
A Case of Unlawful Discourse: The Steven Avery Case and Discourse Analysis on Manitowoc County

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Since the release of the Netflix Documentary series *Making A Murderer*, many people have come to hear about the story of Steven Avery and the injustice that surrounds him and his family. It all started in 1986, when Steven Avery was falsely convicted of the sexual assault and attempted murder of a local woman. Avery was imprisoned for eighteen years until he was exonerated by DNA evidence that was initially excluded from the trial. In 2004, Avery filed suit against Manitowoc County for the false imprisonment—seeking the recovery of \$36 million in damages—and one year later finds himself awaiting trial for yet another crime, this time murder.

It could be argued that the plausibility of Avery's most recent charge is questionable, given the aforementioned events. Furthermore, the investigation that followed was riddled with circumstantial evidence, broken protocols, and the coercion of an under-aged minor. Viewers of the documentary were left stunned when they learned that the jury had found Avery guilty. This was not necessarily because he is innocent, but because of the flawed investigation and lack of direct evidence that was presented. Many high-profile cases—OJ Simpson, Casey Anthony, and Michael Jackson—received acquittals with far more damning evidence. To argue their guilt would be as futile as arguing Steven Avery's innocence; ultimately, no one but the defendants themselves will ever truly know the events that transpired. Per contra, it should be noted that innocence and wrongful conviction are not synonymous. Thus the following research conducted was not for the purpose of proving innocence, but rather for the depiction and analysis of a miscarriage of justice.

Many viewers of the documentary have hypothesized on social media that the reason behind Steven Avery's convictions was due to his demeanor. He was described as an "outsider" and not considered to be a part of his local community. Others speculate that his arrests were caused by an unjust legal system that was set on gaining a conviction. In order to confirm these theories, psycholinguistic and rhetorical research must be examined and applied.

Thus far, existing research provides insight into the cases of wrongful convictions and the effects of language use within the courtroom. Studies involving wrongful convictions have determined and analyzed prosecutorial overzealousness as a leading factor in the phenomenon. While these studies have clearly established that wrongful convictions are often the consequence of a skewed variable within the justice system's processes, they have not addressed the impact of the defendant's identity. Specifically, there is a lack of research acknowledging the accused's own Discourse and the influence it may have had in his or her criminal proceedings.

Additionally, researchers have also analyzed the language used when constructing a defendant's identity and discussed the potential effects caused by the variables presented within the identity construction. While studies have acknowledged that identity construction of the defense has notable effects on the proceeding litigation, they have not addressed the issues surrounding the circumstances that hinder identity construction.

Prosecutorial Overzealousness

Scholars of the Criminology discipline cite prosecutorial overzealousness as attributing to false convictions (Rattner 289; Huff). In his book, *Convicted but Innocent: Wrongful Conviction and Public Policy*, Criminology Professor Ronald Huff designates the term "prosecutorial overzealousness" to refer to a prosecutor's anxiety to solve a case. Huff states that prosecutorial overzealousness often leads the prosecutor to believe the "slightest evidence of the most negligible nature, that the culprit is in hand" (90). Similarly, fellow Criminology Professor Arye Rattner concurs that prosecutorial overzealousness may lead to the "temptation to use improper, unethical, and illegal means to obtain that conviction" (289). Comparably, in the case of Steven Avery, the prosecutor that conducted his trial made the illegal decision to use Avery's nephew's inadmissible confession to convict Avery (*State of Wisconsin*). Despite previous research clearly identifying prosecutorial overzealousness as a cause of wrongful convictions, research regarding the rationale of this behavior has yet to be conducted.

Identity Construction

Academics of the Sociology and Criminology disciplines have formally acknowledged the role that identity construction has in producing differential outcomes in the criminal justice system (Gathings; Roberts). M.J. Gathings, a sociology professor with concentrations on crime and deviance, investigated the interactional processes that occur amongst defendants, attorneys, and the magistrate when constructing and negotiating a defendant's identity (12). She reported that attorneys use "identity talk," which she defines as "the verbal construction and assertion of personal identities to manage how defendants are perceived by courtroom actors" (167). She determines that the most significant aspect in identity construction is ensuring that the defense tailors a defendant's narrative to adhere to a set of specific expectations. Among these expectations is the depiction that the "defendant has been a person of good character or has had a good reputation in the community in which the defendant lives" (168). Unfortunately for Avery, his attorneys were unable to use the preceding characterizations when constructing Avery's identity due to his history of criminal activity (*State of Wisconsin*). While Gathings' study reveals an ideal method that can be used for constructing a defendant's identity, she does not consider the factors of disbelief or bias due to a defendant's prior convictions. Consequently, the process of identity construction should be examined in more detail.

