

Anthem: A Preliminary Comparative Analysis of Sexual Assault Evidence Collection Kits Currently Used in the USA

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Summary of Proposed Research

When we testify to a physical experience, we put an event into language. The words applied to the past are not merely descriptive, but constitutive: they recreate the event in language. Moreover, these words are performative. Once uttered, they *act*, shaping a legal outcome in the future. In the case of sexual assault, the physical event occurs on and in the body, and this bodily experience is brought into language in two distinct ways. First, through speech: the spoken testimony the victim-survivor provides as told to a medical or legal official and retold in court.

Second—and somewhat more complicatedly—through the intermediary of an object: specifically, the sexual assault evidence collection kit or “rape kit.” Except in cases when it is performed post-mortem, the kit transforms a living speaking subject into a crime scene or object, a body from which evidentiary information is excavated and meaningfully named. The language and tools of forensic analysis transform physical material into legally-legible evidence. Since most victim-survivors of sexual assault know their attackers,¹ the rape kit’s primary function from the perspective of the victim-survivor is not necessarily to produce new knowledge; instead, it performs a corroborating redundancy, confirming a fact to which the victim-survivor has already testified.² This object is thus a crucial site wherein physical experience is transformed into testimony—one that has the power to support or supersede the victim-survivor’s own voice. As such, the formal and linguistic qualities of rape kits are critically informative.

My proposed research will take up the following questions: What are the types of language the kit employs (i.e. gendered language vs. gender-neutral language; sexual language; language of trauma/violence; language of physical description; moral language; medical language; juridical language)? What are the illocutionary and perlocutionary qualities of such language, and how are such qualities related to the physical placement of the words on the forms (i.e. instruction vs. labeling)? And how does the language of the kits continue to “act” when viewed as an autonomous object?

A rape kit employs both the discourses of medicine and the law. It usually takes the form of a box containing medical tools of capture (envelopes, swabs, boxes, bags, etc.) used to collect DNA and other forensic evidence from the body. They are produced to comply with varying state requirements by commercial companies, by forensic scientists in state crime labs, and by state-sponsored employment programs. As highly specialized objects, rape kits are both under- and hyper-visible. Most lay people—even those who have undergone a rape examination—have not seen a rape kit for themselves in any detail. Yet even as unseen objects, rape kits have become a familiar as a concept through TV shows such as *Law&Order: SVU* and renewed media attention to sexual assault in the post-#MeToo era.

In both fictional narratives and civic discourse, the rape kit is positioned as a tool meant to empower victim-survivors and bring their assailants to justice; however, this simultaneous

¹ See “Perpetrators of Sexual Violence: Statistics,” *RAINN*, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (accessed 10 December 2018).

² There are of course meaningful exceptions to this, such as when a kit is able to identify a serial rapist, confirm an assault that the victim-survivor was not sure had taken place, or identify additional/multiple assailants that the victim did not know about.

under- and over-exposure has led to severe breakdowns in their implementation. End the Backlog’s “Accountability Project” estimates that “hundreds of thousands of rape kits sit untested in police and crime lab storage facilities across the country.”³ In November 2018, several news outlets reported that seven New York hospitals illegally charged at least 200 victim-survivors since 2016 as much as \$3,000 for rape examinations in direct violation of the federal Violence Against Women Act, which requires that victim-survivors not bear the cost of a rape examination.⁴ Amid these concerns, advocates, medical practitioners, and law enforcement have turned their attention to how these kits can be processed and implemented more effectively after they have been administered. Yet less attention has been paid to the formal qualities of their administration. Specifically, until now, there has been no interdisciplinary analysis of differing language that the numerous state rape kits employ.

Using frameworks of speech act theory, this study will examine the rape kits produced for use in different states. These go by a number of different official names and acronyms depending on jurisdiction, but for the purpose of this text will hereafter referred to as sexual assault kits or SAKs. I propose to conduct a preliminary comparison of the words that SAKs use and their potential consequences. I will examine how SAKs operate as speech acts, and how such speech actions occur through both linguistic and visual proposition. This study will consist of comprehensive documentation of the linguistic, visual, and physical elements of the SAKs currently in use—which I hope will be a useful resource for not only speech act theorists, but also scholars in other fields.

My aim is to provide an interdisciplinary perspective on this complicated object positioned between competing narratives of prosecution and repair. Through this work, I will consider how SAKs “speak for” the victim-survivor of sexual assault, participating in the chain of representational removes that characterize linguistic, aesthetic, and legal systems. I will attempt to parse the anthem of individual and institutional “voices” these objects contain.

