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# Referential practice and contested identities in legal narratives

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## Abstract

Adopting a social constructionist perspective on identity, the study explores the form, functions, and frequency of person reference terms lawyers employ to construct and contest the identities of the defendants and victims in their narratives. Based upon six opening statements from three high-profile trials, the quantitative and qualitative analysis reveals that the prosecution and the defense differ starkly in their referential practice, and that referential terms constitute a prime mechanism that aids in the construction and ascription of polarized identities. These reference terms function to mediate jurors' perceptions, negotiate reality and (de)legitimize guilt and responsibility claims in this institutional setting.

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## 1. Introduction

It has become well established that an individual's identity does not lie inside a self or in pre-established labels (such as *white*, *doctor*, *man*, or *Christian*). Rather, identity is fluid, locally-occasioned, and is constructed and negotiated in discursive practices (Goffman, 1959; De Fina, 2003; Bucholtz and Hall, 2005; De Fina et al., 2006). This social constructionist view holds that “communication is not just a revelation of self, but is formative fashioning” (Carbaugh, 1996:xiv). That is, individuals “do” identity through discursive interaction and, in this process, frame and define themselves and others as certain types of people to establish, manage and maintain membership relations, negotiate roles and responsibilities, or even explain non-normative or otherwise unexpected behavior.

One pertinent case where social identities are at stake is the courtroom (Bogoch, 1999; Hobbs, 2008; D'hondt, 2010; Chaemsaitong, 2011, 2012a,b; Tracy, 2011a,b; Gathings and Parrotta, 2013). As McKinlay and McVittie (2011:124) point out, “what happens in the courtroom depends crucially on how people are characterized by others, on how they characterize themselves, and on the features of themselves as individuals that are made relevant during the course of an interaction”. Due to the adversarial nature of this institutional setting, identities are constantly named, constructed and contested. As presenters (i.e. lawyers) are engaged in (re)presenting and (re)constructing basically the same sequence of events involving the same set of social actors, they strive against each other's version and seek to control and manage the opposing side's contributions. This clash between proponents of conflicting views is believed to determine the truth and deliver justice

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for all. And because of this, lawyers marshal various linguistic resources to manage “identity talk”—the verbal construction and assertion of a personal identity (Snow and Anderson, 1987:1348), and to frame how they themselves as well as the defendant and victim should be perceived by the fact finders. This includes, for example, codeswitching between Standard English and African American English (Fuller, 1993; Hobbs, 2003) and alternating between different speaking roles (Rosulek, 2007). The presenter who is able to dominate the representation, interpretation or evaluation of characters in her narrative and excels at “impression management” (Hobbs, 2003, 2008) will be able to secure a favorable outcome with important social and moral ramification (Mateesian, 2001), including a possibility of lessening the severity of criminal sanctions (Gathings and Parrotta, 2013). To illustrate, Pond and Morgan (2008) find that defense lawyer employs the “violent partner” but “good father” description to negotiate the identity of the clients who have committed domestic violence but who are also seeking child custody. As a result, these men are portrayed as violent in one circumstance (i.e. when dealing with their partner) but as perfectly safe around children. Mateesian (2001) shows that the defense lawyer's categorization of the first person the victim calls after the alleged rape as an “acquaintance” (rather than a “friend”, for example) functions to problematize the victim's accusation, and to suggest that the alleged rape could not have been serious (or even consensual). Consequently, the identity of “victim” is problematized.

The current study sets out to explore one of the most subtle, yet powerful, ways in which lawyers name, construct and contest social actors' identities in their narratives, focusing on the use of person reference terms. Instead of witness examination, which has been extensively examined, this study attends to the under-theorized genre of the opening address—an uninterrupted monologic narrative addressed to the jury, in which two opposing overviews of a single criminal event are presented. This initial phase of courtroom talk is particularly well-suited for observing the process of identity construction for at least two reasons. First of all, the opening statement constitutes the lawyer's first opportunity to manage impression of characters in her narratives in a persuasive way. By law, it is meant to provide an outline of the case and forecast what is to come in later phases, and thus it cannot be argumentative. However, describing the scene, characters and their motives, as well as illegal actions and their outcomes is not sufficiently persuasive and will not create any favorable impression unless attorneys supply a frame into which jurors can fit the evidence that they will subsequently consider (Schuetz, 2007). Analyzing the opening statements of the Oklahoma Bombing Trial, communication scholar Schuetz (2007) argues that the two sides strive to establish opposing “categories” for the same defendant. The prosecution portrays the defendant in both the beginning and ending of the opening speech as a self-absorbed coward who killed so many people in an effort to avenge government policies that he hated, while the defense presents a short biography of the defendant in an attempt to humanize him (although the researcher notices that the defense fails to interpret how such biographical information casts doubt on the prosecution's categories).

Second, the opening statement has been found to influence the jurors to draw tentative conclusions early on (Lind and Ke, 1985; Pennington and Hastie, 1991; Schuetz and Lilley, 1999; Spiecker and Worthington, 2003). This is referred to as the primacy effect, that is, one's ability to remember the information that is presented first (see Linz et al., 1986 for further discussion). Evidence from applied psychology research appears to confirm the primacy power of opening statements. Pyszczynski et al. (1981), for instance, find that jurors later recall hearing the testimony *promised* in the opening statement (although in fact they do not hear such testimony), thereby overlooking the lack of any evidence later at trial to support opening statements' claims. Some studies show that as much as 70–90% of the jurors made up their minds during or immediately after opening statements and the decision remain constant until the end of the trial (Diamond et al., 1996; Hannaford et al., 2000), while others argue that jurors are only leaning toward one side after the opening statement, and that they still remain open and responsive to evidence in other phases (Hans and Sweigart, 1993; Hans et al., 2003). While no definite conclusions can be drawn at this point regarding the argument that trials are won or lost during the opening statement, what is clear is that past research points to the opening statement as contributing to the outcome of a trial.

Based on three high-profile criminal trials, the current study endeavors to answer the following questions: (1) What are the form, functions and frequencies of reference terms lawyers use to position the characters in courtroom narratives? (2) How do those forms index the presenter's ideological basis and communicative goal? and (3) To what extent do the prosecution and defense differ in the use of reference terms? The study contributes to deepening our understanding of the construction of courtroom opening event, and revealing the complex relationships between reference terms, identity, and (de)legitimization of blame and responsibility.

The analysis unfolds in several parts. First I discuss the relationships between reference terms and their roles in establishing and attributing identities. I then provide the background of the cases under study and proceed to present the findings for the defendants and victims, respectively. I conclude with reflections on how different identities enacted through reference terms can function to negotiate meaning and construct opposing versions of reality in courtroom discourse.

## 2. Terms of reference and identity

From a functional linguistic perspective, every time we use language, we make lexico-grammatical choices from sets of available options, and such choices fulfill a communicative function in a specific context (Halliday and Hasan, 1989). Chief

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