Dimensions of Forensic Linguistics

Edited by
John Gibbons
M. Teresa Turell

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Volume 5

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Edited by

John Gibbons
University of Western Sydney

M. Teresa Turell
Universitat Pompeu Fabra, Barcelona

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Introduction

John Gibbons and M. Teresa Turell

The purpose of this volume is to provide a guide to the multidisciplinary nature of Forensic Linguistics – understood in its broadest sense as the interface between language and the law – that could be of interest for scholars, graduate students and professionals working in Applied Linguistics. This book seeks to address the links in Forensic Linguistics between theory, method and data, without neglecting the need for new research questions in the field.

As the title of this collection implies, Forensic Linguistics, in its now widely accepted broader definition, has many aspects. Major areas of study include: the written language of the law, particularly the language of legislation; spoken legal discourse, particularly the language of court proceedings and police questioning; the social justice issues that emerge from the written and spoken language of the law; the provision of linguistic evidence, which can be divided into evidence on identity/authorship, and evidence on communication; the teaching and learning of spoken and written legal language; and legal translation and interpreting.

The papers here explore some of these dimensions, revealing their often complex nature, and in many cases attempt to encourage debate on them. The book is divided into three parts: Part I: The language of the law; Part II: The language of the court, and Part III: Forensic linguistic evidence.

The collection begins with the study of the language of the law (Part I), which is interesting both descriptively (its nature), and in terms of explanation (why it is so very different from everyday language). This difference is linked to applied dimensions: how this unusual register can be taught and learned, and what can be done to make it more accessible to the people it affects – that is, everybody.

The first paper, an elegantly clear presentation by Peter Tiersma, examines the language of regulation and legislation, giving a broad brush description of the development and nature of legal languages, underpinning many of the following papers. He shows how the history of England shaped its legal language, with influences from Latin and Norman French on the language adopted by the previous wave of invaders from Saxony and Scandinavia. He then discusses what

happened to legal English when it was transplanted to what is now the United States. Tiersma then gives an account of the peculiarities of various legal languages, particularly the tendency to complexity and archaism, whether English or other European languages.

Northcott's paper discusses the enormously challenging task of teaching this complex language, particularly to those for whom the language of the law is a second language. It is possible to argue that, for Common Law at least, the majority of legal practitioners speak English as a Second Language, given the huge populations where English is used in the legal system in the sub-continent, not to mention Asia, Africa and Pacific nations. Northcott shows that traditional variables such as the learner's purpose make a major difference to what is taught. For instance relatively few legal practitioners will have to examine witnesses in court, so only a passive knowledge or even no knowledge of the language of examination will need to be taught. Again, legal education my impose language demands on law students that differ markedly from those placed on legal practitioners. Many lawyers are also concerned with a legal language other than their own, not in order to practice in other jurisdictions, but to cope with the impact of international law on their own jurisdiction. These considerations interact with traditional language teaching issues such as learner preferences for learning style, the context of teaching, teacher expertise, and inevitably, resources.

Heffer's paper examines the language of jury instructions – the words that the judge directs to the jury at the end of the trial and before their deliberations. This is a tendentious topic, which has been the object of extensive research by both linguists and psycholinguists, in particular this issue of whether juries can understand judges' instructions. In a carefully researched and provocative paper, Heffer suggests that the legal profession has been negligent in failing to do more to address jury incomprehension of judges' instructions.

Hall's paper engages with another relatively poorly developed dimension of Forensic Linguistics – the language of police. He uses careful transcriptions of police questioning in New South Wales to show how the functions of various elements of police interviews are realised in language, and also the considerable degree to which these functions are performed in a formulaic way, using set phrases and expressions.

Alcaraz Varó gives wide ranging review of the practical issues surrounding legal translation. He discusses the language traps waiting for legal translators, as well as the issues arising from translation across legal systems. He discusses the particular challenges posed by the complexity and abstraction of legal languages, then goes on to discuss the various methodologies uses by translators engaged in legal translation.

The next group of papers in Part II, The language of the court, examines the interactive area of spoken legal discourse from different perspectives. Gibbons' paper looks at courtroom examination, discussing the highly atypical nature of courtroom questions and how these questions differ linguistically from everyday discourse at the overall text level, at the exchange level and also at the level of question structure. Gibbons suggests that the reason for these different linguistic choices has to do with the specific functions that courtroom discourse fulfils in court communication processes.

Richard Powell's paper addresses an issue that is still seriously under-researched – the choices made between two or more languages in courtrooms in multilingual societies. This wide ranging paper uses examples from many languages and countries, discussing the many variables that affect code choice such as official policy and the proficiencies of the participants, and ends with a discussion of the justice issues surrounding code choice in courtrooms. This paper establishes firmly an emerging dimension of Forensic Linguistics.

Kurzon's paper looks at decisions made about a tendentious and fascinating area of language use in courtroom contexts – silence. Silence is not nothing – it can be highly meaningful. It is also explicitly regulated in many legal systems, which vary in the degree and nature of the interpretation that can be placed upon it. Australia for example uses the traditional Common Law tradition that no interpretation can be placed on the silence of an accused. In England and Wales however silence of an accused may be negatively interpreted. Kurzon examines particular cases in the (predominantly Common Law) legal system of Israel, showing debate and decisions concerning the interpretation of silence among witnesses.

Eades is well known for her seminal work in revealing the disadvantage suffered by Australian Aboriginal witnesses. In this paper she additionally surveys other groups that may be linguistically disadvantaged before the law – children, the intellectually impaired, second language speakers, the deaf, and second dialect speakers. She makes the case that the legal disadvantage associated with such groups can be fully understood if only in the context of power imbalances within society. Eades then goes on to present alternatives to the processes that produce such disturbing disadvantage.

Legal interpreting and translation is another important dimension of Forensic Linguistics. Leung picks up Eades' political theme, discussing the unusual situation in Hong Kong superior courts, where in many cases the 93% Cantonese speaking majority must work through interpreters because the main medium is English. She makes the case that this colonial hangover has a range of negative consequences for those who testify through interpreters. This paper adds a new dimension to the debate surrounding legal interpreting.

The last four papers in Part III all discuss linguistic evidence (in the USA sometimes referred to as Forensic Linguistics). This can in turn be divided into two main subfields, author identification and communication. Grant gives a broad survey of the area of authorship, dividing the authorship process into four stages, and showing that no one technique of identification, whether computerised or human based, can satisfactorily address all four stages. He deals primarily with the authorship of written texts.

Butters, an acknowledged expert, discusses the linguistic criteria that define trademarks. He shows what trademarks are, what linguistic features may distinguish or confound them, the strength of such distinguishing features, and, adding an interesting element, the possible impropriety of certain tradenames – those that may be deemed offensive. The paper is marked by Butters' typical clarity and concision, as well as extensive exemplification from his own experience as an expert witness.

Eggington extends the boundaries of Forensic Linguistics in addressing deception and fraud. He suggests that linguistic semantics can help in the definition of deception and fraud. He then goes on to discuss some of the possible semantic, pragmatic and discourse features that might be used by a forensic linguist to identify deceptive or fraudulent texts. He also however warns of the danger of overstating the significance of linguistic evidence in such cases.

Turell's paper explores the complex area of plagiarism. To distinguish between the influence and outright appropriation of others' ideas is a challenging linguistic task. This paper painstakingly explores these difficult boundaries, beginning with a description of plagiarism, including its legal definition, then going on to explore plagiarism of ideas and plagiarism involving direct copying, and the methodologies that can be used to detect and provide evidence of plagiarism. This is probably the first article to broadly define and discuss these issues.

Perhaps the most striking feature of the papers that comprise this collection is their range. The multi-dimensionality of Forensic Linguistics is strikingly illustrated. At the same time they also share a preoccupation with the painstaking linguistic work involved, using and interpreting data in a restrained and reasoned way. Each of these papers could be, and indeed in many cases has been, the subject of entire books. The volume of work already done in this relatively young field is remarkable: the volume of work that yet remains is a serious challenge.

PART I

The language of the law

The nature of legal language

Peter Tiersma
Loyola Law School, Los Angeles

Legal languages are inevitably products of the history of the nation or state in which they are used, as well as the peculiar developments of the legal system in question. In terms of features, they tend to be characterized by minor differences in spelling, pronunciation, and orthography; long and complex sentences, often containing conjoined phrases or lists, as well as passive and nominal constructions; and a large and distinct lexicon. The profession has developed distinct traditions on how its language should be interpreted. In terms of style, the language of the law is often archaic, formal, impersonal, and wordy or redundant. And it can be relatively precise, or quite general or vague, depending on the strategic objectives of the drafter.

1. Introduction

Anyone who studies forensic linguistics, or language and the law more generally, is inevitably going to come into contact with legal language. By "legal language," I mean the distinct manner of speaking and writing that has been developed by just about any legal system throughout the world. A primary concern of many forensic linguists is legal discourse, particularly courtroom proceedings. In this setting, the professional players (judges and lawyers) typically use some kind of legal language to communicate with each other. Even when members of the lay public are involved as parties, experts, or jurors, they will inevitably be confronted with legal language, which in many cases will create a need for some kind of explanation or translation (as when jury instructions try to explain legal concepts in ordinary language). Even greater problems arise when lay persons who do not speak the official language of the courtroom become intertwined with the legal system. Obviously, this calls for translation or interpretation, but it is usually not just a matter of converting, let us say, English into Chinese, but of converting legal English into ordinary Chinese. Thus, any court interpreter must have a solid understanding of at least one legal language, and perhaps more than one. Finally,

those forensic linguists who concern themselves mainly with the use of linguistic expertise to solve legal issues (such as the identification of a speaker or writer, or a person's nationality, by using linguistic criteria) will also need to have a working knowledge not just of the legal system in question, but also its language, in order to competently carry out their function.

In this chapter I will be discussing primarily English legal language, which is my primary specialty. Most of the observations that I will be making apply to other legal languages as well, and from time to time this point will be made explicit by means of specific examples. We will begin our discussion by examining the background or history of legal language, and then proceed to discuss its most prominent features.

2. History

Every language is a product of its history, and more specifically, a product of the history of the people who speak it. Legal language is not just a product of the society or jurisdiction in which it is used, but also of the legal profession that speaks and writes it. Legal English is a good example. Its story involves Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian raiders, and Norman invaders, all of whom left their mark not only on England, but on its language. English legal language was therefore heavily influenced the forces that shaped the English nation in general. But, in addition, it was formed by the distinct experiences of the profession. The discussion that follows is based on Baker (1990), Mellinkoff (1963), and Tiersma (1999).

2.1 The Anglo-Saxon period

The English language can be said to have begun around 450 A.D., when boatloads of Angles, Jutes, Saxons and Frisians arrived from the Continent. These Germanic invaders spoke closely related languages, which came to form what we call Anglo-Saxon or Old English. Although the Anglo-Saxons seem to have had no distinct legal profession, they did develop a type of legal language, remnants of which have survived until today. Examples include words like *bequeath, goods, guilt, manslaughter, murder, oath, right, sheriff, steal, swear, theft, thief, ward, witness* and *writ*.

Because at this time the Anglo-Saxons were illiterate (except for the very limited use of a runic alphabet), they needed mnemonic devices to help them remember the law. The most common of such devices were rhyme and alliteration,

and we find remnants of each in today's legal language. One alliterative phrase that has survived is *to have and to hold*, which is still found in many deeds and also in wedding vows. Numerous modern wills contain the phrase *rest, residue and remainder*, and contracts often have a *hold harmless* clause. An example of rhyme is the maxim, *finders keeper, losers weepers,* which is a well-known albeit not always correct statement of the law.

The Anglo-Saxons used not only Old English as a legal language, but also Latin. Although Latin was originally introduced to England during the Roman occupation of Britain, it became a major force only after the arrival of Christian missionaries in 597. Before long, Latin was the language not only of the church, but of education and learning. The association between literacy and the church became so strong that the two were almost synonymous. The terms *clerk* (someone who can write) and *cleric* or *clergy* (priest) derive from the same Latin root. For centuries, English courts recognized a type of immunity for members of the clergy, who were identified by their ability to read.

The introduction of literacy resulted in many legal transactions being memorialized, or performed, in writing. Several of the early Anglo-Saxon kings created written codes of law, for example. In addition, although writing was seldom essential in this period, dozens of early English written wills and deeds survive. Some of these documents are in Latin, but a substantial number are in Old English.

Not too terribly long after they had themselves invaded England, the Anglo-Saxons found themselves under attack from another group of Germanic warriors: the Vikings. Eventually, a large group of Vikings settled in England and gradually assimilated to the existing population. They ended up speaking English, but in the process they influenced the language by giving it a fair amount of Scandinavian vocabulary. In the legal sphere, their legacy includes the most important legal word in the English language: the word *law* itself. Law derives from the Norse word for "lay" and thus means "that which is laid down."

2.2 The Norman Conquest and the introduction of French

The next foreign invasion, the Norman Conquest, had a far more profound and lasting impact on the language of English lawyers. The Normans were originally Vikings who conquered the region of Normandy during the ninth and tenth centuries. In the course of a few generations, these Vikings became French both culturally and linguistically; the Northmen had become Normans. William, Duke of Normandy, claimed the English throne and conquered England in 1066. Before long, the English-speaking ruling class was largely supplanted by one that spoke Norman French.

The Normans were accustomed to writing legal documents in Latin, not French. So, the role of Latin expanded. At the same time, English was regarded as the language of a conquered people, and for several hundred years largely faded away as a legal language.

Latin remained important for legal purposes until the early part of the eighteenth century. It was used almost exclusively as the language of court records. The practice of using Latin *versus* in case names harks back to these times. English lawyers and judges were also prone to express sayings or maxims about the law in Latin. At one time, there were many hundreds of maxims about the law, virtually all of them in Latin. Just about all that has survived of Latin in the legal sphere is a small number of these maxims, such as *caveat emptor,* which has infiltrated into general knowledge, and a few sayings regarding general principles of law and legal interpretation, including *de minimis non curat lex* and *expressio unius est exclusio alterius.*

The first century or two following the Norman Conquest saw very little written legislative activity, and to the extent there was any, it was done in Latin. But starting with the thirteenth century, the volume of legislation (as well as other legal documentation) started to increase dramatically (Clanchy 1993). Latin was still widely used for legal purposes, of course. But around 1275, statutes in French began to appear. By 1310 almost all acts of Parliament were in that language. During this same time, royal courts were established and judges were appointed who began to dispense justice. Clerics, who had previously done most legal work, were forbidden by the church to do so, and thereafter a distinct profession of lawyers arose. The professional language of these legal professionals was Anglo-French.

Oddly, the use of French in the English legal system grew at the very time that its decline as a living language in England was well under way. Baker (1998) has observed that outside the legal sphere, Anglo-French was in steady decline after 1300. Even the royal household, the last bastion of French, switched to English by the early 1400s. Yet lawyers clung to French as their professional language for another century or two.

Unhappiness about this state of affairs led to what might be considered the first plain English law. In 1362 Parliament enacted the Statute of Pleading, condemning French as "unknown in the said Realm" and lamenting that parties in a lawsuit "have no Knowledge nor Understanding of that which is said for them or against them by their Serjeants and other Pleaders." The statute required that henceforth all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue." Ironically, the statute itself was in French!

The legal profession seems to have largely ignored this statute. Acts of Parliament did finally switch to English around 1480, but legal treatises and reports of courts cases remained mostly in French throughout the sixteenth century and the

first half of the seventeenth. Complaints continued to mount. When the Puritans took over Parliament and abolished the monarchy, they passed a law in 1650 that required all case reports and books of law to be "in the English Tongue only." But when the monarchy was restored, lawyers were once again free to use French, although by then their French was severely degraded.

French had a strong impact on many aspects of modern English, especially in terms of vocabulary. But because it was the main language of the profession for so many centuries, and especially during its formative period, its influence on legal language has been that much greater. For example, just about all the basic terminology for courts and court proceedings is French in origin, including *appeal, attorney, bailiff, bar, claim, complaint, counsel, court, defendant, demurrer, evidence, indictment, judge, judgment, jury, justice, party, plaintiff, plea, plead, sentence, sue, suit, summon, verdict* and *voir dire*.

French influence can also be seen in the substantial number of legal phrases consisting of adjectives following the noun that they modify, which is the usual French word order. Several such combinations are still common in legal English, including *attorney general, court martial, fee simple absolute, letters testamentary, malice aforethought*, and *solicitor general*. Also, Law French allowed the creation of worlds ending in *-ee* to indicate the person who was the recipient or object of an action (*lessee*: "the person leased to"). Lawyers, even today, are coining new words on this pattern, including *asylee, condemnee, detainee, expellee,* and *tippee*.

Parliament finally ended the use of Latin and French in legal proceedings in 1731. By then, however, it was delivering merely a coup de grâce.

2.3 Legal language in the New World

The English colonies in the Americas, which later became the United States, were largely populated by people from Britain who were familiar with English law and its idiom. Nor surprisingly, perhaps, when the colonies became independent, they retained not only the common law, but its language as well. It should be pointed out that by the time of the American revolution, Latin and French were no longer used as legal languages in England, although they both left behind vestiges (mostly words and maxims) testifying to their earlier dominance. Thus, neither Latin nor French was ever used by the profession in the New World. What the early Americans inherited, or adopted, was legal English, which in the words of Thomas Jefferson was characterized by verbosity, endless tautologies, and "multiplied efforts at certainty by saids and aforesaids." Jefferson and the other founders of the United States might have taken the opportunity to revolutionize not just the judicial system of their young country, but its

language as well. But although the revolutionaries had a negative view of much British legislation, they viewed the common law in a more positive light. And because the common law was expressed in traditional legalese, the adoption of common-law principles almost inevitably entailed the adoption of the language used to express them.

2.4 The history of other legal languages

Time and space constraints prevent us from discussing the development of other legal languages in any detail, but we can make some very general observations. In much of Europe, especially in the west, Latin has had a pervasive influence on most legal languages. To some extent this results from the use of Latin in education and religion, but the primary cause is the great influence that Roman law (especially Justinian's Corpus Juris Civilis) had on European law. Justinian was a Byzantine emperor in the sixth century. He brought together experts who were charged with compiling all of Roman law into a code and also a digest. The language of these works, which became essential to the teaching of law during much of the late middle ages and beyond, was Latin (Buckland 1966: 39). Much later a similar project was undertaken by the French emperor Napoleon, whose civil code was also highly influential in much of Europe and promoted the use of French in European legal languages.

In much of the rest of the world, colonialism was a critical factor in the development of legal languages. Most of the nations that became independent during the past century adopted certain aspects of the legal system – and also the legal languages – of their former rulers. Thus, a judge in India or Malaysia is likely to either use English legal language for professional purposes, or to use some English terminology when writing legal Hindi or Malay. Judges in parts of Africa will sometimes use French or Portuguese terms. Religion can also have an impact, especially in areas traditionally governed by religious law, as is common with family law. Thus, in Muslim countries many legal terms derive from Arabic, even if the local legal language is Indonesian or Persian.

In the remainder of this chapter we will discuss some of the primary features of legal language. Once again, we will concentrate on English, with occasional references to similarities or differences in other languages. Given the history that we just reviewed, one would expect that the language of the law tends to be archaic and conservative. To some extent, this is true. But legal language also has several other features that distinguish it from ordinary speech and writing.

3. Features of legal language

There have been a number of examples historically of cases where the language of lawyers and judges is almost completely different from that spoken by the population of the jurisdiction in question. This was the case in England after French had died out as a vernacular during the fourteenth century. For two or three centuries afterward, English lawyers and judges continued to make use of Law French as a legal language.

For the most part, however, legal languages are registers or dialects or, perhaps better, sublanguages of ordinary speech and writing. Thus, legal English is simply a variety of English. The issue that occupies our attention for the remainder of this chapter is how legal and ordinary languages differ.

3.1 Pronunciation and spelling

In terms of spelling and pronunciation, legal English has some minor but interesting distinctive features. Many members of the legal profession pronounce *defendant* as [difɛndænt], where in ordinary speech the final vowel would be a schwa (as in *appellant*). There also is a tendency to pronounce *juror* with two full vowels ([ǰu:ror]), rather than the more usual [ǰʊrər].

Orthographic differences are even more subtle, consisting mainly of a very strong tendency to favor *judgment* (without an *e)* over *judgement.* In ordinary writing both forms occur, but to find *judgement* in a legal text is rare indeed. I distinctly remember being told in law school – despite my protestations that both spellings were valid – that the *only* correct legal option was *judgment.*

The most likely reason for these relatively minor spelling and pronunciation differences is that they are used, probably subconsciously, to express solidarity or to mark that the speaker is a member of the legal fraternity. It is interesting to observe that radio and television commentators, who may have limited training in the law, tend to begin imitating these features when reporting on legal affairs.

Another oddity of English legal language is the pronunciation of Latin and Law French. Traditionally, the legal profession in England has articulated these words with English vowels. In other words, *amicus* rhymes with *ficus* and the first word in *res judicata* rhymes with *peace.* The French word *oyez* ("hear ye"), sometimes used in triplicate to announce the beginning of a court session, is traditionally pronounced as "o yes!" In modern French, of course, it would be [waye:]. Most educated speakers of English have at least a passing familiarity with French and Latin as those languages are taught in schools, with the result that lawyers

increasingly use modern French and classical Latin vowels when pronouncing Law French or Latin. Presumably, they do so because the use of English vowels in these words sounds too bizarre or unsophisticated to the modern ear.

Although it is hard to determine how widespread the phenomenon is, the use of linguistic features for no purpose other than to mark oneself as a member of a particular social or professional group is not uncommon. In legal Dutch, the profession has maintained an archaic pronunciation of words of French origin that end in *-oir*. In modern Dutch these words are pronounced in the modern French manner ([war]). But in the case of legal terms like *peremptoir*, Dutch lawyers pronounce the final vowel as [o:r]. According to Van den Bergh and Broekman (1979: 46), the aberrant articulation of these terms – as in the case of the English examples above – reinforces group solidarity and excludes outsiders.

3.2 Morphology

There is probably nothing particularly noteworthy or distinct about the morphology of legal English, besides the remarkable persistence of a few archaic suffixes. Although *thou* seems to have died out in legal usage, the pronoun *ye* is still sometimes encountered, especially in the phrases *hear ye* and *know ye*. And long after *-s* had become the standard third-person suffix on verbs (as in *comes*), the legal profession continued to use *-th*. In fact, although it is quite rare, I still sometimes encounter it in modern legal texts, particularly in pleadings (*cometh now plaintiff* or *this indenture witnesseth*).

In the related area of word formation, legal language makes prolific use of the suffix *-ee* to create deverbal nouns that refer to the object of an action. Some of these words have entered ordinary English, such as *employee*. Legal examples include *assignee, bailee, donee, lessee,* and *mortgagee*.

3.3 Syntax

One of the most obvious syntactic features of legal language is the use of extremely long sentences. For example, Blackstone's *Commentaries* contains an appendix with a typical English indenture (specifically, a deed of release) dating from 1744. One sentence in this document carries on for over 1400 words. This is an extreme example, of course, and sentences in modern legal texts are decidedly shorter. Nonetheless, even current legal documents tend to have long sentences, as illustrated by Risto Hiltunen's analysis of the British Road Traffic Act of 1972. The average sentence in that act has 79 words, and one sentence has no fewer than 740 (Hiltunen 1984: 108–9). A similar situation holds in other languages.

