37</sup> Rather, the complainant provides answers that depict a lack of intimacy between the complainant and the defendant, that is, a scene in which there were a number of people who *were all talkin* and in which the defendant issued a greeting that was more friendly than intimate. What is significant about Drew's analysis for the present discussion is the fact that the answerer is shown to "control" evidence (in Woodbury's sense) by resisting and transforming the propositions contained in the declarative portions of the lawyer's yes-no questions. In fact, Drew comments explicitly on the need to be attentive to the way that competing descriptions from witnesses may influence juries: "the complainant's attempts to counter the lawyer's descriptive strategies, and hence herself control the information which is available to the jury, should not be overlooked."<sup>38</sup>

### Direct Examination

Given the adversarial nature of the English common law system, there are always (at least) two competing versions of events put forward in the courtroom. Thus, in the same way that answers may contest the version of events put forward by the questions of cross-examining lawyers, it should also be possible for the question-answer sequences of *direct* examination to convey an alternative narrative to the one provided by cross-examining lawyers. Indeed, in what follows, I provide examples from a Canadian rape trial<sup>39</sup> where, I suggest, the prosecuting lawyer anticipated and attempted to challenge the kind of defence strategy seen in examples (4) through (7) above: that the complainant did not resist her perpetrator sufficiently and therefore engaged in consensual sex. This particular case involved a sexual assault that took place during a job interview; the accused interviewed the complainant for a job

37 *Ibid* at 487.

38 *Ibid* at 517.

39 *R v Ewanchuk* (7 November 1995) Alberta Court of Queen's Bench, Edmonton, Alberta [unreported trial transcript on file with the author]. For further discussion and analysis of this trial, see Susan Ehrlich, "Constraining the Boundaries of Gendered Identities: Trial Discourse and Judicial Decision-Making" in Judith Baxter, ed, *Speaking Out: The Female Voice in Public Contexts* (Basingstoke, UK: Palgrave Macmillan, 2006) 139; Susan Ehrlich, "Legal Discourse and the Cultural Intelligibility of Gendered Meanings" (2007) 11 *J Sociolinguistics* 452.



and subsequently invited her to see his work in the trailer attached to his van. According to the complainant's testimony, the accused sexually assaulted her in the trailer for a period of approximately two hours. The accused was acquitted by the trial judge and 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.

Atkinson and Drew, in their investigation of courtroom discourse, have noted that witnesses often display their recognition that a series of questions is leading to a "blame allocation" by producing "justification/excuse components in answers."<sup>40</sup> In other words, witnesses will provide defences and justifications in their answers even though the questions asked of them "do not actually contain any blame-relevant assessments of witnesses' actions."<sup>41</sup> Such defences and justifications will thus appear *prematurely* within the course of a trial, that is, before they are actually elicited by a cross-examining lawyer. In the same way that witnesses may provide justifications for their actions prematurely, I am suggesting that examples (10) to (15) show that lawyers may also anticipate critical assessments of their witnesses' actions from opposing lawyers and will thus design their questions to elicit premature or pre-emptive defences and justifications for such actions.

In contrast to the adversarial, combative nature of cross-examination, direct examination has been characterized by both legal practitioners and by scholars as supportive and co-operative. In particular, open-ended questions, or questions that display little "control" in Woodbury's sense, tend to be more frequent in direct examination than in cross-examination. This can be seen in the excerpts (9–14). In each of the examples, the prosecuting attorney begins her turn by asking a broad wh- question, such as *What happened then?*, to which the complainant responds by describing an event or a series of events. Immediately following such an answer, the lawyer asks a narrower wh- question — a why- question that attempts to elicit the complainant's motivation for performing a particular action that she has described. What is significant about these why- questions, for the purposes of this paper, is that they allow the complainant to represent herself as having actively pursued strategies of resistance, either strategies meant to discourage the defendant's sexual advances or strategies meant to avoid more in-

<sup>40</sup> Atkinson & Drew, *supra* note 15 at 136.