Theoretical Framework

There are several theoretical approaches that can be applied when gathering empirical evidence on the Steven Avery case. Discourse theory is perhaps the most useful in depicting the relation between Avery's identity and his criminal proceedings. In the future perhaps, researchers may wish to consider studying the Avery case using other frameworks, as they could be useful in depicting the relationships between other elements in the case.

Discourse Theory

Psycholinguist James Paul Gee defines Discourse as an identity kit consisting of the ways in which one talks and acts as to take on a particular role that is recognizable to others ("Literacy" 7). These "others," as a whole, create a group known as a discourse community. A discourse

community is described by linguistics professor John Swales as a group made up of individuals who share a “broadly agreed upon set of common goals” (“The Concept” 219). Therefore, the way in which one carries his or her discourse affects the views of the communities in which they belong or wish to belong to. A central theme in *Making A Murderer* is the suggestion that the Averys as a family were generally disliked. The documentary presented several instances in which Avery’s family members attested to feeling as though Avery was personally targeted by law enforcement. This indicates a rift between the Avery family and their local community, and may suggest that the family’s Discourse as a whole was not recognized by their local community.

Gee notes that in order for one to be considered a part of a discourse community, one must first go through a process called “enculturation,” which is a type of apprenticeship into the community conducted by those who have already mastered that particular Discourse (“Literacy” 7). This process of enculturation is based on whether or not the rest of the community believes one has

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acquired their shared discourse (this shared discourse is also known as a *secondary* Discourse). When the acquisition of the secondary Discourse is unsuccessful, one typically falls back on what is known as their *primary* Discourse— the identity that they are born into. Gee notes that this falling back on one’s primary Discourse leads to socially disastrous results (“Literacy” 9). This is often due to discourse communities favoring agreement and willing to exclude anyone who they disprove of. English professor Gregory Clark provided perhaps the most accurate description of this when he stated bluntly that “a discourse excludes difference... by denying equal participation in the discourse to those who disagree” (61). This raises questions about Steven Avery and his own personal identity. While there are many existing studies on the mechanics of conducting discourse analysis, research regarding Avery’s personal

Discourse is needed in order to determine its significance in affecting his trial.

Did Avery’s Discourse play a role in the prosecutorial misconduct and subsequent false confession surrounding his case? How did his Discourse affect the ways in which his identity was constructed by the prosecution? Avery himself was not put on the stand, a standard in high-profile trials. What then were the results of his lack of ability to construct an identity for himself? Why was the prosecution willing to break the law in order to obtain his conviction? The following study investigates the effects of Discourse: how having the “wrong” Discourse can lead to horribly unfortunate consequences including changes in criminal proceedings that are supposed to be bound by law.

Methods

To determine if the prosecution’s argument against Avery was influenced by prosecutorial overzealousness, I analyzed the leading prosecutor, Kenneth Kratz’s, Facebook page. On Kratz’s page, I looked for posts or comments that revealed his personal thoughts and feelings toward the case. In order to prove prosecutorial overzealousness took place, I needed to find out if Kratz believed the culprit was guilty regardless of the evidence being presented (Huff 90). Analyzing the potential influence of prosecutorial overzealousness may offer an explanation as to why Kratz decided to use unethical means in his argument.

In order to discover how Avery’s identity was constructed in the courtroom, I obtained a

PDF file of all of the trial transcripts of Avery's latest conviction. I used CTRL+F to search for terms that I believe could have been used in identity construction by the prosecution, such as "criminal" and "guilty." While I understand that this method poses some limitations, it was the most efficient way for me to isolate certain texts, as the court transcripts had over nine thousand pages. Whilst doing this, I also looked for any kind of controlling narratives, such as how Avery was described to the jurors. My main intent was to discover the ways in which the prosecution decided to construct Avery's identity and then use this information to analyze the impact it may have had in his subsequent criminal proceedings.