Finnish judgments traditionally consisted of a few sentences of extreme length, sometimes taking up an entire printed page, although – as in English-speaking countries – the recent trend is to favor shorter sentences (Matilla 2006: 90).

Legal language also tends to be syntactically complex. Thus, the average sentence in the British Road Traffic Act has over six clauses, and the level of embedding is significantly deeper than in nonlegal texts (Hiltunen 1984: 109, 119).

Another feature of the language of law is the very high number of conjoined phrases and lists. Thus, California trial courts are organized by county, but they are not officially designated as courts *of* a county, or *for* a county, each of which would be acceptable English, but as courts *of and for* the county in question. A typical American will *gives, devises and bequeaths* the *rest, residue and remainder* of the testator's estate, rather than merely *giving the remainder* of the estate.

In addition to conjoining two or three similar words, legislators and lawyers seem extremely fond of long lists of synonyms or near-synonyms. Typically, the motivation is to cover every base and anticipate every contingency. When making document requests, American lawyers usually do not simply ask for all *documents* relating to a specific matter, but instead demand *any and all letters, correspondence, memoranda, notes, working papers, diaries, invoices, computations, graphs, charts, drafts,* and so forth, enumerating any conceivable form of document. The concern seems to be that if they do not specify every possibility, the party subject to the request will try to wiggle out of it by claiming that, for instance, a chart is not a *document* and need not be produced. Another advantage to a list is that it can expand (or limit) the ordinary definition of a word. It has recently become common for document requests to include tape recordings and computer-readable media, which might not normally be considered *documents*. Once again, lists are common in many other legal systems as well (Matilla 2006: 71).

Finally, legal drafters tend to make great use of verbs in the passive voice, in part because passive constructions allow the writer to omit the actor ("mistakes were made"). Lawyers seem to also prefer nouns or nominalized forms of verbs over more straightforward verbal constructions (to *make a decision* rather than simply *decide.*) Although perhaps not universal, passive and nominal constructions seem to be widespread in the legal languages of the world (see also Van den Bergh and Broekman 1979: 49).

3.4 Lexicon

The most obvious way in which legal language differs from ordinary speech and writing is its tremendous amount of technical vocabulary. The introduction to the seventh edition of Black's Law Dictionary states that it contains approximately

25,000 entries. A fair number of these are purely historical or come from foreign jurisdictions, but there is no doubt that the English legal lexicon is vast.

Other legal languages likewise have a great deal of technical vocabulary. What can be frustrating for those doing comparative analysis, as well as translators and interpreters, is that legal terminology is extremely parochial. In many other specialized fields, such as chemistry, linguistics, and physics, most technical terms have a relatively close equivalent in other languages. The reason is that the fields themselves are international, and often the critical concepts are also international. Law, on the other hand, differs in many details from one jurisdiction to the other. The technical terminology of each jurisdiction is different, and therefore words and phrases are not easily rendered into another language (see also Mattila 2006). Even within a single language, such as English, there are some significant differences between English and American usage, and sometimes even in the usage of various American states.

Much of the vocabulary is quite distinctively legal, but there are also many words that have both an ordinary as well as a legal meaning. The most common meaning of *instrument* is a device for making music, but lawyers use it to refer to a document (usually one that is operative or performative). I have referred to such terms *legal homonyms* (Tiersma 1999: 111–12). This can sometimes be confusing for nonspecialists, who might think that they understand a word or phrase when they do not. When a lawyer tells someone that she is going to *file a complaint* against her, it does not mean that she plans merely to make a complaint, but that she plans to initiate a lawsuit against him. Sometimes it can produce humorous effects, as is the case with a California statute that makes it illegal to "publish...a fictitious...instrument in writing." You would think that it was illegal to publish a novel (in fact, it prohibits forgery). Van den Bergh and Broekman (1979: 33) report that this phenomenon also exists in Dutch, and it seems safe to assume that it is a feature of legal languages in general.

Despite the reputation that legal language has for being conservative and highly precise, it can also contain a surprising amount of informal jargon and slang (Tiersma 1999: 137–38). While all areas of law have their own examples, such vocabulary is probably most common among criminal lawyers (see Murray and Muldoon 2006 for examples). Similar slang expressions abound in police usage and in prisons (Gibbons 2003: 50–4).

Another indication that the language of the law is not nearly as archaic as scholars sometimes suggest (see Mellinkoff 1963), is that it can actually be quite innovative at times. Of course, lawyers and judges are unlikely to adopt a new term when the concept to which an existing term refers is still part of current law. But as our society and material culture change, legal language invariably adapts. For

example, the development of electronic commerce on the Internet has resulted in the coinage of many new legal terms, including terminology for types of licenses that can currently be created online:

- *shrinkwrap licenses* (where the purchaser assents to terms contained in boxed software or in a user's manual by opening the box);
- *clickwrap licenses* (where a purchaser clicks on a box or icon on a website, thereby manifesting assent to the terms of the license); and
- *browsewrap licenses* (where a purchaser on the Internet clicks on a notice that takes him to a separate web page containing the full text of the license agreement).

Consider also the many words that have been coined for electronic transactions by prefixing an *e-* (on the analogy of *email)*, such as *e-commerce*, *e-contracts*, *e-discovery*, and *e-signature*.

3.5 Semantics

The interpretation of legal documents, especially statutes, is the subject of a huge literature. Both scholars and judges have written extensively on the topic, making it impossible to do justice to it in the limited space of this article. Basically, in the common-law world there have been two competing traditions. Although these approaches have been applied to all the major types of legal texts, including contracts, deeds, and wills, most of the discussion has focused on statutes.

During medieval times in England, there was no dominant theory of statutory interpretation, in part because it was then either impossible or very difficult to obtain a copy of the text of statutes that contained the exact words that Parliament had enacted. But during the eighteenth century, reliable copies became available. Before long, courts began to focus ever more closely on the words of the text, leading to what is now called the *plain meaning rule.* It required not just that judges determine the meaning of statute from the text itself, but that they determine the meaning *only* from the text. Unless the words were ambiguous, they were not to consider "extrinsic evidence." Lord Chief Justice Nicolas Tindal expressed it thus in 1843:

> The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain,

> common meaning of the words themselves; and that, in such case, evidence "dehors" [outside] the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. (Attorney-General v. Shore, 59 Eng. Rep. 1002, 1021 (1843))

The plain meaning rule prevailed in England until fairly recently. It also migrated to the United States, but was never applied as vigorously as in the mother country. Throughout the twentieth century, American courts increasingly considered extrinsic evidence, such as the drafting history of a statute or reports of legislative committees, in deciding what a statute meant (Solan 1993).

It appeared that the plain meaning rule had gasped its last breath, at least in the new world. But during the 1990s, new life was injected into the rule by Justice Antonin Scalia of the United States Supreme Court. Scalia has forcefully and often eloquently argued for what linguists would call a very acontextual mode of interpretation, in which judges would determine the meaning of a statute primarily from its text. He particularly scorns references to legislative history (a type of extrinsic evidence) and advocates the use of dictionaries as a neutral source of information on the plain or ordinary meaning of words (Scalia 1997). His approach has been criticized by many scholars (among them Solan 1993, 1997) and failed to instigate the revolution that he anticipated. It did, however, cause judges to pay somewhat more attention to the text than they might have done in the past.

American judges today therefore tend to take a fairly pragmatic approach to interpretation. Most have a great deal of respect for the legislature and acknowledge its power to make law. They will not easily override the clear meaning of the words of a statute. But most also will not refuse to consider legislative history and other types of extrinsic evidence if they believe that it would be helpful in determining what the legislature sought to accomplish (Eskridge 1990).

These two approaches to interpretation in Anglo-American law can also be found in the civil law system of continental Europe. The great codes that were adopted in the late eighteenth and early nineteenth centuries (especially the Prussian *Allgemeines Landrecht* and the French *Code Napoléon*) aimed to state the law as clearly as possible, not only so that it could be understood by ordinary citizens, but also to reduce the interpretive discretion of judges. The notion was that judges were to merely apply the law, without interpretation (Merryman 1985: 43). This, of course, is very similar to the plain meaning rule that was developed in England.

The notion that European codes would not need interpretation turned out to be a fallacy. In reality, continental judges had to fill gaps and resolve ambiguities, just as they do in England and the United States. The methods they use today include textual or grammatical analysis, structural or contextual interpretation, historical interpretation, and teleological approaches that concentrate on

the apparent goal or purpose of the legislation (Brugger 1994). This is not all that different from the pragmatic approach taken by most modern American judges.

3.6 Style

Many of the features of legal language involve questions of style. We have already discussed the archaic nature of much legal language, especially its lexicon. To the extent that old words and phrases express concepts that are still current, of course, there is nothing particularly objectionable to retaining the existing terminology. But there are also archaic words and phrases that serve no function at all, or serve a function that could easily be fulfilled by a more modern term. Examples include *said* and *aforesaid* (used as adjectives), *such* in the meaning of "this" or "that," and *to wit*. Sometimes these words are used to add an air of solemnity (or perhaps pompousness) to a document, or the drafter is mindlessly copying form language that has been recycled for centuries. Equally questionable is archaic word order, sometimes the result of word-for-word translation from Latin, such as language in a will that revokes any previous wills "heretofore by me made," or the text of many subpoenas directing the recipient to appear at a proceeding and warning him that "hereof" he should "fail not." An archaic style seems to be common in many of the world's legal languages (Mattila 2006: 61–62, 206–207).

The style of lawyers and judges also tends to be relatively formal, especially in written legal texts. American lawyers almost always speak of *advising* a client, when they are merely telling her something. Judges write of trials *commencing* and *terminating,* rather than simply *beginning* and *ending.* Clearly, the purpose is to impress the lay public and to inspire respect for the law. Yet a formal style can present comprehension problems when the audience consists of nonspecialists. Much of the resistance by judges to the movement to create more understandable jury instruction stems, in my opinion, from judges' desire to make an erudite impression. Maintaining the dignity of trial proceedings is a legitimate goal, but it should not interfere with the rule of law, which is undermined if the jury does not understand basic legal principles applicable in the case. There must be happy medium, but it's not always easy to find.

Legal style sometimes also includes literary and poetic features. At first reading this claim may seem almost perverse, given how excruciatingly boring some legal documents and statutes can be. Historically, however, the language of law often included rhyme and alliteration, generally a remnant of preliterary times when these devices served a mnemonic function. Even today, the use of conjoined phrases and lists of synonyms can on occasion have a poetic effect. Consider the United States citizenship oath, which I have divided into verse:

> I hereby declare
> on oath
> that I absolutely and entirely
> renounce and abjure
> all allegiance and fidelity
> to any foreign prince, potentate
> state, or sovereignty
> of whom or which
> I have theretofore been
> a subject or citizen. (8 U.S.C. §1448).

Flowery and literary language may also be encountered in judicial opinions, especially dissents, which traditionally allow somewhat greater stylistic freedom. But judges should resist the temptation to wax overly eloquent. A Pennsylvania judge was recently chastised by a higher court for issuing an opinion in rhyme. The underlying lawsuit involved a claim by a disappointed fiancée that the ring her husband-to-be had given her did not contain a diamond, as he had claimed. The judge responded, in part:

> A groom must expect matrimonial pandemonium
> When his spouse finds he's given her a cubic zirconium.

The appellate court was not impressed, observing that the rhyming opinion "reflects poorly on the Supreme Court of Pennsylvania" because "[n]o matter addressed by this court is frivolous" (Los Angeles Times 2002).

Less likely to make a poetic or literary impression is the penchant of lawyers to draft excessively wordy and redundant documents. Perhaps the best American example is the humble will. It usually contains a provision directing the executor of the estate to pay the decedent's lawful debts, even though this is a legal obligation that cannot be avoided, making the provision absolutely vacuous. Of course, most provisions in a will do have a function, but the language expressing that function tends to be quite redundant. A typical residuary clause reads as follows (Tiersma 1999: 249):

> I give, devise and bequeath all of said rest, residue and remainder of my property which I may own at the time of my death, real, personal and mixed, of whatsoever kind and nature and wheresoever situate, including all property which I may acquire or to which I may become entitled after the execution of this will, in equal shares, absolutely and forever, to A and B.

All that really need be said is "I give the rest of my estate to A and B."

Interestingly, wordiness and redundancy seem to be more prevalent in Anglo-American law than in the civil law system. As a general matter, European

statutes and documents are substantially shorter than those in England and the United States. The obsession with covering all the bases and anticipating ever more remote contingencies seems to be far more of a concern in Anglo-American law, perhaps due to its more adversarial nature, than it is in continental Europe (Hill and King 2004).

Stylistically, legal language also tends to be relatively impersonal. We have already seen that lawyers tend to prefer passive and nominal constructions, both of which can promote an impersonal style. Similarly, judges and legislators tend to speak in the third person, as when a judge writes, "This court sentences the defendant to ten years in state prison," in place of "I sentence the defendant..." Probably the principal reason is that impersonal expressions create the impression (and to some extent, the reality) that law is objective and not a respecter of persons. It also is related to abstractness, which is essential for the expression of general and broad legal principles (Matilla 2006: 51, 73–4).

Precision is another stylistic feature of the language of law. Language can never be as precise as some lawyers seem to think possible (Mellinkoff 1963: 290). At the same time, it is more precise than many skeptics suggest. There are a number of features that do, in fact, have the capacity to increase the precision of legal documents. One is the use of lists of near-synonyms. Although sometimes such lists are completely redundant, as we have seen, on other occasions they can be helpful in specifying exactly what is meant. Thus, an enumeration of types of vehicles ("automobiles, buses, trucks, bicycles, skateboards") is almost always more precise than a general superordinate term ("vehicles"), since use of the general term can lead to debate about whether specific items are members of that category.

Definitions can also enhance exact expression. A word might in context have a number of possible meanings; defining can specify which is meant. It can also circumscribe an otherwise nebulous term.

A final example is that the careful repetition of words can sometimes be useful. If a statute refers to a *city,* it should use that term consistently, rather than using *town* or *municipality* in the same meaning. If it does employ *municipality*, a reader should be able to assume that this was a deliberate choice and that the word means something different from *city*.

Yet lawyers are not always so precise. To some extent this results from the inability of people to foresee every possible future contingency. For this reason, a lawmaker might decide that the single word *vehicle* is more appropriate than a list because it is flexible enough to cover future vehicular developments. Somewhat more vague and general language may also give greater discretion to those charged with implementing a law.

It would thus be wrong to say that legal language is inherently precise, or not. The choice between one option or the other is usually a strategic one. When

lawyers involved in a lawsuit request documents from the opposing party (which they have a right to do under American law), they stipulate in exact detail what they mean by the term *document*, either by defining it or by using a list. On the other hand, a publishing contract often requires an author to produce a *satisfactory* manuscript, which gives the publisher a great deal of freedom to later reject it. Likewise, because of rule of law considerations, criminal codes must specify in relatively exact terms what types of conduct are prohibited. A constitution, in contrast, is generally meant to last indefinitely and therefore typically contains very broad and general principles.

3.7 Speech vs. writing

An important point about legal language, something that is not always sufficiently acknowledged in the literature, is that most of the features attributed to it are, in reality, characteristics of *written* legal language. David Mellinkoff's classic study of the language of the law (1963) focused almost exclusively on written legal texts. Only in the past few decades has this situation begun to change. Thus, while legal language is indeed sometimes archaic, redundant, wordy, formal, full of passives and nominalisations, and so forth, we need to qualify this statement by specifying that we are referring to written legal texts. Lawyerly speech (office banter, or even a closing argument at trial) has far fewer of these features.

Once we identify most of the features of legalese with the written language of lawyers and judges, we can return to the question posed earlier in this article: how different is legal language from ordinary speech and writing? Because we need to compare apples with apples, a more appropriate question is, how different is written legal language from other relatively formal types of prose? Clearly, the law's technical terminology is quite distinct, but just about every trade and profession has a large technical vocabulary. What about the other posited features of legalese?

A study by Chafe and Danielewicz (1987) of academic writing found that it generally contains a more literate (i.e., formal) vocabulary than speech. They also discovered that writers use more nominal and passive constructions than speakers do. Finally, Chafe and Danielewicz noted that there are few first person pronouns in academic prose, and that generally such writing is more detached (i.e., impersonal) than speech.

An overview of linguistic research into the difference between speech and writing by Akinnaso (1982) confirms most of Chafe and Danielewicz's conclusions. Although the research is sometimes inconclusive, most studies have found that writing (compared to speech) has higher levels of abstraction, more difficult and

more Latinate vocabulary, fewer personal pronouns, and more elaborate syntax (including more subordination, as well as greater use of passive and nominal constructions).

Thus, it turns out that legal and other types of text are more similar than one might initially think. Most of the features traditionally attributed to legalese are not exclusive to the language of the law, but are rather associated with writing more generally.

As to spoken legal language, it is likewise not as different from ordinary speech as one might think. It is true that the speech of the profession employs a great deal of technical vocabulary, and that lawyers and judges tend to speak in a relatively formal style. But in other respects their speech from a purely linguistic perspective does not diverge significantly from ordinary speech.

Nonetheless, as recent work by linguists has shown, the discursive practices of judges, lawyers, and witnesses involved in legal proceedings can be very interesting. There is a growing literature on this topic in the Anglo-American sphere (see Atkinson and Drew 1979; Cotterill 2003; Ehrlich 2001; O'Barr 1982; Stygall 1994). Similar studies exist of the very different types of trials in the civil law world (Jacquemet 1996; Komter 1998). This research illustrates the various discursive strategies used by lawyers to control the legal process and attempt to shape the outcome. At the same time, the studies also reveal how witnesses and defendants (and the lawyers representing them) can sometimes resist such efforts at verbal domination. It is, predictably, the more vulnerable and less educated members of society who are most likely to be manipulated by the communicative practices of lawyers (Gibbons 2003: 200). Of course, the discursive strategies that lawyers use to obtain information from witnesses or persuade jurors are not unique to the trial context, but there are few other arenas in which those strategies are used as frequently or intensely.

Although there are few absolute distinctions between written and oral language, there are in general some important differences between two modes of communication. Certainly in the case of legal language, the written texts produced by the profession have a number of characteristics that are rare in the profession's speech, and vice versa. We are fortunate that during the past two decades or so, the oral communication of lawyers and judges is finally being placed under the linguistic microscope.

4. Conclusion

Legal language is anything but monolithic. Despite claims that it is archaic, highly formal, redundant, precise, and so forth, we have observed that it can also be

innovative, casual, and purposely vague. As is true of speech and writing more generally, the nature of legal language is highly dependent on the communicative goals of its users.

Nor does the language of lawyers deviate as much from ordinary speech and writing as is sometimes thought. Of course, a written legal text would never be confused with a casual conversation about the weather. But it is not that terribly different from similar types of formal written prose. Academic writing, particularly in the sciences, is also quite formal, impersonal, and precise, and it is full of technical terminology.

Perhaps the most interesting question is why legal language sometimes differs from ordinary formal writing in ways that are not explainable by the likely strategic aims of the author. Many archaic features of legalese seem to have no legitimate function, except perhaps to make a document seem more impressive to clients as a means of justifying the lawyer's fee. Or the language may be intentionally complex in order to suggest to clients that they should not try to draft such documents themselves, thus helping lawyers preserve their monopoly on legal services.

Thus, a close examination of the language of the legal profession allows us to determine which of its features serve a legitimate function and which are more questionable. This, of course, is the first step towards developing a language that not only facilitates communication among the professionals working within the legal system in question, but also between those professionals and the members of the public whose lives and fortunes are governed by it.

References

Akinnaso, F. 1982. On the differences between spoken and written language. *Language and Speech* 25: 97–125.

Atkinson, J. & Drew, P. 1979. *Order in the Court: The Organization of Verbal Behavior in Judicial Settings*. London: Macmillan.

Baker, J. H. 1990. *An Introduction to English Legal History*, 3rd edn. London: Butterworths.

Baker, J. H. 1998. The three languages of the common law. *McGill Law Journal* 43: 5.

Brugger, W. 1994. Legal interpretation, schools of jurisprudence, and anthropology: Some remarks from a German point of view. *American Journal of Comparative Law* 42: 395–421.

Buckland, W. W. 1966. *A Text-book of Roman Law.* 3rd edn, revised by P. Stein. Cambridge: CUP.

Chafe, W. & Danielewicz, J. 1987. Properties of spoken and written language. In *Comprehending Oral and Written Language*, R. Horowitz & S. J. Samuels (eds.), 113. San Diego CA: Academic Press.

Clanchy, M. T. 1993. *From Memory to Written Record: England 1066–1307*, 2d edn. Oxford: Blackwell.

Cotterill, J. 2003. *Language and Power in Court: A Linguistic Analysis of the O.J. Simpson Trial.* Houndmills: Palgrave Macmillan.
Ehrlich, S. 2001. *Representing Rape: Language and Sexual Consent*. London: Routledge.
Eskridge, W. 1990. The new textualism. *UCLA Law Review* 37: 621.
Gibbons, J. 2003. *Forensic Linguistics: An Introduction to Language in the Justice System*. Malden MA: Blackwell.
Hill, C. & King, C. 2004. How do German contracts do as much with fewer words? *Chicago-Kent Law Review* 79: 889.
Hiltunen, R. 1984. The type and structure of clausal embedding in legal English. *Text* 4: 107–121.
Jacquemet, M. 1996. *Credibility in Court: Communicative Practices in the Camorra Trials*. Cambridge: CUP.
Komter, M. 1998. *Dilemmas in the Courtroom: A Study of Trials of Violent Crime in the Netherlands.* London: Lawrence Erlbaum Associates.
Los Angeles Times. 2002. Bad times over a judge's rhymes. Nov. 28, 2002, at A50.
Matilla, H. 2006. *Comparative Legal Linguistics*. C. Goddard, trans. Aldershot: Ashgate.
Mellinkoff, D. 1963. *The Language of the Law*. Boston MA: Little Brown.
Merryman, J. 1985. *The Civil Law Tradition*. 2nd edn. Stanford CA: Stanford University Press.
Murray, G. & Muldoon, G. 2006. *Criminal Law Slanguage of New York*, 3rd edn. Charlottesville VA: Gould Publications.
O'Barr, W. 1982. *Linguistic Evidence: Language, Power, and Strategy in the Courtroom*. San Diego CA: Academic Press.
Scalia, A. 1997. *A Matter of Interpretation: Federal Courts and the Law*. Princeton NJ: Princeton University Press.
Solan, L. 1993. *The Language of Judges*. Chicago IL: University of Chicago Press.
Solan, L. 1997. Learning our limits: The decline of textualism in statutory cases. *Wisconsin Law Review* 1997: 235–283.
Stygall, G. 1994. *Trial Language: Differential Discourse Processing and Discursive Formation*. Amsterdam: John Benjamins.
Tiersma, P. 1999. *Legal Language*. Chicago IL: University of Chicago Press.
Van den Bergh, G. & Broekman, J. 1979. *Recht en Taal: Praeadvies*. Deventer: Kluwer.