<sup>41</sup> *Ibid* at 138.

tense and/or prolonged instances of violence from the defendant.

- (9) 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.*
- (10) 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.*
- (11) 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 ... 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.*
- (12) 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.*

(13) 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.*

(14) 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.*

In the italicized portions of (9) to (11), the complainant represents herself as attempting to create circumstances that will discourage that accused's sexual aggression: she suggests going inside the mall to talk because it is a *public* place and she leaves the doors open to the van and the trailer respectively because she is hesitant about talking to the accused alone in a confined space. In the italicized portions of (12) to (14), the

complainant represents herself as attempting to prevent more extreme acts of violence from the accused: she complies with all of his requests (eg, that she sit down, that she massage him, that she turn around so he can massage her feet) out of fear that not complying will *egg him on even more*. 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.”<sup>42</sup> That is, if physical resistance on the part of victims can escalate and intensify violence, as some research shows<sup>43</sup> and many women (are instructed to) believe, then submission to coerced sex is undoubtedly the best strategy for survival.

In a general way, then, what is important about the prosecuting attorney’s questioning in examples (9) to (14) is the fact that her why-questions served to elicit responses that highlighted and emphasized the complainant’s active deployment of strategies meant to resist the accused’s escalating sexual violence. In this way, the lawyer can be viewed as anticipating, and attempting to pre-empt, a certain kind of “blame allocation” from the defence — that the complainant did not resist the accused “to the utmost” and thus engaged in consensual sex. The preceding discussion is significant because it shows that the cultural rape mythologies often invoked by defence lawyers can be challenged in courtrooms by alternative kinds of narratives. More specifically, in the direct examination of the sexual assault trial just described, the complainant’s actions were contextualized within a sense-making framework that acknowledged the structural inequalities that can characterize male–female sexual relations and the effects of such inequalities in shaping women’s strategies of resistance.

## CONCLUSION

According to Gibbons, the primary way that cross-examining lawyers construct a version of events that supports their own clients’ interests is by including “elements of this desired version” of events in their ques-

42 Lora Bea Lempert, “Women’s Strategies for Survival: Developing Agency in Abusive Relationships” (1996) 11 *J Family Violence* 269.

43 See, for example, R Emerson Dobash & Russell P Dobash, *Women, Violence and Social Change* (London: Routledge, 1992).

tions.<sup>44</sup> Drawing upon Woodbury's notion of question "control,"<sup>45</sup> I have shown how cross-examining lawyers in acquaintance rape trials can incorporate "elements" into their "controlling" questions that are strategically designed to undermine the credibility of complainants. More specifically, by encoding damaging cultural mythologies (eg, the utmost resistance standard) into the declarative portions and pre-suppositions of questions, I have argued that defence lawyers can cast doubt on complainants' allegations of sexual assault and rape.

I began this chapter by pointing to the cultural mythologies that often inform the adjudication of sexual assault and rape cases in Canada and the United States in spite of four decades of progressive statutory reform. What this chapter has demonstrated is the way that these same cultural mythologies can make their way into rape trial discourse, potentially reinforcing the problematic cultural assumptions held by judges and juries. As Steven Shulhofer says about the failure of rape law reform in the United States, "social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law."<sup>46</sup> If it is true that culture is of paramount importance in the legal system's treatment of rape and sexual assault, then the rape trial becomes an important site for viewing this culture "in action." Defence lawyers exploit damaging cultural narratives about rape as a way of undermining the credibility of complainants; at the same time, given the *adversarial and dynamic* nature of the trial, witnesses in their answers and prosecuting lawyers in their questions have the potential to produce competing cultural narratives about rape, as I have demonstrated. Put somewhat differently, if the rape trial provides a window onto culture "in action," then it not only provides a forum for viewing discriminatory narratives about rape but also for viewing the potential for these narratives to change.

44 Gibbons, *supra* note 19 at 98.

45 Woodbury, *supra* note 21 at 197.

46 Steven Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Cambridge, MA: Harvard University Press, 1998) at 17.