To learn more about the identity kit created for Avery and his family by the community, I decided to review Reddit threads and an article published in *People* magazine. Within the Reddit threads, former residents of Manitowoc County express their opinions on the Averys. The *People* article, titled "Making a Murderer: Wisconsin Neighbors Have No Doubt About Steven Avery's Guilt," consisted of interviews given by current residents of Manitowoc County. Within these interviews, journalist Jeff Truesdell asks each resident for their opinion on Steven Avery and his family. This evidence is useful in determining if the Averys were considered "enculturated into their community" ("Literacy" 7). Ideally, I would have preferred to interview local members of this community myself; however, I unfortunately do not have the resources to do so.

Results and Discussion

My main objective when analyzing the above artifacts was to discover the impact Steven Avery's identity had on his criminal proceedings. More specifically, I was interested in analyzing the community's perception of Avery. Once I completed my analysis, I was convinced that in Manitowoc County the general consensus regarding Avery's identity was negative. I argue that as a result of this negative perception, prosecutor Kenneth Kratz was convinced of Avery's guilt and thus likely to engage in prosecutorial overzealousness. I also suggest that this negativity caused further detriment in the courtroom, as Kratz was able to use Avery's past to construct his identity in an even more unfavorable manner. Overall, the evidence discovered suggests that Avery's identity had a major role in his subsequent criminal trial.

After exploring prosecutor Ken Kratz's Facebook page, I discovered that the majority of his public posts are regarding Steven Avery. Kratz has a total of sixty posts on his Facebook page, thirty-nine of which contained matter related to either Avery, the case, or the victim. Of these thirty-nine posts, thirty-six were posted with attached links to online articles that refute the possibility of Avery's innocence. Five of these articles contained the phrase "Steven Avery is Guilty" in their titles. Some examples of these include "Don't Believe the Press, Steven Avery is Guilty of Murder" and "Steven Avery Is Guilty As Hell" (Kratz). This evidence suggests that Kratz was engaging in prosecutorial overzealousness, as his posts indicate that he was convinced of Avery's guilt, that may have lead to the use of "improper, unethical and illegal means to obtain that conviction" (Arye 289). Consequently, this may offer explanation as to why Kratz allowed the submission of illegal evidence in Avery's trial.

My analysis of the court case files suggests that Avery's identity construction was mediated by his past criminal record. When searching the word "criminal" in the trial transcripts, I discovered that Avery's prior criminal record was discussed and presented to the jury in approximately four separate instances. The discussion of Avery's criminal record may have shaped his identity to the jurors as a "criminal" and therefore worthy of conviction. When searching the word "guilty," I learned that due to a decision made in the pre-trial hearing, the judge had ordered the defense to refrain from implicating a third party and therefore the only instances in which the word "guilty" could be used was in reference to Avery (*State of Wisconsin*). Due to the impact that attorneys have in the assertion of personal identity (Gathings 167), this particular construction of Avery's identity might have negatively impacted the jury's view of Avery and therefore may have

lead to their guilty ruling.

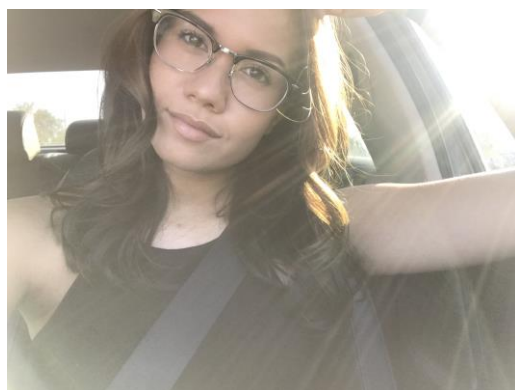
In reviewing the Reddit threads, it was discussed that the Averys were viewed as “always causing trouble” (GovernmentStatistic). Additionally one redditor mentioned that his grandmother, who is from Manitowoc, stated that she thought Avery was guilty because of “the type of folk that family is.” She further described the Averys as “dirty” and “not contributors to the community” (GibbonJiggle). These statements were consistent with the statements given in the *People* article in which Avery’s neighbors are interviewed. They offered statements such as, “Those of us who live here, know he’s guilty,” and when asked about the documentary, “I just hope he doesn’t get out [of prison] because of this” (Treusdell). This evidence indicates that the Averys were not enculturated into their community. As a result of this, they may have fallen back on their primary Discourse and thus caused further discontinuance between the Averys and their community (Gee “Literacy” 9). Additionally, the community implicated disapproval of the Averys, which may have been caused by their differences in Discourse (Clark 61). This dissonance between the Averys and their community may have been a factor in his criminal proceedings, as both Kenneth Kratz and the jurors in Avery’s trial were from Manitowoc County.