Language education for law professionals

Jill Northcott
Institute for Applied Language Studies, University of Edinburgh

Increasing globalisation has led to English becoming the lingua franca of international legal practice requiring L2 legal professionals to develop high level skills in English thus creating significant challenges for language educators who may not have a background in law. This article provides an overview of language education for L2 legal professionals. Developments and practice in English for Legal Purposes (ELP) viewed within English for Specific Purposes (ESP) are presented to provide a model focusing on the interrelated dimensions of learner context, methodology and teacher background. I acknowledge the contribution of genre studies in providing pedagogical descriptions of written legal language and stress the need for further ethnographic investigation to identify and describe relevant oral legal genres.

1. Introduction

English has for some time been the dominant language in the field of public international law and is the language of preference for international legal journal publications. It is rapidly moving towards the same position in the private commercial sector as a result of the growing influence of Anglo-American law. This greater use of English in legal contexts poses challenges for language educators. For this reason the chapter focuses on issues related to the teaching of English, rather than other languages, addressing some key issues for the development of L2 legal professionals' ability to communicate effectively. Lawyers, law students, legislative translators and legal interpreters are all users of English for Legal Purposes (ELP) but their language learning needs will differ depending upon their communicative purposes and learning contexts. Moreover, these factors influence decisions about the professional background and knowledge base required by language educators in this field.

ELP is part of the English for Specific Purposes branch of Applied Linguistics. Current research and practice in ESP emphasise that texts can only be understood

within the contexts in which they are used. Hence my starting point is not legal register but specific legal contexts. Drawing on ethnography and pragmatic pedagogical solutions, a multidimensional explanatory model of learning contexts, approaches, methods and materials and teacher backgrounds is proposed.

After considering the influence on approaches to teaching ELP of the specific characteristics of law as a discipline, I use data from one ELP teaching context to illustrate the limitations of recent ESP models which stem from both a binary divide between *general* and *specific* ELP and a continuum from *general* to *specific*. Current research extensions of the social constructionist perspective (Berkenkotter and Huckin 1985; Bizzell 1992) give further credence to the view that teaching skills and language cannot be divorced from content because disciplines and professions are created by the communicative practices of their members for particular audiences. The practice of ELP teaching must reflect these research realities if it is to be pedagogically effective. ESP best practice prioritises the needs of learners, enabling them to access the language necessary for the achievement of their own professional and study goals. In order to provide a systematic overview of current practice in language education, ELP is broadly categorised either as English for Academic Legal Purposes (EALP) or English for Occupational Legal Purposes (EOLP). Within each area course content and methodology are reviewed and the implications for the knowledge and skills base of language educators considered.

2. Implications of the characteristics of law as a discipline

ELP has long been recognised to pose different challenges from English for business or medicine, because of the close interplay between law and language (Gibbons 2003; Tiersma 1999). Consequently, legal professionals have often considered themselves to be experts on both law and language, placing legal English education within the sphere of the law lecturer rather than the language teacher. The large number of books on legal method and guides to the study of law published (e.g. Hanson 1999; Bradney et al. 1995; Dane and Thomas 1996) are cited in support of this view. There is, it is maintained, no other academic subject which requires such a radical induction to specialised language and ways of thought. Strong (2003: 1) for example, asserts that "students come unprepared to the study of law since it is qualitatively different from the study of other subjects".

These concerns can be considered within the *general* versus *specific* debate between proponents of the view that there is a teachable common core of academic language which is consistent across disciplines and those who stress the

discipline – specific nature of academic language. However, since Sprack's 1988 proposal that discipline specific language should not be tackled by language teachers but left to the subject specialists the scales have tipped firmly in favour of specificity (Hyland 2002). Research into the language used by discourse communities calls into question the existence of a common core of academic language used consistently across disciplines. The case for specificity in EAP teaching has been further strengthened by the research evidence from genre analysis (Dudley-Evans 2001) which is particularly compelling in the field of law. It is clear that genres may play different roles in different disciplines. Bhatia (2002) gives the example of cases, which are used extensively in both business and legal education. Although, on the surface, business and legal cases share some common features they play radically different roles in business and law. In Common Law systems a legal case will begin with the facts followed by the reasoning of the judges supporting their decision. This portion of the judgment, known as the ratio decidendi, may contain a new and binding principle of law which courts must apply in subsequent cases. It is the principle of law and the reasoning behind it which concern legal professionals. White (1981) and Swales (1990) both give accounts of how they were misled by the surface structure of legal cases into devising reading skills development tasks for law students focusing on understanding the narrative or the facts of the case instead of the legal reasoning for the decision. Thus, at the very least, an understanding of the methods employed in legal education is essential for those responsible for developing appropriate legal reading skills in English.

Dudley-Evans and St. John (1998) have extended Blue's 1988 distinction between common-core EGAP (English for General Academic Purposes) and specific ESAP (English for Specific Academic Purposes) to ESP generally. In addition to the usual classifications of ESP according to learners' experience (studying or working) and professional area (business, medicine, law) they propose a continuum of English language courses from general to specific with five positions. ELP appears on this cline at Position Four with other "courses for broad disciplinary or professional areas" (Dudley-Evans and St. John 1998: 9). As the authors indicate, groups are not likely to be homogeneous, so great care needs to be exercised in selecting skills and contexts which appear relevant to all the different participants. Although this accurately reflects practice, locating specific courses within a general ESP framework, further modifications are necessary to account for the variety of learners and contexts within ELP. Including the general/specific split only serves to mask the fact that courses with an SP label are actually general English courses given a specific label for purposes of face validity.

One of the overarching principles of ESP is that courses should be based on needs analysis (see West 1994 for an overview of historical developments and

terminology in this area). An analysis of the target situation for ELP use forms only part of the prerequisite for course design. Learning needs and the present situation of the learners in terms of their current level of English and pre-existing legal content knowledge must also be established (Hutchinson and Waters 1987). Within ELP a considerable amount of work has been done to facilitate target language description. Bhatia (2002) outlines, from a historical perspective, the different stages in analyses of linguistic data for pedagogical applications. There has been a movement from descriptions of lexico-grammar, through studies of discourse structure with the focus currently on the contexts in which the language is used. Ethnographic needs analyses of specific professional and academic settings provide a good starting point for identifying the contexts in which the learners will need to use the language and those communicative events which place most stress on the learners' language abilities (Northcott 2001). However, apart from courtroom studies, less work has been done to identify and analyse oral than written legal genres and an ethnographic approach lends itself to this further exploration of "the complex realities of the world of institutionalized communities" (Bhatia 2002: 3).

Genre analysis is well supported by advances in corpus linguistics providing the means to analyse written legal text efficiently. Grover, Hachey, Hughson and Korycinski (2003) describe the development of tools and methods for the automatic linguistic annotation of House of Lords judgments, based on initial genre analysis, in order to provide computer-generated summaries. Goźdź-Roszkowski (2006) has examined a 500,000 word corpus of judgments delivered by the Law Lords in the House of Lords consisting of 35 different opinions delivered between 2000–2004 and extracted a list of four-word lexical bundles with the computer programme *WordSmith Tools*. He found a large number of lexical bundles consisting of a noun phrase followed by a post-modifying *of*-phrase fragment and categorised them (Table 1). For language educators the concern is translating these and similar research findings in the complex field of law into teachable materials and activities which motivate learners.

3. Legal English contexts

In order to indicate the importance of distinguishing learning contexts and purposes I refer to a data sample from one ELP course provider. Edinburgh University's Institute for Applied Language Studies has offered courses for L2 legal professionals for the past twenty years. Participants are attracted from the many different legal contexts in which English is used. In order to reach pedagogic

Table 1. Lexical bundles in judgments classified according to their functions in context (Goźdź-Roszkowski 2006)

CATEGORY	SUBCATEGORY	EXAMPLE
Referential bundles	Time markers	at the end of, at the date of, at the time of, in the course of,
	Descriptive bundles	the purpose of the, the scope of the, the content of the, the meaning of the
	Quantifying bundles	the value of the, the cost of the, the amount of the,
Text organisers	Contrast/comparison	on the one hand, on the other hand, in contrast to,
	Inferential	as a result of, on the basis of, the effect of the, as a consequence of
	Framing	in the absence of, in the case of, in the context of, in relation to a, by reference to the, on the ground that,
	Focus	it is important to, it is difficult to,
Stance bundles	Epistemic impersonal possible probable	it is possible to, it is likely to, there is no doubt, there is no reason,
	Attitudinal	I do not think, I agree with it, I consider that the, appeal should be allowed
Operative bundles		I would allow this (appeal), I would dismiss the (appeal) Court of Appeal held
Other		a cause of action, the rule of law

solutions, the issues for learners crossing the Common Law Civil Code divide have received particular attention. Three short open courses are available:

1. *English for Legal Studies* is aimed primarily at law undergraduates and recent graduates from Civil Code jurisdictions.
2. *English for Lawyers* attracts mainly European lawyers from a variety of legal areas.
3. *English for the LL.M* is for those about to begin a postgraduate law degree in English.

Data on learners' needs is routinely collected by means of questionnaires completed at the beginning and end of the course. The following comments relate to data collected over the period 2000–2005 from participants on the *English for Legal Studies* (LS) and *English for Lawyers* (Law) courses. For the LS data, responses from a total of 262 students were considered and a detailed analysis made of the responses from

one year's intake (41) as this appeared to be representative of student views. The Law responses totalled 82 for the five year period. The same year's intake (2004) as for LS was analysed for comparative purposes. There were 16 responses.

Both groups were asked why they had decided to take the course. Responses from the law students (LS) relate to their future careers and are consistent in the assumption of the necessity of having a good command of legal English in order to get a job. This is not just a view expressed by those intending to work in the international context for large cross-border firms where most of the work is done in English. Even those anticipating a career with local law firms perceive the importance of English competence. As one commented:

> There is no future for a lawyer who does not know accurately legal English and the English legal system, especially in branches like commercial law where English colonisation is very deep, regarding both legal terms and substantive issues.

The lawyers' responses, whilst similar, were more focused on their current needs and tended to specify particular skills such as writing contracts and other legal documents. Asked to complete the sentence "I'd like to learn how to…" these responses were given (LS):

Write (a legal brief, emails to colleagues discussing cases, a contract in English, legal documents)
Read (legal documents, textbooks)
Speak fluently (have a legal conversation with someone, speak with clients on the phone, explain legal contents in English, talk about law matters, the equivalents of Spanish company forms and taxes, use the appropriate legal register)
Understand how the English legal system works

The lawyers (Law) wanted to:

Understand English better
Write letters about legal matters
Make a presentation in English
Understand legal documents
Write a claim
Conduct a consultation with a client in English
Negotiate on legal issues
Draft contracts in English.

English for the LL.M ran for the first time in 2004. Questionnaires were sent to course participants half way through their subsequent LL.M studies to obtain

data on the efficacy of the pre-sessional course. In addition to comments about the importance of reading and essay writing skills, one area highlighted was the need for an even stronger focus on the Common Law background and reading and understanding law reports. As one respondent commented: "For students from the Civil Law System the method of studying the Common Law is quite different from their previous experience".

This brief snapshot of ELP in microcosm illustrates the importance of distinguishing learners' purposes. In addition to the obvious differences between students and professionals such as the focus of the lawyers on work–related genres (writing a claim for example), there are clear differences within the legal student body. Those studying or intending to study in a Common Law context or prepare for a Common-Law influenced working environment recognise the need for a specific focus on the Common Law. Participant responses also indicate an acceptance of the interrelationship of law and language and the difficulty in separating legal content knowledge from skills. Students, for example, cannot learn how to write a legal essay without understanding how to read law reports. Moreover, understanding of the socio-legal context within which these texts are interpreted is necessary, hence the need, for example, for familiarisation with aspects of the UK legal system. Although there is a major emphasis in Forensic Linguistics on courtroom discourse, it is not an area of need for L2 legal professionals. There are clear limits on rights of audience in the courts so this is one area in which legal professionals use their first language.

In the following sections I widen the scope to consider legal English provision for learners categorised according to context, course content, methodology, indicating the influence of these factors on choices for ELP teacher background.

4. Course content

This section attempts an overview of ELP content for specific learner contexts, summarised in Figure 1. In addition to the usual considerations for needs analysis, specific to law is the need to know whether the learners are (1) professionals or students of law (2) studying law through the medium of English or their L1 (3) intending to study or practise law in a civil or Common Law system (4) knowledgeable about at least one legal system or have little or no legal knowledge.

Although a distinction is made between EALP and EOLP course content there is some overlap. Lawyers may need aspects of the course content indicated for students and vice versa. For example, lawyers need to read, understand and summarise statutes and case reports to prepare for meetings with clients. Similarly,

Table 2. Learner context and course content

LEARNER CONTEXT → / COURSE CONTENT ↓	Law undergraduates studying in English (Common Law systems)	LLM students (Common Law systems)	Undergraduates Studying law in their L1 (Civil Code systems)	Practising lawyers (Common Law)	Lawyers (Civil Code)	Legal Translators	Legal Interpreters
Reading and understanding law reports and statutes	X	X		X		X	
Reading legal textbooks	X	X	X				
Writing problem question essays	X						
Writing discursive legal essays		X					
Legal seminar participation skills		X					
Common Law legal vocabulary development	X	X		X		X	X
General legal vocabulary development	X	X	X	X	X	X	X
Reading and drafting legal agreements				X	X	X	
Writing letters, memos, opinions			X	X	X	X	
Participating in meetings & negotiations			X	X	X		X
Giving presentations	X	X	X	X	X		X
Interviewing & advising clients				X	X		X

university law schools, under pressure to demonstrate the transferability of academic skills, are beginning to emphasise professional legal skills, such as lawyer client interviewing.

4.1 EALP course content

Possible learners in this category are (1)undergraduate law students studying in English in Common Law or Common Law influenced systems (2) LLM (Masters in Law) students studying in English in Common Law systems (3) undergraduates studying law in Civil Code jurisdictions in their L1. Some understanding of Anglo-American legal systems has become a pre-requisite for lawyers, particularly commercial lawyers. Legal English programmes are active in many European universities both within the law faculties where they form part of the legal studies curriculum or provided by language support units.

In addition to the ability to argue effectively and read and write critically required in all academic disciplines, law students need an understanding of the crucial role played by legal authority. Approaches to legal education in Common

Law systems have entailed a major focus on reading judicial opinions. This is seen as having the dual function of enabling students to understand the law and helping them create their own legal arguments. EALP focuses on the language skills needed to work towards these academic goals. Those in category (1) can reasonably be expected to learn the vocabulary of the Common Law in the course of their studies. However, category (2) who are moving from a background in civil law, also need a wide knowledge of Common Law concepts and terminology in order to understand cases and statutes. LL.M courses are attended both by practising lawyers and recent law graduates from civil law jurisdictions in Europe and Asia. Feak and Reinhart (2002) and Northcott (2004) give accounts of pre-sessional programmes for LL.M students at the Universities of Michigan and Edinburgh respectively. Course content in Edinburgh focuses on developing academic legal reading and writing skills, legal vocabulary development and legal seminar participation skills. The Michigan course equivalents are (1) Processing Legal Materials (2) Academic Legal Writing (3) Interactive Listening and (4) Researching Legal Issues (Feak and Reinhart 2002: 11).

4.2 EOP course content

The role of English as a legal lingua franca is expanding but brings with it particular problems because of the system-bound nature of legal language. Commercial lawyers representing international clients need to understand and even draft contracts in English. Cross border mergers of law firms necessitate an understanding of legal English for meetings and negotiations and overall liaison with colleagues in offices in different countries. English may also be the language of choice although it is not the first language of either the lawyer or the client. Within the European context, in addition to the commercial law firms, smaller private firms increasingly need English in their dealings with individual clients. As movement between the countries of Europe continues to increase, everyday life takes on increasingly international dimensions: buying and letting property, entering into employment contracts, divorce and adoption are just a few examples. In dealing with British clients, Spanish lawyers, for example, need to be able to explain Spanish legal concepts and procedures in English. The ability to give good explanations necessitates an understanding of the differences in the ways the two legal systems operate.

As law firms are competing in an increasingly competitive commercial environment business and legal genres are merging. Giving presentations, telephoning, participating in meetings and negotiations, writing letters and socialising are communication skills required by both business and legal professionals. In addition lawyers need to interview and advise clients. Of the specifically legal genres

with which lawyers will need to work, either receptively or productively, the priorities are legal documents, in particular contracts and legal letters. Haigh (2004) provides a useful syllabus for a course in English for legal communication for lawyers focusing on three areas – written, spoken and contractual English.

4.3 Course content for highly specialised ELP contexts

ELP practitioners may occasionally find themselves working with other groups or individuals involved in the legal process such as legal secretaries, judges (from Civil Code countries) and legal translators and interpreters. A thorough needs analysis will identify the target language behaviour for these groups. Northcott (1997) provides an account of ESP teacher input into a training programme for magistrates' court interpreters in Zimbabwe indicating a role for ESP, with its pragmatic approach and rich tradition of cooperation between subject specialists and language teachers, in many different language training situations.

5. Teaching approaches, methods and materials

ESP methodology has always advocated using the methods and approaches of the discipline it supports with a focus on authenticity of task as well as text. A genre-based approach has proved effective in EALP (Bhatia 1993, 2002; Weber 2001; Langton 2002). Key genres identified are case reports and statutes and materials developed to aid students in comprehension. Bhatia (1993), Maley et al. (1995), Bowles (1995) and Reinhart (2007) all provide accounts of the text structure of law reports. Increasingly sophisticated materials have been produced both for classroom and self study use (e.g. Bathia, Langton and Lung 2004). Badger (2003) proposes techniques for using newspaper law reports in the legal English classroom as a more accessible option for students than the long texts which constitute the official versions.

Much of the focus in the undergraduate law context is on developing writing skills. Candlin, Bhatia, Jensen and Langton (2002) reviewed the available resources for legal writing, concluding that as most of the books were intended for L1 students, there was a dearth of suitable material for use in EALP writing contexts. Most of the legal writing materials on the market are produced for US law students. These are often very extensive and include advice on good writing in general as well as detailed analysis of specific legal writing genres contextualised in the US legal system (e.g. Shapo, Walter and Fajans 1999). The assumption made traditionally in the UK is that law students already know how to write or else will

pick up the skill during training in the barristers' chambers or law firm without any explicit teaching (Butt and Castle 2001). However, there is evidence of a change in this trend, acknowledging that legal English teaching approaches and materials used with L2 law students may also be of relevance to L1 students. For example, McKay and Charlton (2005) have produced a legal English coursebook specifically intended "to assist those interested in law and wishing to become more conversant in English within a legal context, whether as a native English speaker or someone using English as a second or foreign language" (p.1).

The problem question essay has received attention from ESP researcher-practitioners (Bhatia 1989; Harris 1997; Bruce 2002). Students are expected to apply existing case law to the solution of a different legal problem to illustrate their legal reasoning abilities and knowledge of the law. Various models have been developed to aid students in their ability to construct these essays. Strong (2003) for example, presents the CLEO (Claim Law Evaluation Outcome) method to tackle essay writing.

EALP contexts have often been the source of methods and approaches devised for the specific situation which may be usable in other contexts. Smyth (1997, 1999) for example, has developed language materials and approaches adapted to the demands of the students' specific law courses which can be used by non-specialist teachers of legal English. In the US, where there is a stronger emphasis on skills based courses, legal English courses may be run in tandem with introduction to American law courses for both L1 and L2 speakers of English. They may be taught by either law lecturers or language teachers, using specially prepared introductory material with detailed instructors' notes. (e.g. Reinhart 2007; Lee, Hall and Hurley 1999). They are however, very context-specific and do not lend themselves easily to adaptation for non-US contexts. European university language departments with a tradition of materials writing have proved to be a source of Legal English materials, designed specifically for local needs (e.g. Kossakowska-Pisarek and Niepytalska 2004; Bardi 2001). The legal English coursebooks most widely available from UK publishers originated as courses taught to European law undergraduates (Riley 1994; Chartrand, Millar and Wiltshire 2003). Although ESP courses in these contexts traditionally focused on developing reading skills many have widened their focus to speaking and listening skills to meet the increasing recognition of students that spoken English is vital for their future professional careers.

There is, however, less published material available for the development of specific legal oral skills. A communicative task-based methodology may be employed to develop learners' oral skills using roleplay and simulation in mock trials, negotiations and job interviews, for example. These activities are selected on the basis of their motivational benefits in encouraging law students to speak in

what they perceive as relevant situations but may also provide the basis for more detailed moots if students have the relevant background legal understanding of the issues. There is increasingly crossover between developments in legal English and legal education. Ricks (2004), for example, proposes activities to encourage oral participation in law classes involving role play and collaborative groupwork.

For LL.M students a major area of difficulty is found in seminar participation. The Socratic methods employed in postgraduate law seminars emphasising individual participation and contribution may be stressful for students from some cultures. LL.M seminars make considerable demands upon the language competence of L2 speakers, particularly when there are the additional factors of inadequate background knowledge and the necessity of coping with new learning styles. For example, in preparation for each seminar students are expected to read extensively. This reading consists of a combination of texts about the law such as textbooks and journal articles in addition to operative legal texts such as treaties, statutes, EC directives, regulations and judgments. In the seminar itself they may then be expected to use the knowledge gleaned to participate in debate and argument citing legal authority for their particular stance. Methods are employed to help students develop the requisite skills in a relatively safe environment. For example, students participate in seminar type activities in the classroom in preparation for introductory seminars conducted by law lecturers invited to contribute to the language course, gradually building confidence for participation in the LL.M seminar itself. In addition to providing information about the learning context analysis of seminar discourse is a source of useful data about the language students might need in order to participate. One example is the use of questioning techniques by the seminar leader. These can be analysed so that students are aware of the kinds of responses expected in seminars (see Appendix 1).

Some of the methods described can also be used successfully with lawyers who need an understanding of Common Law concepts and language. However, task performance and individual feedback receive more emphasis with lawyers who are often taught one to one or in small groups employing a deep end strategy. After an initial focus on relevant interactional language, learners will roleplay a meeting or negotiation and receive individual language feedback which is then used to improve their language performance in a second communicative task. The need to focus on giving clear explanations, advice and opinions both in written and oral form becomes a method in itself and can be used in tasks to develop legal and general vocabulary.

The increasing globalisation of legal practice has been recognised in the creation of legal English qualifications available through the examination boards. The TOLES (Test of Legal English Skills) test, which targets lawyers intending to

practice in the UK, has been available for a number of years. The new Cambridge ILEC (International Legal English Certificate) gives certification of ability to operate in English in international legal working environments. Although the test is highly rated for its face validity, in terms of the authenticity of topics, texts and language (Thighe 2006: 6) it raises the question of what exactly constitutes international English in an area which has always been very closely tied to specific contexts and cultures. The concept of international legal English in any specific legal field is controversial and it is only possible to tackle this area by reference to socio-cultural contexts i.e. specific legal systems. A typical method employed is to look at, for example, the essential elements of a contract under English law and then to ask learners to use the language they have learnt in order to compare their own country's contract law. (Chartrand, Millar and Wiltshire 2003: 10–11).