As an object, the SAK represents an intersection between medicine and law. It is intended for use in a medical-forensic exam administered by a specially-trained nurse practitioner, and as such, requires compliance with law enforcement standards of evidence collection. As the *National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents (Second Edition)* produced by the US Department of Justice in 2013 advises, the primary purpose of the SAK is evidence collection, and “patients must understand that the exam does not provide routine medical care.”⁵ The SAK kits are, at present, guided primarily by local rather than nationalized standards, and are produced/procured at the local jurisdictional level. They generally conform to the minimum standards described by the *National Protocol*—yet as the protocol describes, this content is “intended as a guideline for suggested best practices rather than a list of requirements.”⁶ Even in this capacity, the minimum standard for contents of sexual assault evidence kits are concise. The entirety of these guidelines are as follows:

- A kit container. It is suggested that this container have a label with blanks for identifying information and documenting the chain of custody. Most items gathered during evidence

³ “Where the Backlog Exists and What’s Happening Next,” End the Backlog, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> (accessed 10 December 2018).

⁴ See Liz Robbins, “They Were Raped. Then, at 7 Hospitals, They Were Billed for Evidence Kits,” *The New York Times*, 29 November 2019, <https://www.nytimes.com/2018/11/29/nyregion/rape-kit-hospital-bills-attorney-general.html> (accessed 10 December 2018)

⁵ Office of Violence Against Women, *National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents (Second Edition)*, (Washington, D.C.: US Department of Justice), 95.

⁶ *National Protocol* 71

collection are placed into the container, after being dried, packaged, labeled, and sealed according to jurisdictional policy. Bags are typically provided for more bulky items that will not fit in the container (e.g., clothing). Some jurisdictions provide large paper bags to hold the container and additional evidence bags.

- An instruction sheet or checklist that guides examiners in collecting evidence and maintaining the chain of custody.
- Forms that facilitate evidence collection and analysis, including patients' authorization for collection and release of evidence and information to the law enforcement agency; the medical forensic history; and anatomical diagrams.
- Materials for collecting and preserving the following evidence, according to jurisdictional policy:
 - Patients' clothing and underwear and foreign material dislodged from clothing.
 - Foreign materials on patients' bodies, including blood, dried secretions, fibers, loose hairs, vegetation, soil/debris, fingernail scrapings and/or cuttings, matted hair cuttings, material dislodged from mouth, and swabs of suspected semen, saliva, and/or areas highlighted by alternate light sources.
 - Hair if required in the jurisdiction
 - Vaginal/cervical swabs.
 - Penile swabs.
 - Anal/perianal swabs.
 - Oral swabs.
 - Body swabs
 - Known blood, saliva sample, or buccal swab for DNA analysis and comparison.⁷

A more recent report produced in 2017 by the Department of Justice, *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, expands on these guidelines, usefully offering a review of not only the minimum standards, but also a comparison of adult and pediatric recommendations, as well as a list of materials not recommended for inclusion.⁸ While the *National Best Practices* includes a hyperlink to a "Multidisciplinary Sexual Assault Glossary," a resource to look up medical, legal, forensic science, and advocacy terminology, it does not offer any specific guidelines on the language that should be used in directions or collection materials of the SAKs. Yet as the very need for the glossary attests, the SAKs in practice employ multiple and differing terms that speaks to the concerns and criteria of different fields.

Why does language matter?

The law presents a clear venue wherein to say something is to do something—for example, the written edicts of governance, the judge's sentence, the magistrate's pronouncement "I now declare you man and wife." As legal scholar Robert Cover writes in his influential essay, "Violence and the Word," "Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law."⁹ He goes on to explain:

The judicial word is a mandate for the deeds of others. [...] The context of a judicial utterance is institutional behavior in which others, occupying preexisting roles, can be expected to act, to implement, of otherwise to respond in a specific way to the judge's interpretation. This, the institutional context ties the language act of practical understanding to the physical acts of others

⁷ *National Protocol* 71-72

⁸ See Office of Justice Programs, National Institute of Justice, *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, (Washington D.C.: US Department of Justice, 2017).