Therefore, it appears that the community’s initial perceptions of Avery’s identity were perhaps the most harmful in his case. Kenneth Kratz contends to this day that Avery is guilty and defends his methods of handling the case (Kratz), despite the illegality involved. In addition to the unlawful investigation, Kratz used Avery’s past to further damage his character by referring to him as a “criminal,” therefore hindering Avery’s defense in attempting to refute and rebuild his identity. While the evidence presented in this study cannot produce a tangible factor as to why Avery was convicted, the evidence does offer an explanation for the events that took place within his criminal proceedings. Even though the Sixth Amendment offers the right to a “fair and speedy trial,” it may be overlooked if one happens to be the holder of an unlawful Discourse.

Works Cited

- Clark, Gregory. “Rescuing the Discourse of Community.” *College Composition and Communication*, vol. 45, no. 1, 1 Feb. 1994, pp. 61-74. *JSTOR*, www.jstor.org/stable/358587.
- Gathings, M.J., et al. “Constructing An Identity Worthy Of Leniency.” *Contexts of Deviance: Statuses, Institutions, and Interactions*. Edited by J. William Spencer, Oxford UP, 2015, pp. 166-73.
- Gee, James Paul. “Literacy, Discourse, and Linguistics: Introduction.” *The Journal of Education*, vol. 171, no. 1, Literacy, Discourse, and Linguistics, 1989, pp. 5-176. *JSTOR*, www.jstor.org/stable/42743865.
- Gee, James Paul. “Saying, Doing, and Designing.” *How to Do Discourse Analysis: A Toolkit*, 2nd ed., Routledge, 2014, pp. 49-80.
- GibbonJiggle. “Re: We never get much insight into why everyone hates the Avery family so much.” *Reddit*, Jan. 2016, www.reddit.com/r/MakingaMurderer/comments/3yshy5/we_never_get_much_insight_into_why_everyone_hates.
- GovernmentStatistic. “Re: What made everyone in Manitowoc hate the Averys?” *Reddit*, Jan. 2016, www.reddit.com/r/MakingaMurderer/comments/3ydk0e/what_made_everyone_in_manitowoc_hate_the_averys.
- Huff, C. Ronald., et al. *Convicted but Innocent: Wrongful Conviction and Public Policy*. SAGE Publications, 1996.
- Kain, Donna, and Elizabeth Wardle. “Activity Theory: An Introduction for the Writing Classroom.” Wardle and Downs, pp. 273-283.
- Kassin, Saul M. “False Confessions: Causes, Consequences, and Implications for Reform.” *Current Directions in Psychological Science*, vol. 17, no. 4, 2008, pp. 249-253, www.jaapl.org/content/37/3/332.long.
- Kratz, Kenneth. “Begrudgingly concludes he did it.” *Facebook*, 12 Jan. 2016 www.facebook

- .com/ken.kratz.3?lst=100001160757265%3A1376856406%3A1480475406.
- Rattner, Arye. "Convicted but Innocent: Wrongful Conviction and the Criminal Justice System." *Law and Human Behavior*, vol. 12, no. 3, 1988, pp. 283-293 www.jstor.org/stable/1393679.
- Ricciardi, Laura, and Moria Demos, creators. *Making a Murderer*. Netflix, 2015.
- State of Wisconsin v. Steven Avery*. Circuit Court Manitowoc County: Branch 1. 2007.
- Swales, John. "The Concept of Discourse Community." Wardle and Downs, p. 215-28. Originally published in *Genre Analysis: English in Academic and Research Settings*, Cambridge UP, 1990, pp. 21-32.
- Truesdell, Jeff. "Making a Murderer: Wisconsin Neighbors Have No Doubt about Steven Avery's Guilt." *People.com*, Time Inc., 14 Jan. 2016, www.people.com/crime/making-a-murderer-wisconsin-neighbors-have-no-doubt-about-steven-averys-guilt.
- Wardle, Elizabeth, and Doug Downs, editors. *Writing about Writing: A College Reader*. 2nd ed., Bedford/St. Martin's, 2014.



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