For very specialised ELP contexts the resources of both legal professionals and linguists can be utilised to provide materials and methods. Northcott and Brown (2006) describe short training courses for non-legally qualified legislative translators stressing the need for a high degree of subject specialist and ELP (English for Legal Purposes) teacher cooperation in very specialised ELP teaching and training contexts. There are other accounts in the literature of ingenious solutions by ESP practitioners, involving different types of cooperation between language teachers and legal professionals to meet the varying needs of legal professionals and students.

Table 3 shows the different methods which can be employed to teach ELP content.

6. Language education provision

The dilemma for provision of language education in legal contexts has often been viewed as a simple choice between legal professional and language teacher. However, as the preceding discussion and description of contexts has shown, the reality is more complex. First of all, one cannot disregard the marginalisation of language teaching and the elitism of the legal profession. High earning legal professionals are simply not in the market as language teachers. Moreover, as has been shown, the background needed by the legal English teacher is very dependent on a number of factors. If the learners possess expert legal knowledge or have a source at hand, but have more limited language proficiency there is in fact less need for the language teachers to possess this legal knowledge. For example, for lawyers who want to develop their ability to use English effectively in legal contexts, advanced language teaching expertise and experience working with professionals from

Table 3. Interaction between content and methodology

APPROACHES, METHODS AND MATERIALS → / COURSE CONTENT ↓	Genre and corpora based	EAP/study skills development	Use of a manual with very specific materials and detailed teaching notes and key	Task based methodology employing methods used within the discipline/profession	One to one and small groups. Focus on individual performance and feedback
Reading and understanding law reports and statutes	X		X	X	
Reading legal textbooks		X			
Writing problem question essays	X		X	X	
Writing discursive legal essays		X			
Legal seminar participation skills	X	X		X	
Common Law legal vocabulary development	X		X		X
General legal vocabulary development	X	X	X	X	X
Reading and drafting legal agreements	X			X	X
Writing letters, memos, opinions	X		X	X	X
Participating in Meetings & negotiations	X			X	X
Giving presentations	X			X	X
Interviewing & advising clients	X		X	X	X

many different fields will be more highly valued than legal expertise. On the other hand, law students with high levels of language proficiency but non-expert levels of legal knowledge will appreciate a teacher who has greater legal expertise.

How much the ELP teacher needs to engage directly with legal subject matter will be affected not only by the learners' level of legal knowledge but also by what other exposure learners have to legal input. Where either of these factors is high the focus has traditionally been either, in EALP, on common core study skills or, in EOLP, on professional communication skills. In South Africa and in Zimbabwe, for example, English is still the dominant language of the law (de Klerk 2003; Northcott 1997). However, Morrison and Tshuma (1993) showed that in Zimbabwe subject specific courses which introduced students to the underlying schemata and modes of study of the discipline were more motivating and achieved better results than general academic study skills courses. In Israel,

a legal system increasingly influenced by the US, the importance of specificity in language education for law students is fully acknowledged (Deutch 2003). Deutch argues, however, that although a thorough needs analysis of the target situation indicates that a high level of legal reading skills is a priority, realistically many students will not achieve the high level of proficiency in English necessary for successful reading of legal texts.

Many ESP teachers quickly realise that they cannot approach the task as experts in the law and seek collaboration with experts. (Blue 1988; Howe 1993; Morrison and Tshuma 1993; Smyth 1997; Bruce 2002; Candlin et al. 2002; Northcott and Brown 2006). There is, however, a clear need for the teacher to have some subject specific knowledge, whether this is obtained by the traditional route of the undergraduate law degree or by other means. What "knowledge" is needed depends on the specific contexts of the learners. ESP teachers experienced in the theory and practice of needs and language analysis, can analyse the language learning needs of specific groups of learners and develop an effective course which enables legal professionals to communicate in a clear, jargon-free manner. For those new to ELP teaching there are now coursebooks designed for the international market (e.g. Krois-Lindner 2005). Deutch (2003: 141) points out that although legal English teachers have to deal with highly professional material, most of them have never had a legal education. Whereas some law schools employ lawyers to teach legal English, lawyers lack the pedagogical background for teaching a language course. Lee et al. (1999) put the matter in perspective by indicating the limitations for both potential groups of teachers:

> Instructors with legal training but little or no English language teaching may experience some initial difficulties with classroom management issues and some of the generally accepted English language techniques while instructors with English language teaching may experience a little bit of initial difficulty when dealing with the legal aspect of the text. (Lee et al. 1999: 1)

Nevertheless, the commercial sector has tended to favour lawyers over language teaching professionals to work with their clients, usually on a one to one or small group basis. There is increasingly a demand for dual qualified teachers to work with lawyers. UK based private language schools attract a high premium for courses tailored to the needs of individuals and taught by lawyers with language teaching qualifications.

Table 4 tabulates the possible combinations of learner context and teacher background. The distinction is made between legal professionals and law lecturers to indicate lack of teaching experience of the former.

Table 4. Teacher background and learner contexts

LEARNER CONTEXT → / ELP TEACHER BACKGROUND ↓	Law undergraduates studying in English (Common Law systems)	LLM students (Common Law systems)	US Law Schools	Undergraduates Studying law in their L1 (Civil Code systems)	Practising lawyers (Common Law)	Lawyers (Civil Code)	Legal Translators and interpreters
ESP teachers in Common Law countries (App Linguistics + TEFL qualified)	X	X	X	X		X	
ESP teachers in Civil Code countries (MA Languages/ Philology)				X		X	
University law lecturers	X		X	X			
Dual qualified teachers (ESP + Law)	X	X	X	X	X	X	
Legal professionals with language teaching qualifications			X	X	X	X	
Team teaching + other partnerships between ESP teachers/ legal professionals/law lecturers	X	X			X		X

7. Conclusion

In the preceding discussion I have attempted an overview of a relatively wide area, focusing mainly on the current state of language education for L2 law professionals and indicating the different dimensions which influence choice of content and methodology. As the data and illustrations show this is a very dynamic area. I have attempted to use the available data to construct a flexible model which provides a systematic overview without simplifying complex social realities unduly. A considerable amount of progress has been made in the analysis of written legal genres and discourse contributing to pedagogic description which can be used in ELP. There is still much to be done in the area of identifying and analysing spoken academic legal genres. For those involved in language education a descriptive account of the specific contexts of use in which their learners operate is as important as an awareness of different legal genres. With this end in view, ethnographic skills are particularly valuable for those needing to develop language programmes for students attending ELP courses, which are always situated in specific learning contexts.

The background needed by legal English teachers is dependent on the interplay of the different dimensions of the teaching context. It is clear that teaching

legal English requires some understanding of the law whether this is possessed by the language teacher or made available to the learner through partnerships between legal specialists and language educators. However, as we have seen, other teaching skills are equally important in developing English language skills for effective legal communication. The pragmatic approach and grounded interplay between theory and practice of ESP provides a good "home" for language education for legal professionals.

References

Badger, R. 2003. Legal and general: Towards a genre analysis of newspaper law reports. *English for Specific Purposes* 22: 249–263.

Bardi, M. (Project Coordinator) 2001. *English for Legal Purposes* [Prosper with English]. Bucharest: The British Council.

Berkenkotter, C. & Huckin, T. 1993. Rethinking genre from a sociocognitive perspective. *Written Communication* 10: 475–509.

Berkenkotter, C. & Huckin, T. 1995. *Genre Knowledge in Disciplinary Communication*. Hillsdale NJ: Lawrence Erlbaum Associates.

Bhatia, V. K. 1989. Legislative writing: A case of neglect in EA/OLP courses. *English for Specific Purposes* 8: 223–238.

Bhatia, V. K. 1993. *Analysing Genre: Language Use in Professional Settings*. London: Longman.

Bhatia, V. K. 2002. A generic view of academic discourse. In *Academic Discourse*, J. Flowerdew (ed.), 21–39. London: Pearson Education.

Bhatia, V. K. 2003. Applied genre analysis: A multi-perspective model. *Iberica* 4: 2–19.

Bhatia, V. K., Langton, N. & Lung, J. W. Y. 2004. Legal discourse: Opportunities and threats for corpus linguistics. In *Discourse in the Professions: Perspective from Corpus Linguistics,* U. Connor & T. Upton (eds.), 203–234. Amsterdam: John Benjamins.

Bizzell, P. 1992. *Academic Discourse and Critical Consciousness*. Pittsburgh PA: University of Pittsburgh Press.

Blue, G. 1988. Individualising academic writing tuition. In *Academic Writing: Process and Product* [ELT Documents 129], P. Robinson (ed.), 95–99. London: MEP/British Council.

Bowles, H. 1995. Why are newspaper Law reports so hard to understand? *English for Specific Purposes* 14: 201–222.

Bradney, A., Cownie, F., Masson, J., Neal, A. & Newell, D. 1995, 3rd edn (2000). *How to Study Law*. London: Sweet and Maxwell.

Bruce, N. 2002. Dovetailing language and content: Teaching balanced argument in legal problem answer writing. *English for Specific Purposes* 21 (4): 321–345.

Butt, P. & Castle, R. 2001. *Modern Legal Drafting. A Guide to Using Clearer Language*. Cambridge: CUP.

Candlin, C., Bhatia, V. J., Jensen, C. & Langton, N. 2002. Developing legal writing materials for English second language learners: Problems and perspectives. *English for Specific Purposes* 21: 299–320.

Chartrand, M., Millar, C. & Wiltshire, E. 2003 *English for Contract and Company Law,* 2nd edn. London: Sweet and Maxwell.

Dane, J. & Thomas, P. 1996. *How to Use a Law Library. An Introduction to Legal Skills,* 3rd edn. London: Sweet and Maxwell.

De Clerk, V. 2003. Language and the law. Who has the upper hand? *AILA Review* 16: 89–103.

Deutch, Y. 2003. Needs analysis for academic legal English courses in Israel: A model of setting priorities. *English for Academic Purposes* 3: 123–146.

Dudley-Evans, T. 2001. Team-teaching in EAP: Changes and adaptations in the Birmingham approach. In *Research Perspectives on English for Academic Purposes* J. Flowerdew & M. Peacock (eds.), 225–238. Cambridge: CUP.

Dudley-Evans, T. & St. John, M. J. 1998. *Developments in English for Specific Purposes*. Cambridge: CUP.

Feak, C. & Reinhart, S. 2002. *An ESP Program for Students of Law*. In *English for Specific Purposes,* T. Orr (ed.), 7–24. Alexandria VA: TESOL.

Gibbons, J. 2003. *Forensic Linguistics*. Oxford: Blackwell.

Goźdź-Roszkowski, S. 2006. Recurrent word combinations in judicial argumentation. A corpus-based study. In *Langue, Droit, Société* [Cahiers du DNPS], D. Bartol., A. Duszak, H. Izdebski & J. Pierrel (eds.), 139–152. Nancy: Université de Nancy.

Grover, C., Hachey, B., Hughson, I. & Korycinski, C. 2003. *ICAIL*'03. June 24–8 University of Edinburgh.

Haigh, R. 2004. *Legal English*. London: Cavendish.

Hanson, S. 1999. *Legal Method*. London: Cavendish.

Harris, S. 1997. Procedural vocabulary in law case reports. *English for Specific Purposes* 16: 289–308.

Howe, P. 1993. Planning a pre-sessional course in English for academic legal purposes. In *Language, Learning and Success: Studying through English*, G. Blue (ed.), 148–157. London: Macmillan.

Hutchinson, T. & Waters, A. 1987. *English for Specific Purposes: A Learning-Centered Approach*. Cambridge: CUP.

Hyland, K. 2002. Specificity revisited: How far should we go now? *English for Specific Purposes* 21: 385–395.

Kossakowska-Pisarek, S. & Niepytalska, B. 2004. *Key Legal Words*. Warsaw: Leon Koźmiński Academy of Entrepreneurship and Management.

Krois-Lindner, A. & TransLegal. 2005. *International Legal English*. Cambridge: CUP.

Langton, N. 2002. Hedging argument in legal writing. *Perspectives* 14 (1): 16–52.

Lee, D., Hall, C. & Hurley, M. 1999. *American Legal English: Using Language in Legal Contexts*. Michigan MI: University of Michigan Press.

Maley, Y., Candlin, N., Crichton, J. & Koster, P. 1995. Orientations in lawyer-client interviews. *Forensic Linguistics* 2 (1): 42–55.

McKay, W. & Charlton, H. E. 2005. *Legal English. How to Understand and Master the Language of the Law*. Harlow: Pearson Education

Morrison, A. & Tshuma, L. 1993. Consensus ad idem: English for academic legal purposes at the University of Zimbabwe. In *Teaching and Researching Language in African Classrooms*, C. Rubagumya (ed.), 50–62. Clevedon: Multilingual Matters.

Northcott, J. 1997. EFL teacher involvement in a training programme for court interpreters in Zimbabwe. In *Teacher Education for LSP*, R. Howard & G. Brown (eds.), 186–201. Clevedon: Multilingual Matters.

Northcott, J. 2001. Towards an ethnography of the MBA classroom: A consideration of the role of interactive lecturing styles within the context of one MBA programme. *English for Specific Purposes* 20: 15–37.

Northcott, J. 2004. Law and language or language and law? In *Langue, Droit, Société* [Cahiers du DNPS], D. Bartol, A. Duszak, H. Izdebski & J. Pierrel (eds.), 435–445. Nancy: Université de Nancy.

Northcott, J. & Brown, G. 2006. Legal translator training: Partnership between teachers of English for legal purposes and legal specialists. *English for Specific Purposes* 25: 358–375.

Reinhart, S. 2007. *Strategies for Legal Case Reading and Vocabulary Development*. Ann Arbor MI: University of Michigan Press.

Ricks, S. 2004. Some strategies to teach reluctant talkers to talk about law. *Journal of Legal Education* 54 (4): 570–587.

Riley, A. 1994. *English for Law*, 2nd edn. London: Macmillan.

Shapo, H., Walter, M. and Fajans, E. (4th edition) 1999. *Writing and Analysis in the Law*. New York: Foundation.

Smyth, S. 1997. Sentence first verdict later: Courting the law on a university in-sessional English language course. *ESP SIG Newsletter* 10: 15 –20.

Smyth, S. 1999. Communicating in legal English or taking the law into our own hands? *ESP SIG Newsletter* 15: 6–15.

Sprack, K. 1988. Initiating students into the academic discourse community. How far should we go? TESOL Quarterly 22 (1): 29–51.

Strong, S. I. 2003. *How to Write Law Essays and Exams*. UK: LexisNexis.

Swales, J. 1990. *Genre Analysis*. Cambridge: Cambridge University Press.

Thighe, D. 2006. Placing the International Legal English Certificate on the CEFR. *Research Notes* 24: 5–7. University of Cambridge ESOL Examinations.

Tiersma, P. 1999. *Legal Language*. Chicago: University of Chicago Press

Weber, J. J. 2001. A concordance- and genre- informed approach to ESP essay writing. *ELT Journal* 55 (1): 14–20.

West, R. 1994. Needs analysis in language teaching. *Language Teaching* 27: 1–19.

White, G. 1981. The subject specialist and the ESP teacher. In *Lexden Papers* [Essays on Teaching English for Specific Purposes by the staff of the Colchester and Bedford Study Centres] 2: 9–14.Oxford: Lexden Centre.

Appendix 1

Materials based on analysis of LL.M seminar leaders' questions
Questions in English can be confusing! In writing, a question mark indicates a question which the writer will usually go on to answer. In spoken English rising intonation at the end of an utterance indicates a question. However, how do we respond? Should we respond? In academic seminars, how are students expected to respond to lecturer's questions? Are students expected to ask questions?
Lecturers' questions may be of several different types. Some frequent types are presented here in ascending order of difficulty.

1. Rhetorical questions.
These do not require an answer. Usually the lecturer will pause, for dramatic effect, then go on to answer the question herself. Sometimes it is unclear whether a question is rhetorical or Type 2.
e.g. *"Can Community law do anything about that? We'll see from the materials we're going to look at today and hopefully you've already looked at*

2. Straightforward questions with a correct answer.
The lecturer may address the whole class in which case anybody can volunteer an answer. Sometimes the lecturer will address an individual student. If you are asked a question like this you are expected to give an answer. It is better to attempt an answer even if you are wrong. Lecturers ask questions for many different reasons. There is no stigma attached to being wrong! Silence is not an acceptable response. If you really do not know the answer, then say so confidently. Sometimes the lecturer is using questions in order to decide where to begin. It may be a very difficult question which will be answered during the course of the seminar. The lecturer's intention is not to embarrass or humiliate you!
e.g. *"What features summarise the traditional system?*

3. Questions asking for causes or reasons why.
Often, the lecturer will be asking you to provide some legal justification. These questions require you to know and understand the relevant legal source and be able to apply it. Even in law, there is not necessarily only one correct answer. You will be expected to justify your answer.
e.g. *"Why should they have exclusive monopoly of a plastic bottle?"*

4. Questions requiring some kind of inference before an answer can be attempted.
They are often questions asking for consequences or results**.** These may relate to the effect of a particular law or the possible result of a hypothetical legal case. They are difficult questions to answer (even in your first language!) as they involve a high level of information processing.
e.g. *"Would David Beckham get a trademark on his signature?"*

5. Questions involving making a case or argument from existing information.
These are very common questions for law students, trained in arguing from analogy. They are similar to 4 except that they require synthesising information from multiple sources.
e.g. "I'm a UK business, John Brown. I want to export to other European states. What happens?"

The language and communication of jury instruction

Chris Heffer
Cardiff University

Systems of justice based on lay juries are meant to ensure a close link between the law and the community it serves: jurors represent the values of the community and these are fed back into the legal system. However, juries can only arrive at legally fair decisions if they have managed to understand and apply the law relating to the case. Yet legal systems in common law countries have paid scant attention to whether legal instructions delivered by the judge are actually conveyed effectively to the jury. This chapter considers the process of jury instruction from linguistic and communicational perspectives. It draws a key distinction between 'jury instructions', or the legal texts produced by judicial committees and delivered by judges, and 'jury instruction', or the process of communicating the relevant law to a specific jury in the context of a specific trial. While the comprehension of specific instructions can be improved by rewriting them in plain English, the overall process of instruction requires much more radical revision if we want to ensure that lay juries will bring in true and just verdicts which reflect both the law and the values of the community.

1. Introduction

Jury instruction, or the process of conveying the law of a case to a jury, is of vital significance to the justice systems of common law jurisdictions retaining jury trial. In principle, trial by jury is an attempt to link legal rules with community values. Members of the community are randomly selected from all walks of life and brought together to hear the evidence in a case and decide on a verdict in accordance with the legal charges.[1] The jury decide on the 'facts' of the case (what

1. Jury systems vary widely (Vidmar 2000). In US jurisdictions, jury trial is used extensively in both criminal and civil cases, while in England and Wales, it is almost solely used for serious ('indictable') criminal cases tried in Crown Courts. Most jurisdictions have juries of twelve, but

actually happened) by drawing on their combined knowledge and experience of the world, their 'community' or 'common' sense. They are then expected to arrive at their verdicts by applying the relevant categories and principles of the law. Since juries, though, cannot be expected to have prior knowledge of the law, it falls on the trial lawyers and judges both to convey to the jury clearly and effectively the legal elements of their decisionmaking task, and to facilitate the jury's compliance with those legal instructions during deliberation. If a judge fails to convey the standard of proof 'beyond reasonable doubt'[2] effectively, the jury might set too low a standard and convict a defendant unjustly. Moreover, if that offence is a capital one and the penalty phase instructions on aggravating and mitigating circumstances are incomprehensible, the defendant may eventually be put to death unjustly, and irremediably.

Legal instruction, then, can have a marked effect on jury verdicts, and those verdicts can have a profound effect on people's lives. Yet despite these high stakes, this chapter will show that the legal profession has mostly failed to communicate the law effectively to juries, which has put into question the very legitimacy of jury trial. I shall begin the chapter by outlining the context of jury instruction and by making an initial distinction between jury instruction as text and process. I shall then briefly survey the sub-area most extensively studied by linguists: the comprehensibility of standard jury instruction texts. This will lead to a consideration of attempts to rewrite those instructions in a more comprehensible form. Finally, I shall adopt a wider-angle lens to consider jury instruction as an ongoing process of communication rather than as a set of legal texts.

2. The context of jury instruction

We need to distinguish the overall process of communicating the relevant law effectively to the jury during the trial – jury instruction – from the legal texts that are delivered to juries during the trial – jury instructions. The jury instruction process

US juries can be as small as six. The randomness of the selection procedure also varies widely: in England and Wales almost anyone on the electoral roll (including legal professionals and government ministers) can be selected, and challenges to prospective jurors are difficult and rare, while in many US jurisdictions, legal and peremptory challenges are common and jury selection is seen as part of the adversarial process.

2. Several variations on this formula exist. US jurisdictions generally use 'beyond a reasonable doubt', but the determiners *all* and *any* are also used. I will use the 'zero determiner' formulation as an umbrella expression.

has been the main concern of psychologists (Lieberman and Sales 1997), while jury instructions as texts have been the central focus of most lawyers and linguists.

2.1 Jury instruction

Central to the jury instruction process are the jurors themselves. Jurors are used in trials not for their knowledge of the law but for their knowledge of life. In classic jury cases, the jury have to decide such issues as the intent of a defendant, the consent of a complainant, or the reliability of witnesses. There is no way of scientifically proving such issues since they depend on drawing complex pragmatic inferences from the observed verbal and non-verbal behaviour of participants. What jurors are being called on to do in such cases is to reason in a 'narrative' mode (Heffer 2005), which, as Bruner (1986, 1990) explains, means striving to understand the actions and intentions of humans situated in place and time. We are remarkably experienced at doing this since we are fundamentally intersubjective beings who are constantly reading others' minds. Though each of us is fallible in very many ways, the twelve minds of a jury, when working together, can form a formidable body of expertise when it comes to drawing inferences from the facts in a case.

This body of expertise in human affairs, though, needs to be channelled through the legal straits of the logical and decontextualized categories of the law. The jurors might infer from a defendant's actions that he was hit by road rage, but the law will require them to establish according to a number of tests whether the steering-wheel block in his hand constituted an offensive weapon or not. In Bruner's terms, they are being asked to reason in a 'paradigmatic', or logico-scientific mode, yet in a context in which the everyday reasoning of the narrative mode would usually predominate. This is the crux of the challenge for judges: how to overlay legal construction onto a narrative base.

In terms of the trial process, the problem can be modelled as in Figure 1. In this model, the fact-finding stage of a criminal jury trial is conceived as a series of embedded processes of evidence construction, in which the 'facts' explicitly constructed in the evidential phase are embedded into stories explicitly constructed in the opening and closing speeches. These stories, in turn, are embedded into a legal construction introduced in the reading of the indictment or preliminary instructions and explicitly detailed in the judge's instructions to the jury.[3] As with the fact

3. Once again, there is wide variation across jurisdictions. In England and Wales, the Opening Address is given by the Prosecution alone, who are meant to explain the Indictment in a neutral way. In some US jurisdictions, the charge to the jury precedes rather than follows the closing speeches.