⁹ Robert M. Cover, "Violence and the Word," *The Yale Law Journal* 95 (1985-86): 1606-1607

in a predictable, though not logically necessary, way. These interpretations, then, are not only “practical,” they are themselves practices.¹⁰

The efficacy of the law as a system thus depends on the institutionally-guaranteed relationship between the utterance by a judge and an action by a bailiff, defendant, etc. It is for this reason that this interpretive utterance constitutes, for Cover, an act or “practice” unto itself. Legal scholars Janet Bevelas and Linda Coates have a similar understanding of language in “Is it Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgements,” their widely cited text on the specific vocabularies used to describe sexual assault in legal holdings. The article begins, “Language can never be neutral; it creates versions of reality. To describe an event is inevitable to characterize that event.”¹¹ Bevelas and Coates focus on the particular consequences of language in the context of not just law in general, but in the jurisprudence of sexual assault. Outlining the stakes of small linguistic differences and use of sexual euphemisms in the legal language used to describe sexual assault, they argue: “We propose that the choice of term profoundly affects how we see the crime and its consequences. Language has a particularly important role in the legal system. From the testimony of a witness to the trial judge’s summary to the historical precedents found in case law, the language in which events are described becomes the official version of those events, in the courtroom and beyond.”¹²

Though Cover, Bevelas, and Coates’ understanding of the capacity of legal language to act does not explicitly cite any literature in speech act theory, the resonances are clear. In his landmark text *How to Do Things With Words*, common language philosopher J.L. Austin sought to examine those instances of language when to *say* something is to *do* something. He posits two types of speech action: illocution and perlocution. What distinguishes these two performatives, as he calls them, is that they operate at different temporalities. Illocution is immediate: it is when to say something is to do it, as in Austin’s key example of the marriage vow: “When I say, before the registrar or altar, &c., ‘I do’, I am not reporting on a marriage: I am indulging in it.”¹³ When a bride says “I do,” she does not describe a situation, or express an intent to marry, she *does* something: she *marries*. The phrase “I do” is itself *a doing*, an action in the context of the ceremony that takes immediate social and (usually) legal effect. Perlocution, on the other hand, unfolds over a more extended period of time. In the perlocutionary utterance, the full weight of the words’ effect is not felt at the moment of speech, but rather in the chain of consequences speech initiates, such as in another one of Austin’s key examples, the promise.¹⁴ Most speech acts operate through a combination of illocution and perlocution. More importantly though, *all* speech acts require the right conditions in order to be active: they must be spoken by the right person, at the right occasion, and with the right intent. Austin calls this relation to the appropriate context “felicity.”

Legal speech, like any other performative language, also require felicitous contexts—this is the “institutional context” to which Cover refers that guarantees a judge’s words will indeed be carried out in physical actions. The felicity of the SAKs is the current standing of the law, the spatial context of the exam room, the situational context of a victim-survivor requesting the exam—most of which are beyond the purview of what I am capable of observing within the scope of this study. However, I am able to attend to one aspect of the object that renders speech

¹⁰ Cover 1611

¹¹ Janet Bevelas and Linda Coates, “Is it Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgements,” *The Journal of Social Distress and the Homeless* 10:1(2001): 29.

¹² Bevelas and Coates 30

¹³ J.L. Austin, *How to Do Things With Words* (Cambridge: Harvard University Press, 1975), 6

act felicitous: its physical form, which is to say, the container, envelopes, etc. upon which the language visually appears. We can observe felicity in the way the physical objects of policing and medicine “choreograph” the body. For instance, a jail cell confines a body in space, lithotomy stirrups reorient it; a blood pressure cuff lowers the arm, a policeman’s pointed gun raises it.

As a choreographic object, the kit acts on both the medical professional administering it as well as the victim-survivor upon whom it is performed. The kit works through not only speech acts—constituting language—but also directions to action through the form of instructions and functionally-designed objects. Such choreographies not only manifest as direction to physical movement, but also as a broader alignment of body with medical, juridical, and scientific modes of perception and comprehension, which is to say, discourses of power. For this reason, a component of my study will include an examination of the SAKs as “autonomous” objects publicly presented to readers in the absence of the context of the medical-forensic exam. Such autonomy is encoded architectural design of cultural spaces such as museums and galleries. Usually windowless and neutral, these spaces historically have presented objects at a remove from the social, political, and everyday world beyond their walls. By observing the SAKs positioned in this kind of space, I will be able to observe how their language and form—and only their language and form—function together to produce effects. In the tradition of the multidisciplinary inquiries such as the research group Forensic Architecture,¹⁵ I propose to use the frameworks of aesthetic analysis to offer new insight into the impact of these important objects of testimony.

¹⁵ See *Forensic Architecture*, <https://www.forensic-architecture.org> (accessed 10 December 2018).