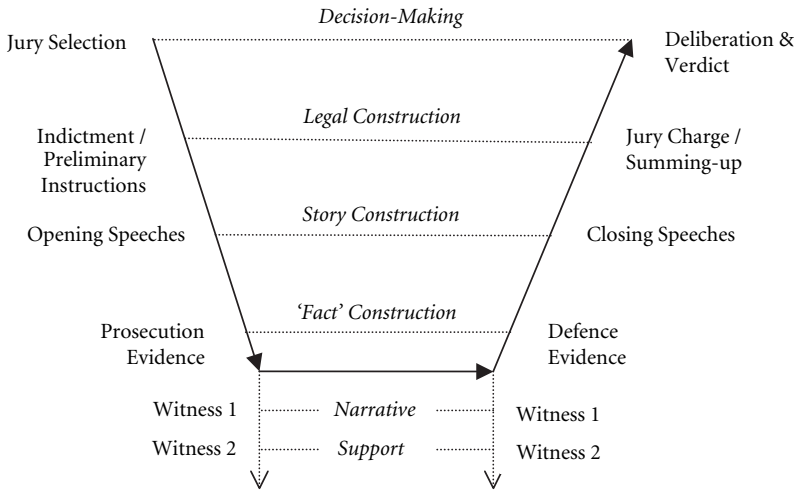

Figure 1. Jury trial and the instruction process (adapted from Heffer (2005: 71))

and story construction, legal construction can take place throughout the trial: trial lawyers in criminal cases will generally refer to the charges and the burden and standard of proof in their speeches; judges will refer to points of law during the evidential phase.[4] However, preliminary instructions, where used, tend to be more procedural than substantive, while the 'advice' of counsel is aimed to persuade rather than instruct. So the main burden of instruction still falls on the judge in his or her 'Charge' (US) or 'Summing-up' (England & Wales) to the jury.[5] In a nutshell, it is primarily the judge's task to ensure that jurors do not skip directly from story construction to decision-making, bypassing the legal construction.

2.2 Jury instructions

Three types of legal instructions need to be conveyed to juries during the judge's charge or summing-up to the jury. Firstly, there is the law applying to the specific case, and particularly the legal elements of the charges on the indictment, such

4. Most discussion of law, though, takes place out of the hearing of the jury: either the jury are sent out of the courtroom (as in England) or the lawyers and judge talk softly at the bar.

5. The English 'summing-up' (judge's instruction of the jury) should not be confused with the US 'summation' (the lawyer's closing argument). To confuse matters further, the authoritative *Black's Law Dictionary* (Garner 1999) gives 'summing up' as a synonym of both 'summation' and 'closing argument' and does not list the meaning of 'summing-up' used in England, Wales, Australia and New Zealand.

as murder, rape or theft. These instructions should enable the jury to address the key question of whether the prosecution evidence satisfies the legal charges. However, the language is usually drawn from statutes written for a solely legal audience and so exhibits many of the characteristic features of legal language, such as complex embedding, listing and nominalization (see below and Tiersma 1999; Gibbons 2003):

> **22**.—(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.
> (British Theft Act 1968, s.22)

Secondly, judges need to instruct juries on the law concerning the evaluation of the evidence they have heard. This includes instructions on how they should treat certain types of evidence (circumstantial evidence, defendant's lies), how they should think about the evidence (speculation, separate offences) and how they should decide on the defendant's guilt (presumption of innocence, burden and standard of proof). The language of these instructions generally derives from case law (judicial opinions and judgments) but it has often been standardised and sometimes simplified in template instructions drawn up by formal or informal groups of legal professionals. The US Federal Judicial Center provides a relatively clear instruction on the burden and standard of proof:

> The prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt…. (FJC 1988: No. 21, 28)

Finally, judges need to instruct juries on the technicalities of deliberation (selecting a foreman, unanimous verdict, retirement). These are often set out in template form but do not derive from legal texts.

The extent to which judges can author their own jury instructions, rather than rely on pre-existing texts, varies significantly. In many US jurisdictions, judges are meant to read the 'pattern' instructions verbatim or to make only very minor changes in phrasing. Accordingly, Judge Ito's instruction on presumption of innocence in the OJ Simpson criminal trial was virtually identical to the then Californian pattern instruction, which in turn was taken verbatim from a section in the California Penal Code, which in turn was taken from the judgment in a Massachusetts case from 1850 (Tiersma 2001: 1111). In England and Wales, on the other hand, judges are guided by the Lord Chief Justice, in his Foreword to the *Specimen Directions*, that the instructions 'have to be selected and tailored to meet the facts of a particular case and not used indiscriminately' (JSB 2005).

Accordingly, English judges display very wide variation in the wording of their instructions (Heffer 2005: 166–75, 2006: 174–78) and this variation tends to be accepted by courts of appeal. The acceptance of judicial discretion and the requirement to tailor the instructions to the facts also explains the existence in the summing-up of extensive reviews of the evidence based on the judge's trial notes.

3. The comprehensibility of pattern jury instructions

Most linguistic and psycholinguistic study of jury instructions has been concerned with the comprehensibility of US 'pattern' (also 'standard', 'model' or 'approved') jury instructions. In theory, pattern instructions are meant to improve the efficiency, accuracy, consistency and comprehensibility of instruction. In practice, only the first three of these aims has been achieved: time and money is saved by not having to prepare new instructions for each case; judicial and bar groups are able to ensure that the instructions are legally accurate, thereby reducing the number of appeals for incorrect instructions; and, if the instructions are read verbatim, consistency of instruction is assured across cases. This focus on efficiency, accuracy and consistency, though, has arguably come at the price of comprehensibility, since, as with other legal texts, the wording becomes fossilised and judges find themselves with no leeway to adapt their language to suit lay jurors. Many US jurisdictions do require pattern instructions to be 'simple', 'conversational', 'free of jargon' and 'understandable to the average juror' (Tiersma 1999: 232), but in practice they are often highly complex, densely written, full of legal terminology and well beyond the comprehension level of the average juror. Seen from the perspective of an individual judge, what we have here is a 'two-audience dilemma', 'an underlying tension between the language appropriate to the lay jury audience, and the language appropriate to the specialist legal audience' (Gibbons 2003: 174). Concerned about the reaction of the higher courts, judges are often extremely reluctant to stray from the legal safety of 'approved' instructions. However, seen from an institutional perspective, this is not so much a dilemma as something approaching culpable carelessness in communication, since the ostensible aim of jury instruction is clearly *not* to communicate with the higher courts but to instruct the jury. Quite simply, if the higher courts understand the importance of clear communication with juries, then they will be more reluctant to overturn sentences on the basis of instructions which communicate effectively to the jury; and if the higher courts are more lenient, then there is less of a dilemma. Yet in drawing up pattern instructions, committees have tended to pay precious little attention to basic questions of comprehensibility:

> Like priests debating fine points of a Latin mass to be delivered to French-speaking peasants, lawyers devote tremendous energy to refining arcane statements of the law that mean little to the jury. (Tiersma 1993: 41)

Indeed, so ineffective have these standard instructions been in actually communicating effectively with juries that a number of studies have shown little or no difference in comprehension between jurors who received the pattern instructions and control groups who received no instruction at all (Strawn and Buchanan 1976; Elwork et al. 1977; Kramer and Koenig 1990).

The issue of incomprehensibility came to the fore with the rise of the Plain English movement in the 1960s and 1970s, but by the end of the 1970s claims about 'legalese' were still primarily anecdotal. Robert and Veda Charrow set out to remedy this situation by producing 'the first empirical, objective linguistic study of the comprehensibility of … standard jury instructions' (Charrow and Charrow 1979: 1307). The Charrows tested three Hypotheses (1979: 1309):

1. that standard jury instructions – when viewed as discourse – are not well understood by the average juror;
2. that certain linguistic constructions are largely responsible for this hypothesized incomprehensibility; and
3. that if the problematic constructions are appropriately altered, comprehension should dramatically improve, notwithstanding the 'legal complexity' of any given instruction.

In a first experiment, they recorded fourteen pattern civil jury instructions that were used at the time in California and played them twice to thirty-five randomly-chosen prospective jurors in Maryland. The jurors were then recorded paraphrasing the instructions they had just heard. To enable quantitative analysis, the instructions were divided into meaningful segments, which were then marked as correct or incorrect paraphrases. On this 'full performance' measure, the jurors managed to paraphrase correctly only 39% of the segments. On a more lenient 'approximation' measure, which counted only those segments essential to the instructions, the subjects scored a mean of 54%. Both these results lent robust support to the Charrows' 'comprehension' hypothesis (1).

Detailed analysis of the results from the paraphrase test provided no support for widely held beliefs about the comprehension of jurors (that it depends primarily on demographic factors) or the comprehensibility of texts (that it depends primarily on sentence length). Comparison of the results with a detailed jury questionnaire revealed that the only demographic factor affecting comprehension

was level of education (1979: 1320–21),[6] a result which has been replicated in a number of subsequent studies (e.g. Elwork et al. 1982; Severance and Loftus 1984; Kramer and Koenig 1990). With regard to the texts themselves, the Charrows found virtually no correlation between sentence length and juror comprehension. This is significant because most readability formulas (including the highly popular Flesch formula now packaged with Microsoft Word® and imposed in some legal contexts as a 'plain language' standard) are based on equations combining word length and sentence length. On the other hand, they identified a number of specific linguistic features that appeared to impede comprehension, thus supporting their 'comprehensibility' hypothesis (2). Some of these features, which are typical of legal language in general, included:

- **Difficult lexical items** – technical legal terms (*proximate cause*) and uncommon words (*stipulate*) which were either unknown or poorly understood.
- **Word lists** – both legal binomials and trinomials ('give, bequeath and devise') that were unknown to the juror, and simple lists ('knowledge, skill, experience, training or education') that created problems of recall.
- **Nominalizations** – abstract nouns derived from verbs, usually by adding suffixes like *-ing*, *-ion* and *-ure*, e.g. 'the party or parties making *the stipulation* or *admission*', '*failure* of *recollection*'. The nominalized forms are more abstract, remove the agent and make the sentence grammatically more complex.
- **'Whiz' deletion** – the omission of relative pronouns (*which*, *who*, *that*, etc.) plus copula verbs (*is*, *am*, *are*, *was*, *were*, etc.) in subordinate clauses, e.g. 'questions of fact [~~which have been~~] submitted to you'. The omission of these key grammatical 'function' words increases the cognitive processing load.
- **Multiple negation** – the use of two or more semantically negative words or morphemes (*no*, *not*, *in-*, *un-*, *mis-*, *unless*, *except*, *avoid*, etc.) e.g. 'innocent *mis*recollection is *not un*common'. There is clear psycholinguistic evidence that 'as the number of negatives in a sentence increases, processing time and error rate similarly increase' (1979: 1324).
- **Passives in subordinate clauses** – e.g. 'You must never speculate to be true any insinuation suggested by a question asked a witness'. Passive structures in main clauses were not problematic, but passives in subordinate clauses seriously impeded comprehension.
- **Embeddings** – use of complex or multiple subordinate clauses within a single sentence. The Charrows found 'a high negative correlation between

6. The questionnaire sought information about age, sex, occupation, education, native language, legal training, prior jury service, prior military service, and a number of other variables.

performance and the number of embeddings used: as the number of embeddings increased, comprehension decreased' (1979: 1327).

– **Poor discourse structure** – the information in an instruction is poorly organised and poorly signposted so that the juror is left confused.

The following instruction on testing for negligence reveals a number of these problem features.

> BAJI 3.11
> One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided, then not to avoid it would be negligence.

The instruction is full of complex embedding and has a poor discourse structure. The first sentence contains nine subordinate clauses, a number of legal binomials (e.g. 'foreseen or anticipated', 'action or inaction') and the legal term 'person of ordinary prudence'. The second sentence has, amongst others, a passive in a subordinate clause ('if … could be avoided'), an infinitive phrase with a double negative ('*not* to *avoid* it'), and an ambiguous phrase ('from certain conduct'). The overall mean paraphrase score for this instruction was 0.25.

In a second experiment, the Charrows rewrote the instructions, removing the problematic constructions and re-organising the information, and the original and revised instructions were tested on two more groups of jurors. This experiment gave some support to their 'rewriting' hypothesis (3), though, as we shall see in the following section, the improvement in comprehension was not 'dramatic'.

After almost thirty years, the Charrows' study remains the seminal psycholinguistic statement on the linguistic complexity of pattern jury instructions, but numerous subsequent studies (e.g. Severance et al. 1984; Kramer and Koenig 1990; Reifman et al. 1992; Ellsworth 1989; Steele and Thornburg 1988) have confirmed their findings. In a review of the literature, Lieberman and Sales (1997: 596–97) conclude that '[i]t is common to find over half the instructions misunderstood, and even the most optimistic results indicate that roughly 30% of the instructions are not understood'.

4. The rewriting and reconceptualization of jury instructions

The Charrows claimed that rewriting their jury instructions had a significant impact on comprehension: removing nominalizations and replacing difficult lexical items both led to a 45% improvement in comprehension on those segments; the restoration of whiz-deleted material led to a 58% improvement; and the elimination of passives in subordinate clauses led to 81% improvement. Overall, their modified instructions resulted in an average of 41% improvement on the full performance measure and 35% on the approximation measure (1979: 1368 Table 12, 1370 Table 14). However, these results are deceptive since the revised instructions still score only 43% on the full performance measure and 59% on the approximation measure. Roughly speaking, then, jurors are still understanding only about half of the modified instructions. It should be noted that no attempt was made to replicate actual trial conditions so this was very much a test of the wording of the instructions rather than of their comprehension under trial conditions, let alone their effectiveness. Oral paraphrase is also a difficult test of comprehension. However, subsequent attempts at rewriting have also been somewhat disappointing. Severance et al. (1984) showed a videotape of a burglary trial as a stimulus and used both paraphrase and comprehension questions, but there was only a modest improvement in comprehension on the modified versions. Steele and Thornburg (1988) used a paraphrase test and revised instructions based on Elwork et al. (1982). However, jurors correctly paraphrased only 13% of the pattern instructions and 24% of the rewritten ones – a notable improvement but still far too little.

Lawyers often claim that the problem is the complexity of the legal concepts themselves. While this might be the case for some extremely complex civil instructions, very often the instructions jurors have most difficulty with are, or should be, conceptually quite straightforward. For example, Severance et al. (1984) failed to achieve any improvement at all in their modified version of the Washington State pattern criminal instruction for 'Burden of Proof; Presumption of Innocence; Reasonable Doubt'. Ignoring legal niceties, from a functional perspective the first two of these concepts are very simple: the prosecution have to prove the case and the defendant does not have to prove he is innocent. The third concept, more clearly labelled 'Standard of Proof', is again very simple: it is concerned with how convinced you have to be by the evidence before you can convict. The Federal Judicial Center, as we saw above, puts it as follows:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. (FJC 1988)

The English Judicial Studies Board puts it even more simply:

> How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. (JSB 2005)

Technically, jurors have to achieve a rational mental state of subjective certainty (Heffer 2006: 164–66), but in lay terms they need, on the basis of the evidence, to be 'firmly convinced' or 'sure' of the defendant's guilt. There is nothing particularly difficult about that, though some legal academics have problems with 'sure' (Heffer 2007). Now consider Severance et al's modified version of the 'Reasonable Doubt' part of the instruction, which is a superficial improvement on the original:

> A reasonable doubt about guilt is not a vague or speculative doubt but is a doubt for which a reason exists. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after that person has fully, fairly and carefully considered all of the evidence or lack of evidence. If, after such thorough consideration, you believe in the truth of the charge, you are satisfied beyond a reasonable doubt. (Severance et al. 1984: 210)

The problem here is not the superficial wording of the instruction but its entire conceptualization. The focus is not on how convinced the current jurors have to be, but on abstractly defining the legal concept of 'reasonable doubt'. Yet that concept is irrelevant to the juror's practical task. Jurors have to be convinced 'beyond reason to doubt' (as the term originally meant); they do not have to spend deliberation time classifying the types of doubt they might have. Indeed, Solan (1999) argues that the focus on 'reasonable doubt' common in many US jurisdictions is not just poor communication but pernicious, since it refocuses the burden of proof from the prosecution to the defence: the juror is left looking for concrete doubts that might acquit the defendant rather than a high level of proof in the prosecution case.

Lawyers persist with a 'presumption of comprehension' when it comes to jury instructions (Tiersma 2001). Rather like the presumption of innocence, which is applied despite, or perhaps because of, our knowledge that people do often presume that the defendant is guilty (Vidmar 1997), the presumption of comprehension is made against overwhelming evidence that juries do not in fact understand jury instructions. This applies not only to instructions as a whole, but also to specific legal terms. New South Wales is far from alone in presuming, in their 'suggested direction', that lay people understand *beyond reasonable doubt*:

> This expression 'proved beyond reasonable doubt' is an ancient one. It has been deeply ingrained in the criminal law of this State for almost 200 years and it needs no explanation from trial judges. (JCNSW 1990–2005)

That ingrainedness in criminal law should entail comprehension by the lay public is a remarkable claim, and the empirical evidence shows that in fact the legal term is poorly understood (Heffer 2006: 168). Similarly, courts in the US have presumed that jurors understand the legal terms *mitigating* and *aggravating* in death penalty instructions. The Supreme Court of Georgia, for example, has claimed that *mitigation* 'is a word of common meaning and usage' (cited in Tiersma 1995: 13) and a number of other courts have claimed that there is no need to define either of the terms. Yet there is ample evidence to show that *mitigation* is a low-frequency word which is poorly understood even by well-educated university students, while *aggravation* is understood well in the informal lay sense of 'annoyance' but poorly understood in the formal and legal sense of 'worsening' (Tiersma 1995). Given that jurors have to weigh up whether the aggravating circumstances outweigh the mitigating ones when deciding on death, simply presuming comprehension is unfortunate to say the least.

5. Jury Instruction as communication process

So far, we have considered jury instruction primarily from the perspective of the comprehensibility of jury instruction texts, or **jury instructions**. Clearly, comprehension is a necessary condition for instruction effectiveness, and one that has been poorly neglected in the past, but it is not a sufficient one. The primary normative aim of jury instruction must be not merely, as Judge Ito declared to the jury in the OJ Simpson criminal trial, to 'provide you with the applicable law' (Ito 1995), but to help ensure that the jury are able to understand that law and apply it effectively to the particular case they are trying. In short, the jury need to be both able and willing to comply with those instructions. As Figure 2 indicates, capability, in turn, requires both competence to carry out the task and comprehension of the instructions, while willingness requires both motivation (the interest or drive to carry out the task) and acceptance of the task as a legitimate one. Clearly, the relation between competence, comprehension, motivation and acceptance is much more complex than indicated here, but the diagram is intended merely as a useful heuristic for discussing more general issues regarding the instruction process.

5.1 Capability

We have considered how the linguistic complexity of jury instruction texts seriously affects comprehension, but such complexity is merely one aspect (though a very important one) of comprehension. The timing of instruction, for

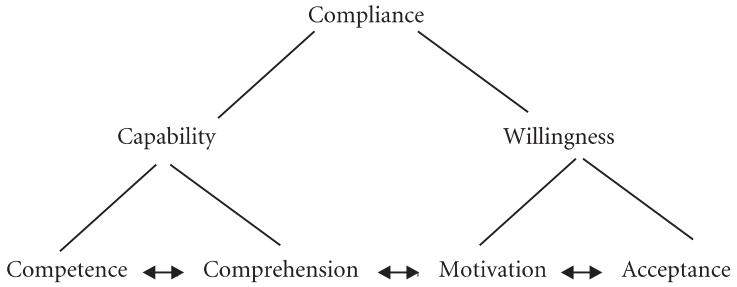

Figure 2. A simple model of instruction compliance

example, is also extremely important. Currently, most instruction is kept back to the pre-deliberation judicial speech, but there is some evidence to suggest that more substantial preliminary instructions would help the jury to filter the evidence they heard through the legal framework already provided by the judge (Lieberman and Sales 1997: 628–32). There is also a serious mismatch between the written mode of the instructional texts and the oral mode in which they are delivered (Stygall 1994: 186–88), though the evidence is mixed on whether the provision of written copies of the instructions helps (Lieberman and Sales 1997: 626–28). On the other hand, processes of linguistic accommodation (Giles and Powesland 1975) to the jury have been noted by both Philips (1985) and Heffer (2002, 2005). In both cases, judges working from Bench Books of instructions adapted those instructions to the specific spoken context. Philips noted that judges switched 3rd person *he* to 2nd person *you,* used interactive checks and broke up long and complex syntactic structures. In my own study, I noted how many of my 60 judges 'narrativised' the language of the *Specimen Directions* through a wide range of experiential, interpersonal and textual features. The extent of accommodation was far greater in this case than in Philips since English judges have much greater discretion than judges in the US. While I speculate that such processes of accommodation aid both comprehension and motivation, we currently lack empirical evidence on the effect of speech accommodation, or audience design (Bell 1984), in instructional contexts.

Questions of accommodation to the jury audience raise the issue of juror competence. On the one hand, jurors qualify for their role on the basis of citizenship and their experience of life. We have seen that educational level is the one sociodemographic variable affecting comprehension, and one might conclude that this would warrant exclusion of the poorly educated. However, this would lead to a serious democratic deficit. Provided the jury is selected from a representative sample of the population, one or two jurors of low educational level should not seriously affect the work of the jury as a whole. On the other hand, jurors are

presumed to come to court as blank slates with regard to the law and their evaluation of evidence. Once again, though, this is a presumption which simply does not hold up. Leaving aside the complication of legally-trained jurors (now possible in England and Wales), all jurors come to court not as empty vessels but with their own prototypical representations of legal concepts which may or may not coincide with those of legal professionals (Smith 1991). They also come with a set of reasoning biases. A dispositional bias, for example, leads us to interpret conflicting statements as more likely to be intentional lies than accidental inaccuracies (Kassin and Wrightsman 1985). Then there are the well-known biasing schemas such as 'once a criminal, always a criminal'. While such evident biases might appear to challenge the competence of lay jurors, there is strong evidence to suggest that judges are no less subject to these biases (Wagenaar et al. 1993). Furthermore, there is evidence to suggest that the biases of individual jurors become weakened on hearing the evidence and discussing it with others (Myers and Lecci 1998). Nevertheless, more effort can clearly be made to counteract these biases through instruction. Smith (1993) found that it was possible in instruction to counteract prototype effects relating to crime categories by explicitly listing non-prototypical features, such as noting that kidnapping does not have to involve a ransom, and Heffer (2006) suggests that a similar intervention might be possible with regard to the presumption of guilt.

2.2 Willingness

Moving to the other side of the compliance diagram in Figure 2, the relation between jury instruction and the willingness of juries to comply has been considerably under-studied. Comprehension improves notably when there is a strong desire to understand (Weinert and Kluwe 1987), and greater motivation, in turn, should lead to more thorough deliberation. Yet the jury are given no carrots or sticks to encourage motivation either positively or negatively: they are not paid, they are given no reward for performing well and they are not required to motivate their verdict. Clearly, esteem and involvement are key issues here. Dumas (2000) argues that jurors should be treated as 'expert' fact-finders and be accorded the type of respect given to other experts. Although it is odd to conceive of jurors as experts, given that they are chosen precisely for their role as 'ordinary' citizens rather than for any particular expertise they might possess, the types of reforms proposed by Dumas and others can be sustained on the basis of improving motivation alone: providing jurors with notebooks containing key information, such as glossaries of technical terms and key information on the witnesses and the charges (Dann 1993); encouraging jurors to take notes and ask questions

of witnesses during the trial (Heuer and Penrod 1994) and the judge during deliberation (O'Neill 1989); and perhaps allowing jurors to discuss the case during breaks within the trial (Sullivan and Amar 1996).

Possibly the most useful reform in terms of both motivation and comprehension is for the judge to adapt the legal instructions to the particulars of the case which the jury have been following. In addition to providing reviews of the evidence, English judges are now being encouraged to integrate their legal instructions with the evidence (Auld 2001). However, this reform is highly contentious, since the greater the interaction between judge and jury, the greater the opportunity for bias. So positive motivational factors appear to be in direct conflict with the ideals of due process. While juries, for example, tend to find reviews of the evidence helpful (Zander and Henderson 1993; Young et al. 1999), reviewing the evidence inevitably leads to the expression of judicial perspective. English judges make very explicit disclamations in their summings-up:

> If in the course of my summary of the evidence I appear to express any views about any matter, ignore them unless they happen to coincide with your views. (Heffer 2005: 198)

However, it is quite possible that these disclamations actually produce a 'backfire effect', of the sort found when judges instruct jurors to disregard inadmissible evidence (Pickel 1995). By constantly disclaiming, they are constantly reminding the jury that they are indeed trying to convey their view of the issues, thereby encouraging jurors to search for a view. Moreover, in searching, jurors may well be listening selectively for comments to support the view of the case they already hold. This might explain the curious phenomenon that while a large proportion of English jurors believe that the judge in the case they heard summed up in favour of the prosecution or defence, there is little agreement within any given jury as to which way the judge summed up (Zander and Henderson 1993).

Finally, jurors might be motivated to apply the law effectively but not accept to do so in the given case. In these cases of jury 'nullification' (or jury 'equity'), we find a mismatch between the law and the community sense of justice (Finkel 1995). In 18th century England, when many petty crimes were capital offences, juries would often knowingly refuse to convict. Today, juries have failed to convict in cases of euthanasia or the revealing of state secrets that show up inadequacies in the government. Frequent nullification on certain types of cases sends a clear message from the community to the lawmakers that the law needs to change. From this perspective, death penalty instructions in the US are doubly problematic. Firstly, the adversarial jury selection process ('voir dire') often results in 'death-qualified' juries that exclude representatives from the large and growing proportion of the community who oppose capital punishment. Secondly,

the jury instructions themselves are often worded in such a way as to remove any moral responsibility from the juror:

> You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances. (NCCSCJ 2006: s.150.10, 42–3)

Such 'scientific-sounding instructions' calling for mathematical weighing of aggravating and mitigating factors 'suggests strongly that the ultimate death penalty decision involves mechanical application of rules rather than the exercise of genuine judgment' (Steiker 1996: 2618). Yet just as the standard of proof, however elaborately put, can be reduced to the basic question 'Am I sure the defendant is guilty?' (Heffer 2007), so the death penalty decision can be reduced to the question 'Does the defendant deserve to die?' Since the death penalty instructions remove this focus on moral desert, though, Steiker argues that it is almost preferable if the jurors do *not* understand them and revert instead to their commonsense notions of justice (Finkel 1995).

3. Conclusion

Judge Hiller Zobel[7] has described the task assigned to juries as 'asking the ignorant to use the incomprehensible to decide the unknowable' (Zobel 1995). With regard to ignorance, we established from the start that the jury are called on for their knowledge of the world and of life (not for scientific expertise), and indeed the courts wrongly presume that they are entirely ignorant of the law. As for the unknowable, we saw that jurors are called on precisely to decide on matters (intention, consent, credibility) which, though beyond the realm of logico-scientific proof, are not beyond the realm of narrative, or everyday reasoning. This rationale for employing a jury, though, places a heavy burden on the legal community to ensure that the legal aspects of the decision-making task are conveyed effectively. That jury instructions are indeed often incomprehensible can be imputed not so much to a requisite complexity in the legal concepts, or to deficiencies in the competence of jurors, but primarily to the inattention of the legal profession. Lawyers have preferred to presume comprehension rather than face the difficult

7. In the 1997 murder case of British au pair Louise Woodward, Zobel famously reduced the Boston jury's verdict of second-degree murder to involuntary manslaughter.

realities of effective, real-time communication. Valiant attempts have been made by some social scientists and lawyers to improve the comprehensibility of jury instruction texts, but the relatively modest improvements that result from these interventions point strongly to the need for more radical change to the instruction process as a whole.

The area of jury instruction thus raises serious questions for forensic linguistics as a whole about the extent to which linguistic and communication experts should go beyond a narrow linguistic remit to challenge wider questions relating to the workings of the justice system. Often the optimum communication solution involves not so much tinkering with the wording of instructions but reconceiving the conceptual foundations of those instructions. A poor 'reasonable doubt' instruction might best be dealt with by replacing the definition with a simple explanation or paraphrase of 'beyond reasonable doubt'. And the most effective instruction on mitigating and aggravating circumstances might make it clear that the jury have to decide whether or not the defendant deserves to die. That might reduce the number of jurors willing to hand down a death penalty, but this in turn might indicate the true level of support in the community for such a penalty. Robert Cover (1986) argued that while judges try to maintain the greatest distance possible between their words and the resulting deeds, all acts of sentencing are ultimately acts of violence which inflict pain and suffering on the convicted. Unless jury instruction conveys quite clearly to jurors how they should arrive at their verdicts and what those verdicts mean, such violence will not help protect but simply damage the community that the law is intended to serve.

References

Auld, R. E. 2001. *Review of the Criminal Courts of England and Wales: Report*. London: Stationery Office. (http://www.criminal-courts-review.org.uk. Accessed 20.6.05).

Bell, A. 1984. Language style as audience design. *Language in Society* 13: 145–204.

Bruner, J. 1986. *Actual Minds, Possible Worlds*. Cambridge MA: Harvard University Press.

Bruner, J. 1990. *Acts of Meaning*. Cambridge MA: Harvard University Press.

Charrow, R. P. & Charrow, V. R. 1979. Making legal language understandable: A psycholinguistic study of jury instruction. *Columbia Law Review* 79 (5): 1306–1374.

Cover, R. M. 1986. Violence and the word. *Yale Law Journal* 95: 1601–1629.

Dann, B. M. 1993. 'Learning lessons' and 'speaking rights': Creating educated and democratic juries. *Indiana Law Journal* 68: 1229–1279.

Dumas, B. 2000. US pattern jury instructions: Problems and proposals. *Forensic Linguistics. The International Journal of Speech, Language and the Law* 7 (1): 49–71.

Ellsworth, P. C. 1989. Are twelve heads better than one? *Law and Contemporary Problems* 52 (4): 205–24.

Elwork, A., Sales, B. & Alfini, J. 1977. Juridic decisions: In ignorance of the law or in light of it. *Law and Human Behavior* 1: 163–189.

Elwork, A., Sales, B. & Alfini, J. 1982. *Making Jury Instructions Understandable*. Charlottesville VA: Michie.

Finkel, N. J. 1995. *Commonsense Justice: Jurors' Notions of the Law*. Cambridge MA: Harvard University Press.

FJC 1988. *Federal Judicial Center Pattern Criminal Jury Instructions*. Washington DC: Federal Judicial Center.

Garner, B. (ed.) 1999. *Black's Law Dictionary*. St. Paul MN: West Publishing Co.

Gibbons, J. 2003. *Forensic Linguistics: An Introduction to Language in the Justice System*. Malden MA: Blackwell.

Giles, H. & Powesland, P. 1975. A social psychological model of speech diversity. In *Speech Style and Social Evaluation,* H. Giles & P. Powesland (eds.), 154–170. New York NY: Harcourt, Brace.

Heffer, C. 2002. 'If you were standing in Marks and Spencers': Narrativisation and comprehension in the English summing-up. In *Language in the Legal Process,* J. Cotterill (ed.), 228–245. Houndmills: Palgrave.

Heffer, C. 2005. *The Language of Jury Trial: A Corpus-aided Analysis of Legal-Lay Discourse*. Houndmills: Palgrave.

Heffer, C. 2006. Beyond 'reasonable doubt': The criminal standard of proof instruction as communicative act. *The International Journal of Speech, Language and the Law* 13 (2): 159–188.

Heffer, C. 2007. The Language of conviction and the convictions of certainty: Is *sure* an impossible standard of proof? *International Commentary on Evidence* 5 (1) Art.5. (http://www.bepress.com/ice/vol5/iss1/art5. Accessed 15/7/08)

Heuer, L. & Penrod, S. 1994. Juror notetaking and question asking during trials: A national field experiment. *Law and Human Behavior* 18: 121–150.

Ito, J. 1995. *Judge Ito's 9/95 Jury Instructions In O.J.s' Criminal Case*. Lectric Law Library**:** 154–70. (http://www.lectlaw.com/files/cas62.htm. Accessed 7/6/06).

JCNSW 1990–2005. *Criminal Trial Courts Bench Book*. Judicial Commission of New South Wales. (http://www.jc.nsw.gov.au/publications/publications.php. Accessed 3/6/06).

JSB 2005. *Crown Court Benchbook: Specimen Directions*. London: Judicial Studies Board. (http: www.jsboard.co.uk/publications.htm. Accessed 15/3/07).

Kassin, S. M. & Wrightsman, L. S. 1985. *The Psychology of Evidence and Trial Procedure*. Beverley Hills CA: Sage.

Kramer, G. & Koenig, D. 1990. Do jurors understand criminal jury instructions? *University of Michigan Journal of Law Reform* 23 (3): 401–438.

Lieberman, J. D. & Sales, B. 1997. What social science teaches us about the jury instruction process. *Psychology, Public Policy and Law* 3 (4): 589–644.

Myers, B. & Lecci, L. 1998. Revising the factor structure of the juror bias scale: A method for the empirical validation of theoretical constructs. *Law and Human Behavior* 22 (2): 239–256.

NCCSCJ 2006. *North Carolina Pattern Jury Instructions for Criminal Cases*. North Carolina Conference of Superior Court Judges. Committee on Pattern Jury Instructions. Raleigh NC: North Carolina Conference of Superior Court Judges.

O'Neill, V. 1989. Famous last words: Responding to requests and questions of deliberating jurors in criminal cases. *Criminal Justice Journal* 11 (2): 381–402.

Philips, S. 1985. Strategies of clarification in judges' use of language: From the written to the spoken. *Discourse Processes* 8: 421–439.
Pickel, K. L. 1995. Inducing jurors to disregard inadmissible evidence: A legal explanation does not help. *Law and Human Behavior* 19: 407–424.
Reifman, A., Gusick, S. M. & Ellsworth, P. C. 1992. Real jurors' understanding of the law in real cases. *Law and Human Behavior* 16 (5): 539–554.
Severance, L. J., Greene, E. & Loftus, E. F. 1984. Toward criminal jury instructions that jurors can understand. *The Journal of Criminal Law and Criminology* 75 (1): 198–233.
Severance, L. J. & Loftus, E. F. 1984. Improving criminal justice: Making jury instructions understandable for American jurors. *International Review of Applied Psychology* 33: 97–119.
Smith, V. L. 1991. Prototypes in the courtroom: Lay representations of legal concepts. *Journal of Personality and Social Psychology* 61: 857–872.
Smith, V. L. 1993. When prior knowledge and law collide: Helping jurors use the law. *Law and Human Behavior* 17 (5): 507–536.
Solan, L. M. 1999. Refocusing the burden of proof in criminal cases: Some doubt about reasonable doubt. *Texas Law Review* 78 (1): 105–147.
Steele, W. W. & Thornburg, E. G. 1988. Jury instructions: A persistent failure to communicate. *North Carolina Law Review* 67: 77–119.
Steiker, J. M. 1996. The limits of legal language: Decisionmaking in capital cases. *Michigan Law Review* 94: 2590–2624.
Strawn, D. & Buchanan, R. 1976. Jury confusion: A threat to justice. *Judicature* 59: 478–483.
Stygall, G. 1994. *Trial Language: Differential Discourse Processing and Discourse Formations*. Amsterdam: John Benjamins.
Sullivan, E. R. & Amar, A. R. 1996. Jury reform in America: A return to the old country. *American Criminal Law Review* 33: 1141–1168.
Tiersma, P. 1993. Reforming the language of jury instructions. *Hofstra Law Review* 22: 37–78.
Tiersma, P. 1995. Dictionaries and death: Do capital jurors understand mitigation? *Utah Law Review* 1: 1–50.
Tiersma, P. 1999. *Legal Language*. Chicago IL: University of Chicago Press.
Tiersma, P. 2001. The rocky road to legal reform: Improving the language of jury instructions. *Brooklyn Law Review* 66 (4): 1081–1118.
Vidmar, N. 1997. Generic prejudice and the presumption of guilt in sex abuse trials. *Law and Human Behavior* 21 (1): 5–25.
Vidmar, N. (ed.) 2000. *World Jury Systems*. Oxford: OUP.
Wagenaar, W. A., van Koppen, P. J. & Crombag, H. F. M. 1993. *Anchored Narratives: The Psychology of Criminal Evidence*. Hemel Hempstead: Harvester Wheatsheaf.
Weinert, F. E. & Kluwe, R. H. (eds) 1987. *Metacognition, Motivation, and Understanding*. Hillsdale NJ: Lawrence Erlbaum Associates.
Young, W., Cameron, N. & Tinsley, Y. 1999. *Juries in Criminal Trials*. New Zealand Law Commission Preliminary Paper No. 37. Vol. 2. Part II. (http://www.lawcom.govt.nz/Publications.aspx).
Zander, M. & Henderson, P. 1993. *Crown Court Study*. Royal Commission on Criminal Justice, Research Study No. 19. London: HMSO.
Zobel, H. 1995. The jury on trial. *American Heritage Magazine* 46(4). (http://www.americanheritage.com/articles/magazine/ah/1995/4/_4_42.shtml. Accessed 17/3/07).

Policespeak

Phil Hall
Appen Speech and Language Technology and Macquarie University, Sydney

This chapter focuses on the spoken language of police communication or "policespeak". It examines a number of the readily recognisable clichés and formulaic expressions that are widely regarded as characteristic of policespeak. It also looks at some facets of police work which promote specific behaviours which are less overtly characteristic of policespeak but are nonetheless strongly motivated by the demands of their contexts of use. The final portion of the chapter shows how policespeak is used as means of accommodation by interactants who are not police officers. In addressing policespeak from these various angles, the chapter attempts where possible and practical to address the contextual factors motivating the observed behaviours.

> Mostly we speak in clichés, in textual "boilerplate", in pre-compiled (as the computationalists might say) formations – not word-for-word, by any means (except, for example, in highly ritualised events), but by and large still within narrowly defined limits of selection and co-selection. This habit is not just a function of register or situational specificity; it applies as well to the structural organization of our texts and even to lexical realizations. It is text patterns, text formations, and not just registers or genres that we learn to speak.
> (Lemke 1991: 29–30)

1. Introduction

In the above passage, Lemke suggests that we all in our everyday use of language speak in clichés and boilerplate. He also suggests that these clichés formulas and boilerplate are associated with learnt registers and genres that we draw upon in order to use contextually appropriate language in a given situation. If Lemke's proposition is accepted, then the language used by police in the execution of their duties – which will be referred to here as "policespeak" (see Fox 1993) – can be thought of not just as *a set* of clichés formulas and boilerplate, but rather as *the*

particular set of them[1] perceived to be appropriate to police work as a context of use by the officers who carry out that police work.

In this chapter, I will examine instances of the kinds of formulaic language that characterise policespeak, and will try where it is relevant, and it is practical to do so, to explain the origins of and/or motivations underlying these characteristic patterns.

All of the illustrative examples used in this chapter have been drawn from real data. The main data sources are police interviews/interrogations recorded in the Australian states of New South Wales and Victoria, and in the North East of England. Additional material (press releases, media conferences) was collected from web-sources, and was drawn from the published work of Newbury and Johnson (2006), Gibbons (1994), and Auburn, Drake and Willig (1995).

This chapter is not intended to provide a comprehensive coverage of the vocabulary of policespeak – in the data reviewed, a number of well known characteristics of policespeak simply didn't occur (e.g. police operational codes – see Gibbons 2003; Cooper 1996). The various examples provided and discussed here have been selected to illustrate that the clichés and boilerplate of police language are sufficiently distinct to justify the assignment of the label "policespeak", and to give evidence that it is an unusual and distinctive form of spoken language. I have also provided examples to show that while many of the characteristics observed and discussed here do conform to the stylised, institutionalised and often clichéd patterns that one might expect of police language, there are also some very important aspects of police work which encourage interactive behaviours more typical of non-clichéd interaction. A further important point made here is that policespeak is not exclusively the domain of police officers – others involved in interactions with police can and do use language that will be discussed here as being consistent with policespeak.

2. Control over topic and interactional focus

Police language will often be oriented towards maintaining control of the direction taken in an interaction. To understand this, it is important to note that in the process of gathering information, police will seek to maintain a focus on relevant information. When interviewing suspects, "relevant" is likely to include some or all of the following: **motive, opportunity, intent, preparation, plan, knowledge,**

1. It should be noted that Lemke has not attached negative connotations to his use of the labels "cliché" and "boilerplate" – it is my intention to assume the same neutral tone wherever these terms are used with reference to policespeak.

identity, or absence of mistake or accident.[2] I will not provide examples and discussion for each of these types of "relevant information", but will use examples of two of the types – *motive* and *knowledge* – to illustrate ways in which the requirements of this type of task manifest in the language of the interviewer.

2.1 Establish 'motive'

When a police interrogator asks a suspect "And what made you do it?", s/he is specifically attempting to establish a 'motive'. The following passage, in which the interviewer is trying to establish a *motive*, illustrates a style of topic management which might seem out of place in most other contexts of interaction. It also shows how multiple purposes can be served by a single question.

(1) Pol: John*[3] it was a brutal attack on that girl.
Sus: I know.
Pol: On little Rikki*. **I want to know why you did it, I want to know what made you do it.**
Sus: I didn't do it.
Pol: **If we knew why you did it and what made you do it** well perhaps we could understand, but the way things stand we cannot fathom out the reason behind it, are you listening to what I'm saying?
Sus: Yes.
Pol: Well wouldn't you feel better **if you told us what it was all about**?
Sus: I didn't kill her.
Pol: And **what made you do it**?
Sus: I didn't kill her.

Here, the interviewing officer is asking questions which explicitly seek to establish a 'motive' for the murder of a young girl, repeatedly using variants of 'what made you do it'. This example also illustrates a number of other characteristics which would be less likely to occur in other contexts of interaction including the interviewer's relentless repetition of a single question, and his choice to ignore the fact that the question makes an implicit presupposition which is explicitly and repeatedly denied/contradicted by the suspect.

The presupposition in questions designed to address *motive*, or "why?", is that something did/didn't happen – *why did(n't)/is(n't)/was(n't) …?* etc. In an

2. The various categories covered by this list turn up in this or similar form in many "rules of evidence" documents.

3. Pseudonyms or other substitutions are marked with an asterisk throughout this chapter.

unproblematic case, the basis for a presupposition is established before a "why?" question is asked. In the above example, however, the presupposition inherent in the line of questioning – that the suspect "killed her" – had not been established earlier, and was not agreed to by the suspect during this exchange. For this reason, the suspect remains, in his responses, focussed on the inherent presupposition, while the interviewer explicitly focuses on the *motive* aspect of the question. It is, of course, almost inconceivable that either interviewer or suspect would have been unaware that a responsive answer to this question would have amounted to a confession.

2.2 Establish 'knowledge'

Establishing *knowledge* on the part of a suspect may also be of high importance to an officer's attempts to build a case. *Knowledge* in this specialised sense refers to a suspect's awareness of details which are likely to be known only to the perpetrator of a crime (and, importantly, are able to be confirmed as true by investigators). For this reason, where a suspect has made a confession, *knowledge* may be a factor in determining whether the confession is genuine or false.[4]

To understand the characteristic qualities of questions asked to establish *knowledge*, it is important to be aware of how these *knowledge* questions differ from other question types. At a most basic level, questions are frequently divided into two broadly defined types – those which *confirm known information*, and those which *seek new information*. The fundamental difference between these types is often represented as being that questions which are designed to *confirm* known information will elicit yes/no responses (formally, for example, simple polar interrogative questions – "so you've hit her on the head …?), whereas questions designed to seek new information are those which will elicit a narrative response (for example, wh-/what questions – "what made you do it?"). Questions asked by an interviewing officer to establish *knowledge* differ from this pattern in a number of ways. *Knowledge* questions use forms typically thought of as performing a *seek new information* function to *confirm known information*. This is to say, that whereas in the case of establishing *motive*, as discussed in the preceding section, an interviewer may not have a clear picture of the motive before s/he is given this information by the suspect, the interviewer **must** know (or must have the capacity to confirm independently) the answer to *knowledge* questions if they

4. False confessions are not rare and unusual occurrences – it is well documented that confessions of this type do frequently occur and that this is a particularly acute problem in jurisdictions which allow plea bargaining. See for example Leo and Ofshe (1998) and Gudjonsson (1992).

are to perform their function successfully. So if, for example, an interviewing officer were to ask "how many (e.g. *times did you stab him*)?" or "whereabouts (e.g. *on his body did you stab him*)?", the accuracy of a suspect's response to the questions could be checked against information independently known to the interviewer.

While the *motive* examples in the preceding section were clearly concerned with points central to the actual matter under investigation (e.g. "why did you kill …?"), questions designed to establish *knowledge* need not focus on details central to a case in order to be effective in achieving their aims. A suspect's ability to accurately recount otherwise mundane and irrelevant details of the crime-scene may well be adequate for the purpose of establishing *knowledge*. For this reason, interviewers may at times appear to be doggedly pursuing irrelevant matters, when they are in fact attempting to establish a point of evidence with the potential to make or break a case.

The following examples were taken from a case (ultimately dismissed due to the lack of appropriate evidence to support a poorly corroborated confession) in which the suspect, after three days of sustained questioning, during which time he denied any involvement, finally confessed to the murder of a young girl.

(2) Pol: How did you get inside.
Sus: One b- board was loose.
Pol: On what.
Sus: On the back.
Pol: Back of what.
Sus: Where the door would have been.
Pol: Was it a door?
Sus: It was shaped like a door, it may have been a window.

The above example occurs at what appears to be a transition point in the (sequentially organised) confession. Up to this point, the 'facts' of his confession were all things that could be considered to be common knowledge, since the case had received a good deal of news coverage. In other words, anyone who had read a newspaper or seen/heard a news broadcast in the preceding days would know: that a child had been murdered; where the child had last been seen; and where the child's body had been found. At this point in the confessional narrative, the suspect begins to address, and confess to, things that he might be able to <u>infer</u> on the basis of questions asked of him during the preceding interviews, but that he could know in accurate detail only if the confession were genuine. It should be noted that one of the characteristics of this and other examples from the same interview is a high level of cooperation between interviewer and interviewee – the interviewer believes that the suspect committed the crime and so is eager to accept the confession, the suspect is eager (at this point) to confess, and both are

eager to have the confession accepted by others. In this case, leaving aside the implausibility of mistaking a door for a window, the distinction between "door" and "window" is peripheral to the case, but the implications of this *knowledge* as a means of proving that the person making the confession was actually present are not trivial.

In contrast to the preceding example's focus on peripheral detail, the following extract from the same interview addresses *knowledge* of details most central to the case. Again there appears to be a high level of cooperation between a suspect who is willing to confess, and interviewers who are attempting to ensure that the suspect's *knowledge*, which will later be required in order to corroborate the confession, is fully documented.

(3) i. Pol: Did that kill her John*, with the brick?(a) John*, it didn't did it, John*?(b) There is more isn't there John*?(c)
ii. Pol: Howay[5] you have told us there was blood all over the place, what else did you do?(a) John*, we know what's happened, we know what's happened. So you know you are not holding anything back by not telling us, John* what else did you do?(b) John* howay son, just finish it off and tell us what else you did.(c) John*.
iii. Sus: Went to throttle her.
iv. Pol: You went to throttle her, what with?
v. Sus: Me hands.
vi. Pol: But you hit her with something else didn't you?
vii. Sus: Probably, I can't remember.
viii. Pol: John* think, I know it's not very nice son but just think what else did you hit her with? Eh. John*.
ix. Sus: Fist.
x. Pol: What else?(a) Howay[5] John* you used something else didn't you, John*?(b) We know howay, John* what else did you do?(c) Come on.
xi. Sus: Piece of metal.
xii. Pol: Piece of metal.

In the above passage, the purpose for which this phase of questioning is being carried out is very clearly reflected in the language choices of the interviewers. The interviewers[6] repeatedly use question forms which direct the suspect towards particular responses. They are most careful not to reveal the specific experiential

5. "howay" is a slang term commonly used in the North-East of England to mean "come on".

6. There were two interviewers present, but the transcription did not indicate which of the interviewers was speaking at any time, and these identities are not easily determined from lis-

details of the *knowledge* they are seeking to attribute to the suspect, but while stopping short of this experiential explicitness, they are presenting a considerable amount of focussed information to the suspect in order to direct him towards the provision of the specific corroborative knowledge that they require to build their case. They appear to be of the view that as long as they have not explicitly named what was used as a weapon, then they are not compromised by questions such as "but you hit her with **something else** didn't you?".

Information is presented to the suspect via presuppositions inherent in the questions asked, or by asking questions which are in essence information giving.

As was the case in the preceding section on "motive" questions, presupposition plays an important role here. A number of the questions asked in this passage encode presuppositions which indicate to the suspect the nature of information sought by the interviewers, often using the words 'else' or 'more':

- Questions ii$^{(a/b/c)}$, and x$^{(c)}$ ask "what else did you do?", presupposing that the suspect *did something else*;
- Questions viii and x$^{(a)}$ ask "what else did you hit her with?", presupposing that the suspect *hit her with something else*.

It is an inherent characteristic of Wh- questions that they make presuppositions, but there is an important distinction between the presuppositions made by these "what else" questions, which clearly reflect the focus of the interviewers on fulfilment of evidentiary requirements, and presuppositions made more generally by questions of this type. As an example of the typical pattern, when question iv encodes the presupposition that the suspect *went to throttle her* – "You went to throttle her, what with?" – the presupposition is unproblematic since it originates from information provided by the suspect in his preceding turn. This is in contrast with the "what else" questions at ii$^{(a/b/c)}$, viii and x$^{(a/c)}$, in which the presuppositions originate, not in information exchanged and agreed upon in the course of the interview, but in new knowledge/information external to the interview.

Along with these "presupposing" questions, the other frequently occurring question type in the passage above is *tagged question* – a question type that Woodbury (1984) locates at the "most controlling" extreme of her *continuum of control*. Again the information given in the questions stops short of full experiential explicitness, but nonetheless directs a compliant/cooperative interviewee towards the specific *knowledge* that the interviewers will need him to have in order to build a corroborated confession. At line i, for example, the interviewer asks

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tening to the audio (the speakers are both male, both have the same strong regional accent, and are both senior officers, suggesting that they may also be from similar age groups).

whether the brick killed the victim, but then asks two further questions which give the information that "it didn't" and that "(t)here is more".

i. Pol: Did that kill her John*, with the brick?[(a)] John*, **it didn't** did it, John*?[(b)] **There is more** isn't there John*?[(c)]

In response to this, and to further prompting at line v, the suspect puts forward a thesis that he "went to throttle her". The interviewers don't rule this proposal out, but they do indicate that this is not the piece of *knowledge* that they were looking for – "But you hit her with something else didn't you?". The suspect indicates that he "can't remember", but with further prompting proposes a new thesis, that he hit her with his "(f)ist". The interviewers do not directly engage with this response, but continue to pursue a specific item of *knowledge* that they appear to have in mind. When the suspect proposes a third thesis, "piece of metal" in response to the group of questions that follows ("what else?"/"…something else …?"), the interviewer reacts differently – he repeats what the suspect has just said. This is typical of the three-part exchange discussed by Berry (1987) in the classroom context. In Berry's description the parts of an exchange of this type are: initiation^response^feedback (see also Gibbons's chapter in this collection).

> Teacher – can you tell me why do you eat all that food. Yes? (initiation)
> Pupil – to keep strong (response)
> Teacher – to keep strong, yes to keep you strong (feedback) (Berry 1987: 46–47)

x. Pol: What else?[(a)] Howay John* you used something else didn't you, John*?[(b)] We know howay, John* what else did you do?[(c)] Come on. (initiation)
xi. Sus: PIECE OF METAL. (response)
xii. Pol: Piece of metal. (feedback)

The Berry example, and the *knowledge* seeking example under discussion here, have in common that: the person asking the question is in a position of authority; that the person asking the question knows the correct, or at least the desired, answer to the question in advance; and that the desired response is fed back to the student/suspect as confirmation that they have given the right answer.

3. Use of characteristic vocabulary and set phrases

One of the recognisable characteristics of Police language is the use of particular vocabulary, phrases, and clichés. It appears that often this may be directly linked to the language used in the elaboration of laws and codes which are central to police work. For example, road rules frequently refer to "vehicles" generically

(and appropriately – in these documents this term is used to refer to all vehicle types) – "A driver making a U-turn must give way to all vehicles and pedestrians".[7] Perhaps in an effort to ensure that they are quite literally following the "letter of the law", police officers often prefer to use a superordinate, and possibly legalistic (or pseudo-legalistic) term, even when a more specific/accurate general language term might be appropriate.

(4) Pol: Do you recall having a conversation with a **middle-aged female** being the driver of a **vehicle** stopped in front of you at the intersection of Brown* Road and the Green* Highway at Townborough*, at that time and date?
Sus: I would not call it a conversation.
Pol: Can you tell me what it was?
Sus: I would, would more like say an exchange. A conversation's a rational speech between two people.
Pol: Do you recall what type of **vehicle** the **female** was driving on the date that you spoke to her?
Sus: Yeah, she was driving um ah a Navarro, a Nissan Navarro.
Pol: Do you recall seeing any damage to any panel of **the four-** of **the vehicle** at the first time you saw it?

In the passage above, two of the terms used by the interviewing officer are typical of legalistic/pseudo-legalistic policespeak. The officer uses the term "*vehicle*" even after the details of the vehicle type have been established, and he refers to the driver of the Nissan Navarro initially as "a middle-aged female" and subsequently as "the female" (for more policespeak vocabulary, see Gibbons 2003: 87). In the last turn of the extract, the officer appears to make what Schegloff, Jefferson, and Sacks (1977) would refer to as a self initiated repair by stopping short of referring to the Navarro as "**the four-**[wheel drive]" (Nissan Navarro is a 4WD vehicle), and correcting this to be "the vehicle". That the officer would not only give preference to this term, but would self-repair what appears to have been a legitimate, appropriate and more precise alternative descriptor suggests a strong desire to use what he perceives as the *right* terminology. A review of the interview as a whole supports this – over the course of the interview (118 question/answer pairs), the interviewing officer refers to the Nissan Navarro as the "vehicle" 35 times (and on 5 of these occasions specifies that it is the "female's vehicle"). He does use the term "car" on three occasions, but one of these is when reading back the suspect's written statement. In contrast, the suspect uses the term "car" on 11 occasions, and

7. Australian road rules, p55. http://www.rta.nsw.gov.au/rulesregulations/downloads/pts1-21.pdf

the term "vehicle" on 6 occasions. When the suspect did use the term "vehicle", it was usually a reflection of the term's use by the interviewer.

Interviewer reports suspect's use of the term "car":

(5) Pol: Do you agree that during the course of that conversation you said to me, "I've just had an argument with a lady down the road. She punched me, I kicked her **car**, I'm ashamed of what I did and I've come straight here to report it".

Suspect reflects the interviewers preferred term "vehicle":

(6) Pol: D- do you sit high in the **vehicle**?
Sus: Do I sit high in the **vehicle**?

With regard to the use of the term "female", the police officer uses this term 18 times, and the suspect only once. It is also notable that on 16 out of 18 occasions, the police officer refers to "***the*** female", making this his preferred term of reference for the other party involved in the incident – for the purpose of the interview this in effect becomes her identity. In contrast, the suspect does not at any point use the definite article to refer to the woman in this way – the one time that he does use the term it is as a descriptor not an identifier:

(7) Sus: …she stuck up her index finger, her left index finger, visible through the side um basically signalling, you know, fuck off, that's what th- the index finger is, um which I sat in my car and I just thought to myself, you know, "bit of dickhead", but; 'cause I thought it was a male at this time, I didn't know it was **a female**, I thought it was a male[8], 'cause of the; you know work truck and everything …

The tendency to use male/female to refer to un-named parties is not limited to the interrogation room – the following example was taken from a police news media briefing.

(8) Pol: As a result of a joint police investigation between New South Wales Police and a number of other states, over the last number of days we have been pursuing **a female individual** throughout Sydney.
(The World Today – Thursday, 6 July, 2006 12:26:00 ABC Radio)

Other examples of terms commonly used in legal documents being given preference over more commonplace vocabulary include the use of *person* (and

8. The examples discussed here are "female", but "male" is also used as what the interviewers seem to perceive as a contextually appropriate superordinate term.

"individual", as seen in the above example), and more markedly the plural form *persons.* Police media releases often refer to a *person or persons of interest*, and as illustrated in the following example taken from the ERISP interview guidelines, these terms are commonly used in legal and other regulatory contexts.

(9) 4. Mr/Mrs/Miss/Ms, ……. , do you agree that there are no other **persons** present in this room apart from yourself and those I have introduced? (NSW Police Service, 1995)

The examples below show the singular and plural forms in use.

Singular

(10) Pol: For the purpose of voice identification could **each person** introduce themselves. *[could **everyone** …]*
Pol: Do you know **any person** who may have wished to harm your wife? *[do you know **anyone** …]*

Plural (more marked form)

(11) Pol: When you were buying dinner did you see **any persons** that you recognised? *[did you see **anyone** …]*
Pol: And were there **any other persons** living in that house at that time? *[And was there **anyone else** …]*
"Do you agree …"

It is a characteristic of the NSW police service's electronically recorded interview model that prior to the commencement of the interview proper, as a formality, the interviewing officer will summarise the details of any earlier interaction between the interviewer and the suspect. When these details of earlier interaction are presented to the suspect it is expected that the suspect will confirm the veracity of the details as presented. In the data that I have had the opportunity to review, uncontested confirmation has almost always been given – in the remaining instances, details have been contested, but ultimately confirmation has been given nonetheless. The term used for this phase of the interview is "adoption".[9]

Overwhelmingly, questions asked during this phase of the interview are framed as requests for agreement using the set phrase "do you agree …?". For example:

9. See Hall (2004) for a detailed discussion of the way in which the adoption phase of the NSW interview model limits the extent to which cognitive interview and other interview techniques can be effective in achieving their aims.

(12) Pol: **Do you agree** that you said, "I kissed her and she was cold"?
Pol: **Do you agree** that you smoke that brand?
Pol: **Do you agree** that you have been charged in relation to the death of Mr McCarthy*?

In the guidelines given to NSW police interviewers during the period that these interviews were recorded, this phrase is a part of scripted questions that are to be asked in every interview (see example below). This suggests that perhaps police officers are drawing upon the scripted elements of the interview as a template/boilerplate for the construction of contextually appropriate question forms in parts of the interview that allow them greater freedom in phrasing these questions.

(13) 4. Mr/Mrs/Miss/Ms, ……, do you agree that there are no other persons present in this room apart from yourself and those I have introduced? (NSW Police Service, 1995)

It is, of course, possible that this was a frequently used construction even before the preparation of the ERISP guidelines, and therefore found its way into the guidelines by virtue of its being a reflection of actual police practice. But whether the fixed phrase has its origins in historic practice, or in the guidelines, it appears that interviewers will give preference to an established form of expression.

In the following example, the officer uses the expression to ensure that the adoption is watertight before proceeding to the interview proper. Having already presented individual items from his notebook to the suspect for adoption, the officer uses the "do you agree" form to confirm that the suspect has also read the notes, has accepted them as accurate, and has signed the notebook – thus securing an oral confirmation of a written confirmation of a written record of a spoken interaction.

(14) Pol: Do you agree that also you have read those notes?
Sus: Yes, I have.
Pol: And are those notes correctly recorded?
Sus: Yes, they are.
Pol: And you agree that you have also signed that – that notebook?
Sus: Yes, I have.

In a corpus of NSW police interviews of more than 92,000 words, "agree" is used by police officers 369 times – of these, 342 occur in the phrase "do you agree". In an *n*-gram analysis, "do you agree" is by far the most frequently occurring trigram, and "do you agree that" is overwhelmingly the most frequently occurring 4-gram (263 instances) – making this a very popular piece of boilerplate. To put this into perspective, in the same data, the word "agree" is used by suspects 9

times, and 8 of these are to say "I agree" (or something close to this) in response to a police question.

The fixed phrase "do you agree (that)" occurs in every interview.

Variations on the fixed phrase include:

Statements as questions

(15) Pol: And **you agree** …?
Pol: **You agree** …?

Hypotheticals

(16) Pol: **Would you also agree** that if someone was kneed to the stomach it would be likely that that person would – would also receive injuries?

Negotiated agreement

(17) Pol: You told me you were born in 1971. Is that correct?
Sus: That's the one
Pol: And do you agree
Sus: well I was conceived in 1970, so really my birthday should be my date of conception, so, you know
Pol: Well, **would you agree** with me if I told you that you were 26 years of age ... today?
Sus: Yeah, all right.

On a small number of occasions "agree" occurred in past tense.

(18) Pol: **Did you agree**, or do you agree that I also told you that at the conclusion of the interview you would be given an audio cassette tape of that interview?

In all but two of the past tense examples the phrase included another characteristic of policespeak (Fox 1993), the insertion of a temporal adverb immediately following the Subject – " Did **you then** agree …?" (this is discussed further in the following section).[10]

It is interesting to note, that even though the NSW interviews reviewed here took place over a period of years, and in 20 different locations, every single one of the observed instances of this phenomenon dealt with the same topic – the

10. The phenomenon observed by Fox does also occur in declarative contexts – "And do you agree that I then weighed the um small satchel of um cannabis leaf which was found in the kitchen and that weighed six grams?"

electronically recorded interview – making this another clear case of the "boilerplating".

Subject^temporal adverb – past tense clause

(19) Pol: Did **you then** agree to be electronically interviewed? (identical wording in 3 interviews)
Pol: O.K. Did you, did **you then** agree that you would come over to the room here and be electronically recorded on the interview? Do you wish to be further interviewed on this electronic recording machine?
Pol: Did **you then** agree to being electronically interviewed about this matter?

Related present tense examples

(20) Pol: Do **you then** agree to be electronically recorded?
Pol: …You indicated earlier that you wished to go on a typed record of interview in relation to this matter with Keith* Thompson*. Do you agree I've just spoken to you in relation to that typed interview and it would, it would take some time to complete that and do **you now** agree to conduct this interview on the electronically recorded machine?

Given that there are 350+ "agree" questions, and that these questions address multiple aspects of the various cases, it is interesting to note that the Subject ^ temporal adverb pattern is uniquely associated in this context with the topic of agreement to be recorded electronically. Although I have not had access to a document in which this pattern has been included in an interview script, the strength of this correlation would seem to suggest that this might be the case.

As noted at the beginning of this section, the fixed expression "do you agree (that) …?" has become institutionalised in the NSW ERISP interview model, and may well for this reason be a characteristic of NSW policespeak specifically. However, the function performed by this question type is likely to be relevant to police work in other locations, and this relevance is likely to manifest in formulaic stock phrases suited to this function. For example, in data from the UK presented by Newbury and Johnson (2006), and Auburn, Drake and Willig (1995) the interviewers use functionally similar questions to establish agreement on relevant background information.

(21) Pol: And I think, from what you were saying earlier, you were aware that a post-mortem examination was subsequently undertaken. Certain samples were taken at that post-mortem for forensic analysis. **Would you accept this?** (Newbury and Johnson 2006)

(22) Pol: I would think that she would probably know you as well as anybody **would you agree with that**
Pol: right they say that you swung your right fist at the policeman which hit him on the left side of his head about his ear and it knocked him to the ground **is that correct** (Auburn, Drake and Willig 1995)

As is the case for "*do you agree*" as a characteristic of NSW policespeak, the use of statement plus: "would you accept this?"; "would you agree with that?"; and "is that correct?" in the above British examples seems if not scripted, then certainly formulaic/boilerplated, and reflective of the immediate requirements of its context of use.

Subject ^ temporal adverb

The sequence Subject ^ temporal adverb (introduced in the preceding section) is a frequently occurring characteristic of policespeak (Fox 1993). This pattern occurs with 1st, 2nd and 3rd person Subjects (in the data reviewed, this is skewed to 1st and 2nd person), and with adverbs indicating temporal location in the past ("then" – *at that time/at that point sequentially*), and the present ("now" – *at the present time/in the current circumstances*).

"at that time/at that point sequentially"

1st person

(23) Pol: And do you agree **I then** handed a occupier's notice to your mother?

2nd person

(24) Pol: So **you then** set about scrubbing these items of clothing that you put in the bath is that right. (UK)
Pol: Okay, you explained then to Detective <police 1> that **you then** inflicted a number of blows on your wife, is that correct?

3rd person

(25) Pol: It's alleged **she then** went to the toilet.

The location of a temporal adverb immediately after the Subject in general conversational English would be a marked selection grammatically, and this markedness would indicate that it may be of heightened importance. Since this pattern occurs quite frequently in police language, the degree to which it should be regarded as a *marked* selection might be lower than it would be in general conversation, but it does nonetheless indicate, in the "then" examples, that the sequential placement of the events is relevant to the interviewer's agenda, and should be noted.

"at the present time/in the current circumstances"

1st person

(26) Pol: **I now** propose to – to complete the interview.

2nd person

(27) Pol: O.K. As a result of speaking to Mr Beaumont* are **you now** prepared to continue with our interview in relation to the death of Keith* Thompson*?

(28) Pol: What can **you now** tell me about the death of your wife, Karen*?

In the case of the 2nd person "now" examples, the significance of the use of this Subject/adverb organisation may be greater. In the reviewed data, this sub-type occurs far less frequently (which may heighten the degree of markedness where it does occur) and in the examples provided, this pattern indicates an important transition point, or possible change in circumstances – i.e. what I have represented in the heading as "in the current circumstances" might more accurately be thought of as "in these **new** circumstances".

In (27), "…are **you now** prepared to continue …", the change in circumstances is that suspect has just spoken by telephone with legal counsel (during the course of an interrogation), and has been advised to stop answering questions until counsel can be present.

In (28), "What can **you now** tell me about the death …", the suspect has just been presented with forensic evidence that when ambulance officers arrived, rigor mortis had set in on his wife's body. This made his earlier claim that he had spoken to his wife moments before the arrival of the ambulance officers implausible.

In instances of this type, the adverb is indicating *at the present time/in the current circumstances*, but the aspect of this that is reflected in the marked positioning of this element as contextually important is that the *current circumstances* are new and different.

3rd person

(29) Pol: Okay. **The time now** is 21.15. Detective Sergeant Brown* is leaving the room. I'll just make you aware that the interview is still running, anything you say will be recorded. Do you understand that?

In the above example, the Subject is in noun form. While noun as Subject forms do occur in the reviewed data, overwhelmingly, the pattern is for Subject to be represented pronominally (this goes hand-in-hand with the skew to 1st and 2nd person Subjects noted earlier).

Other fixed phrase boilerplate and clichés

At its most extreme, policespeak features fixed phrase expressions which border upon being clichés in a more pejorative sense than that intended by Lemke (1991), for example: "…***is assisting*** *us with our enquiries*", and "***I put it to you*** *that ….*".

is assisting …

This phrase is most frequently used either by police when providing information to mass media, or by the mass media in reporting police activity (as communicated to them by police).

(30) *A 20-year-old Gold Coast man* ***is currently assisting*** *police in relation to a fatal hit-and-run incident at Reedy Creek on Sunday.*
http://www.police.qld.gov.au – 02/05/2006

This phrase is usually used at an early stage in an investigation, and is consciously vague and non-committal about the way in which *assistance* is being provided. Since the initial interview is often a transition point – early questioning is likely to be concerned with making a change from the quality of evidence required to make an arrest, to the quality of evidence required to lay charges (see Hall 2004, Dixon 1997) – it should not be surprising that vagueness as to the actual status is reflected in the reporting of this phase of an investigation.

The following quote from British Defence Secretary Geoffrey Hoon on the search for weapons of mass destruction in Iraq indicates general acceptance of this borderline cliché phrase:

(31) *"I think it is fair to say that the people who* ***are now assisting us with our inquiries*** *– that is the standard police phrase, isn't it? – are proving co-operative."*
BBC News – Thursday, 1 May, 2003, 12:35 GMT 13:35 UK

I put it to you that …

As with a number of the phenomena discussed here, this phrase is not exclusively part of a policespeak domain and may in fact be more frequently and more effectively used in other settings (e.g. cross-examination). It is nonetheless a phrase which is unlikely to turn up in general conversation, but which does appear with some frequency in police communications. This phrase issues a challenge to the addressee, which if unsubstantiated is easily refuted, and which if supported by evidence is somewhat redundant in a police questioning context. This contrasts with its use in a courtroom setting where the presentation of a version of events which is plausible but unsubstantiated may be a useful strategy since it allows the person proposing this version of events to present an hypothesis to a jury. The following example shows this phrase in use with a non-compliant interviewee.

(32) Pol: Alright, **I put it to you**
Sus: Mm
Pol: that you were there Warren*
Sus: Mm
Pol: and that you did er have a look in that filing cabinet
Sus: Well how do you know I was there?
Pol: no, **I just put it to you**

In this example, the police officer used this set piece phrase as a last resort since other questions asked to establish that Warren* had looked in the filing cabinet had failed. Not surprisingly, since Warren* was a non-compliant interviewee, this use of boilerplate police speak failed to achieve its objective of extracting an admission.

Scripted questions and phrases

Scripted items are helpful to police interviewers since, if applied correctly in an appropriate context, they are less likely to expose an officer to the risk of having evidence gathered in an interview rejected. The use of scripted questions/phrases by interviewers does, however, have distinct risks and limitations associated with it. To illustrate some of these risks and limitations in action, I will use examples of a scripted question that has been removed from the NSW ERISP interview model on the basis of expert advice provided to the NSW Police Service by John Gibbons (2001, 2003). Although this particular question has been removed from the scripted portions of the ERISP model, issues illustrated by the examples remain relevant as generic concerns.

Standard question form and default/preferred response

(33) Pol: Has any threat, promise or offer of advantage been held out to you to take part in this interview?
Sus: No.

In the NSW data reviewed for this chapter, this question was typically asked at least twice (once by the interviewer, and again by an officer not involved in the questioning) at the conclusion of the interview. The simple negative response was expected and given in almost all instances.

Standard question form and dispreferred response

(34) Pol: Has any threat, promise or offer of advantage been held out to you to take part in this interview?
Sus: Yes. (Gibbons 1996: 294)

The above example occurred in an interview with a Tongan-Australian second language English speaker. The other scripted questions surrounding this one had all expected default affirmative responses (e.g. "Have you made this recorded interview electronically of your own free will?"), and it appeared that the suspect was simply following a pattern of providing affirmative responses without fully understanding what was being asked, but being aware that affirmative responses were apparently desired and expected by the interviewers. This is typical of the phenomenon of gratuitous concurrence which is a well documented characteristic of the interactive style of Aboriginal English speakers (Eades 1994), but is also "common among people in the Asia-Pacific region" (Gibbons 1996: 294) and may be commonly used by oppressed people in general (Eades 1994).

As seen in the following example, even when the expected response to a question is given (in this instance, "no"), a good interviewer is likely to probe and seek confirmation of understanding since an appropriate response to an ill-conceived question may mask a lack of understanding on the part of the respondent.

(35) Pol: Has any threat, promise or offer of advantage been held out to you to take part in this interview?
Sus: No.
Pol: Do you understand what all of those three terms mean?
Sus: What?
Pol: Do you understand what "offer of advantage" is?
Sus: No.
Pol: O.K. Have I promised you anything to take part in this interview?
Sus: No.

Whereas in the preceding example, the suspect's failure to understand the question was exposed by the initiative and good interview technique of the police officer, in the following example the interviewer persists with the fixed wording of the question even though it is clear that the suspect is finding it difficult to understand. The interviewer's first three turns in this extract are word-for-word repetitions, and in her fourth turn, in response to a question from the suspect as to the meaning of the question, she responds unhelpfully by telling him that it means "(e)xactly what it says".

(36) Pol: Has any threat, promise or offer of advantage held out to you to take part in this interview?
Sus: What's that one?
Pol: Has any threat, promise or offer of advantage been held out to you to take part in this interview?
Sus: [5] [whispering] Has any threat, promise

Pol: Has any threat, promise or offer of advantage been held out to you to take part in this interview?
Sus: Have I been bribed to be here, is that what you mean?
Pol: Exactly what it says, has there any been threat; have you been threatened in any way?
Sus: No. No.
Pol: Have you been promised by anything or with anything to take part in this interview?
Sus: No.
Pol: Do you understand what a promise is?
Sus: A promise is a promise.
Pol: Or has any offer of advantage been held out to you, to take part in this interview?
Sus: Don't know what you mean. What do you mean advantage?
Pol: Any offer of advantage, by participating in this interview are you gaining any benefit?
Sus: I will, yeah. And get the truth.
Pol: Have Detective Sergeant Killen* and I, made any offers of that nature to you?
Sus: You made no offers to me no, no you haven't.
Pol: So has any offer of advantage been held out to you to participate in this interview?
Sus: Probably not, no.
Pol: Just for the purpose of this interview, I'll just get you to state your full name again for me thanks.

As a final example, I have included the following extract from an interview, also recorded prior to the introduction of the recommendations made by Gibbons (2001, 2003)), in which the interviewer paraphrases the dense and complex scripted form of the question and breaks it down into more manageable chunks.

(37) Pol: O.K. Have the answers you have given this electronically recorded interview, been made of your own free will?
Sus: Yes, sir.
Pol: Have we held out any proposals to you, to give the answers as recorded in this interview?
Sus: No, you haven't, sir.
Pol: Have we threatened you in any way?
Sus: No, not at all, sir. I believe if I co-operate with you, you'll co-operate with me, right?

In this example, from an interview with a highly cooperative suspect, although the interviewer has broken the complex construction into smaller chunks, he still uses abstract forms of expression – e.g. "**held out any proposals**".

4. Rapport building

For police to be successful in gathering information through questioning, it is considered to be important that they establish an atmosphere conducive to co-operation by building rapport with the suspect (Cherryman and Bull 2000; Inbau 1948; Inbau and Reid 1962; Inbau et al. 1986; Stacey 1997a, 1997b) It is a characteristic of the rapport building activities observed in the data that they are expressed in a language style that would not seem out of place in interaction between friends – the language used to achieve this purpose is not characterised by the institutionally oriented boilerplate discussed in the preceding sections as typical of policespeak. In a sense, the absence of canonical markers of "policespeak" in the more readily recognised forms described above is a key characteristic of this variant of policespeak.

Police officers may choose terms of address that they believe will help establish a friendly and cooperative atmosphere.

(38) Pol: But you knew she was dead didn't you. **John*** didn't you didn't you **son**. Eh didn't you **John***. **John*** come on, come on it will be better when it is all out. Didn't you, you knew then she was dead, didn't you **son**.
Sus: YES.

(39) Pol: [I] just want to close that door
Sus: well do you want me to-
Pol: nah it's okay Warren* I'll do that **mate**

In (38), the interviewer repeatedly uses the suspect's name, and also calls him "son" – where this interview was recorded, in the North East of England, this term of address is commonly used, typically for an older male to address a younger male. In (39), an Australian police officer uses the term "mate" to address the suspect. Although the term "mate" is widely used as an informal[11] term of address

11. Boundaries for *formal* versus *informal* are less well defined in Australian culture than in other territories. It would be unremarkable for a sales assistant in Australia to use "mate" as a term of address in a context which in an analogous US setting would probably prompt the use of "sir" as the appropriate term (though not exclusively a male-to-male term of address, this is its most typical context of use).

in Australia, its frequency of occurrence in interrogation settings appears to be heavily skewed towards use by police officers.

I have represented the use of "mate" by Australian interviewers as a manifestation of the desire to build rapport with suspects. It should however be noted that suspects too are typically keen to establish a cooperative questioning environment.[12] However their efforts towards this do not seem to manifest linguistically in the same way as those of police. In the example below, two distinct approaches to rapport building/cooperation (both making use of "*mate*") can be observed: (1) the police interviewer's introduction of a new vocabulary item, "*mate*", into the interview; and (2) the suspect's recycling of the introduced term as a form of accommodation.

(40) Pol: How you going **mate**?
Sus: I'm pretty good **mate**.

It should also be noted that not all attempts at rapport building of this type are successful.

(41) Sus: can we get one thing straight, you must be of the misconception that I'm your **mate**
Pol: yes, Warren*
Sus: I'm not your **mate**
Pol: I know Warren*
Sus: so don't call me your **mate**
Pol: no worries.

and later in the same interview:

(42) Sus: Well don't call me **mate**, I fuckin- I DON'T LIKE IT (screamed)

Expression of empathy may, in addition to supporting more general rapport building activities, produce more specific benefits – indicating to a suspect that his or her perspective is understood by the interviewer is conducive to the elicitation of a confession (Inbau et al. 1948, 1962, 1986). In the following example, the interviewing officer indicates empathy with the suspect's feelings and perspective.

(43) Pol: Yes you loved her I accept that.
Sus: More than anybody seems to realise.
Pol: John* I can realise, I can realise, I've got a daughter of me own.

12. Baldwin (1983) found that around 74% of suspects could be categorised as cooperative/submissive, and that only 14% fell into the category of awkward/difficult to interview.

Although expressions of empathy of this type occur frequently in the data, it is difficult to assess the extent to which this plays a specific role (as claimed by Inbau et al. 1948, 1962, 1986) in the elicitation of a confession.

5. Control of topic navigation

Overwhelmingly, the pattern in police interviews is for police to ask questions and for interviewees to answer them. This trend is so much a part of the interview, that some police transcription procedures even codify this. For example, the following passage from a British interrogation uses the label "Q" (for question) to represent the police interviewer, and "R" (for response) to represent the interviewee – even though there are, clearly, instances in which these functions will be the reverse of what is indicated by the labels.

(44) Q. What sex life have you got?
R. Sex life?
Q. Mm
R. None.

The fact that the police interviewer's role is essentially information seeking, and the suspect's or interviewee's role is information giving, places control over topic navigation/management in the interviewer's hands – questions are initiating moves, answers are responding moves. The following examples illustrate how police in a largely unchallenged way maintain this navigational control.

(45) Pol: Why did he call you a motherfucker?
Sus: I'm fucked if I know. I'll get this chucked out of court anyways.
Pol: Sorry?
Sus: I'll get this thrown out, chucked out of court.
Pol: O.K. Did anyone ask you to leave the unit last night? [interviewer shifts focus to new topic]
Sus: I dunno, can't remember.

In the preceding example, the suspect's provides an uncooperative response to the interviewer's first question and adds a comment suggesting that there is perhaps little point in answering the questions since he will have the case "chucked out of court". After prompting a repeat of the comment, the interviewer continues with a question which takes the interview in a new direction. In doing so the interviewer abandons a potential theme introduced by the initial question – friction between the suspect, and the third party (in this case the murder victim). The interviewer also dismisses the new theme introduced by the suspect – that there might be legal reasons for this

interview to be deemed inadmissible as evidence. The "thrown out of court" theme, while not immediately relevant to the question that was being asked at the time it was introduced, is at least potentially relevant to the interview as a whole. This disjointed topic navigation might seem unusual in day-to-day conversation, but is a commonly occurring characteristic of this type of police interaction.

(46) Pol: Did, did she complain about any other discomfort?
Sus: She was complaining about her heart, I said, "you sure it's not just indigestion" and she took one of the health food indigestion tablets, I did too. Pizza can give you indigestion.
Pol: Did you have heartburn?
Sus: I'd say 'yes'. Because I took a tablet and I felt better after taking it. One of those herbal ones, not not the nasty quickeze type, yeah. It worked rather well.
Pol: **Do you know any person who may have wished to harm your wife?** [interviewer abandons current topic of interaction (suspect's heartburn), and introduces new theme (potential suspects)]
Sus: Not that I am aware of, no, but then again, there are a lot of people that I've never met, quite frankly. I hope you catch whoever did it.

In the above example, the focus moves from "condition of wife" to "condition of suspect" in a way that would not seem unusual in day-to-day conversation. The subsequent change of focus from "condition of suspect" to "potential suspects in death of wife" is managed in an abrupt way which would seem unusual in other interactional contexts

In the following example, the interviewer's control over the interactional focus is highlighted, not by the introduction of a new focus, but rather by the dogged pursuit of a single focus.

(47) Pol: John* it was a brutal attack on that girl.
Sus: I know.
Pol: On little Rikki*. I want to know why you did it, I want to know what made you do it.
Sus: I didn't do it.
Pol: if we knew why you did it and what made you do it well perhaps we could understand, but the way things stand we cannot fathom out the reason behind it, are you listening to what I'm saying?
Sus: Yes.
Pol: Well wouldn't you feel better if you told us what it was all about?
Sus: I didn't kill her.
Pol: And what made you do it?
Sus: I didn't kill her.

6. Policespeak used by suspects wishing to accommodate to police

In addition to the characteristics of policespeak as the linguistic manifestation of the function of police (as discussed in preceding sections), it is also worth giving consideration to the use of policespeak by others. This is particularly relevant since in the past the occurrence of language characteristic of policespeak in alleged confessions has been cited as evidence that the authorship of the disputed confessions might be attributed to police officers involved in a case (e.g. Coulthard 1997).[13] In the preceding discussion, the various phenomena observed in the data have all been represented as characteristic of the language used by police officers, and as being a product of the broadly defined and locally defined contexts in which police officers work. It is, however, important to note that many of the linguistic behaviours represented here as characteristic of policespeak also occur in the language of those interacting with police as a manifestation of accommodation.

(48) Pol: O.K. Was Kelly, or the two **persons** in the car was; so there was four of youse in the car, I take it?
Sus: Four **persons**, yes

In this example, the suspect confirms the interviewer's proposition that "*there was four of youse in the car*" recycling the interviewer's use of the term **persons.**

Police will often use the verb *sustain* when discussing injuries. For example:

(49) Pol: Did you sustain any injuries as a result of her having hit you?
(50) Pol: Now, can you tell me how he may have ah sustained those injuries?

In the following example, a suspect uses *sustain* in quite a marked and awkward way perhaps suggesting that this is not part of his regular vocabulary. In doing so, he appears to be attempting to accommodate to the police language style.

(51) Pol: You previously told me that prior to the ##th of <month> your wife fell down the stairs in the local park, can you tell me what injuries she received as a result of that fall?
Sus: When she finally told me that she did fall down these stairs and she lost, she said a a quantity of – or a fair amount of blood from down the vaginal area. I said, "What ...," I said, "What did you **sustain**?" She said she fell on her backside and she also hit the corner of one of the stairs.

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13. This is not intended to bring into to question the validity of earlier studies – the evidence cited by Coulthard, for example, seems quite unequivocal. It is my intention only to remind that the mere presence of isolated instances of language considered characteristic of policespeak would not on its own be sufficient to prove that these are not the words of someone who is not and never has been a police officer.

In this case, the suspect is not recycling a term introduced by the interviewer,[14] rather he appears to be using what he believes to be contextually appropriate language. It is also interesting to note that he references body parts using both commonplace ("*backside*") and pseudo-scientific/medical ("*vaginal area*") terminology.

Police frequently state times using the 24 hour digital system (e.g. "the time now is 21.15"). Use of this form of time expression is not typical of day-to-day conversation, and in the reviewed data it is not typically used by suspects. However, the suspect who appeared to be attempting to accommodate through the use of "sustain" as a characteristic of policespeak in the preceding example, also used digital time expressions on a number of occasions. The following examples are extracted from a single extended narrative turn.

(52) Sus: I got home at approximately **16.30** this – yesterday afternoon … Approximately **10 to 6** I went down and bought dinner. I got back at approximately **18.20, 18.25**, just in time to watch the news on channel 7 …
He sat there, watched more TV and approximately somewhere between **7.30 and 8 o'clock** Karen* decided she wanted to go to bed … I kept popping in and then about approximately **9.45** I noticed there was a colour change in her skin …

In this example, the suspect switches between digital 24 hour (e.g. "16.30"), digital 12 hour (e.g. "9.45") and analogue (e.g. "10 to 6"). Since the use of 24 hour digital time expressions is less common in everyday conversation and in the recorded speech of suspects, but is common in the speech of police officers, it might raise questions of authenticity if a police officer were to record in written notes that a suspect had used an expression which is apparently characteristic of policespeak. For example:

(53) Pol: And do you agree that you said, "I got home about **16.30**…"?

However, both of the preceding examples are taken from the same interview – so when the officer reads from his notes and quotes the suspect as having used the digital form **16.30** there is no reason to think that this is inaccurate. It should also be noted that within the interview these examples occur in the same order as they do here – the suspect is not recycling a form used by the interviewer.

14. This interviewer does not actually use the term *sustain* at any point in the recorded interview, but it is of course possible that the term was used during other non-recorded interactions with police and ambulance officers over the preceding days.

7. Conclusions

This chapter has attempted to show how the nature of police interviews shapes their language, and how that language can become clichéd – for instance establishing a suspect's motive is frequently done by asking a question using variants of "what made you do it?", and presenting the police version by "do you agree (that)". It also showed how the attempt to get suspects to reveal knowledge known to the police and the guilty but not to the public leads to tortuous presupposition questions. It documents the use of formal rather than everyday vocabulary, and unusual syntactic organisation, such as placing time adverbials after the subject. It also showed a form of police public relations language in the use of "(a person) is assisting (police with) …". It suggested that there is a relationship between written police guidelines and spoken police formulas, one that may not always help communication. It also showed the use of familiar address forms in attempts to build rapport with suspects, and heavy handed topic management that would be inappropriate in normal conversation. Finally, the article documents the use of policespeak by suspects, possibly as an accommodation strategy. All these characteristics are evidence of the unusual nature of policespeak.

References

Auburn, T., Drake, S. & Willig, C. 1995. 'You punched him, didn't you?': Versions of violence in accusatory interviews. *Discourse and Society* 6 (3): 353–386.

Baldwin, J. 1993. Police interview techniques: Establishing truth or proof. *British Journal of Criminology* 33 (3): 325–352.

BBC News – (http://www.news.bbc.co.uk).

Berry, M. 1987. Is teacher an unanalysed concept. In *New Developments in Systemic Linguistics,* Vol. 1: *Theory and Description,* M. A. K. Halliday & R. P. Fawcett (eds.), London: Frances Pinter.

Cherryman, J. & Bull, R. 2000. Reflections on investigative interviewing. In *Core Issues in Policing,* 2nd edn, F. Leishman, B. Loveday & S. Savage (eds.). London: Longman.

Cooper, L. S. 1996. *Police Jargon: How to Talk like a Cop.* Denver. (http://www.hodrw.com/cop1.htm). (Originally printed in *Romance In The Rockies*, April '96 issue).

Coulthard, R. M. 1997. A failed appeal. *Forensic Linguistics* 4 (2): 287–302.

Dixon, D. 1997. *Law in Policing: Legal Regulation and Police Practices*. Oxford: Clarendon.

Eades, D. 1994. Forensic linguistics in Australia: An overview. *Forensic Linguistics* 1 (2): 113–132.

Fox, G. 1993. A comparison of 'Policespeak' and 'Normalspeak': A preliminary study. In *Techniques of Description: Spoken and Written Discours.* J. M. Sinclair, M. Hoey & G. Fox (eds.). London: Routledge.

Gibbons, J. 1994. *Language and the Law*. London: Longman.

Gibbons, J. 2001. Revising the language of New South Wales police procedures: applied linguistics in action. *Applied Linguistics* 22 (4): 439–469.

Gibbons, J. 2003. *Forensic Linguistics: An Introduction to Language in the Justice System*. Oxford: Blackwell.

Hall, P. 2004. Prone to distortion? Undue reliance on unreliable records in the NSW Police Service's formal interview model. In *Language and Justice,* J. Gibbons, V. Prakasam & K. V. Tirumalesh K (eds). Delhi: Longman Orient.

Inbau, F. E. 1948. *Lie Detection and Criminal Interrogation*. Baltimore MD: Williams and Wilkins.

Inbau, F. E. & Reid, J. E. 1962. *Criminal Interrogation and Confessions*. Baltimore MD: Williams and Wilkins.

Inbau, F. E., Reid, J. E. & Buckley, J. 1986. *Criminal Interrogation and Confessions*. 3rd edn. Baltimore MD: Williams and Wilkins.

Lemke, J. L. 1991. Text production and dynamic text semantics. In *Functional and Systemic Linguistics: Approaches and Uses*, Eija Ventola (ed.), 23–38. Berlin: Mouton de Gruyter.

Newbury, P. & Johnson, A. 2006. Suspects' resistance to constraining and coercive questioning strategies in the police interview. *The International Journal of Speech, Language and the Law* 13 (2): 213–240.

NSW Police. 1995. *Step by step use of ERISP* (Draft). Sydney: NSW Police Service.

Queensland Police Service. (http://www.police.qld.gov.au).

Schegloff, E. A., Jefferson, G. & Sacks, H. 1977. The preference for self-correction in the organization of repair in conversation. *Language* 53 (2): 361–382.

Stacey, H. 1997a. Cognitive interviewing. *Policing Issues and Practice Journal* July: 36–41.

Stacey, H. 1997b. Investigative interviewing: Conversation management. *Policing Issues and Practice Journal* October: 7–14.

Woodbury, H. 1984. The strategic use of questions in court. *Semiotica* 48 (3/4): 197–228.

Legal translation

Enrique Alcaraz Varó
Universidad de Alicante

This paper tries to discuss some of the problems arising in the translation of legal English. In most analyses of legal translation, vocabulary (and terminology) has justifiably received most attention, as lexis fulfills the symbolic or representational function of language better than any other linguistic component. Although this article examines some problems in the translation of legal vocabulary, especially through the concept of anisomorphism, it makes an attempt to deal with the snags of syntax in legal translation, by means of the concept of anfractuosity, particularly in repetition, thematisation, passivissation and nominalisation.

1. Introduction

The object of this article is to examine some of the main issues concerned with the translation of legal texts. As the process of translation is always carried out from one language, called the source language, into another, known as the target language, most of our examples will assume English as the source language, although on occasions, for reasons of convenience, English may also become the target language, and Spanish will then be the source language. There are two grounds justifying the choice of English as the source language: the first one is that it is used in the drafting of most legal texts and documents in international organisations and in the European Union setting as well. The second justification is that English is the language that conveys one of the two most important legal cultures in the world, namely, the Anglo-American legal culture, also known as "[countries belonging to] the Common Law system". The other mainstream legal culture is the "continental legal culture", also recognized as Civil Law countries, Roman-Germanic legal system, etc.

Most specialists have held that the chief purpose of translation is the search for equivalence, that is, finding in the target language an equivalent expression for the words or sentences coming from the source language. The term 'equivalent' is thus

central in translation theory, since the finding of an equal, like, similar, or analogous expression in the target language is not always attainable. The word 'expression' has been used here in a rather ambiguous way, since equivalence is sometimes sought for in a lexical item or word, and occasionally in a full utterance. Let us examine the translation of the following English utterance into Spanish:

> The Commission clearly announced that users of the transport system need to be put back at the heart of the transport policy.
>
> *La Comisión anunció que hace falta devolver a los pasajeros el protagonismo de la política de transportes*.

When the phrase "users of the transport system" is translated as *pasajeros* (*passager* in French; *Fahrgast* in German) the equivalent of this descriptive syntactic construction has become a lexical item. In the translation of 'put back at the heart of' as *devolver el protagonismo* (*rendre le protagonism* in French; *wieder in den Mittelpunkt stellen* in German), a syntactic construction in the source language has turned into another syntactic construction in the target language, although the traductological technique of modulation has also been used (see Section 7).

2. A caveat for translators: Anisomorfism

Before we examine a descriptive model of legal translation in Section 4, at this stage we will discuss what I call a "caveat for translators". The word 'caveat' is a classical term in English law, which regularly appears in several legal situations. Its central meaning might be 'a warning' or 'a legal notice'. In the context of this article, I have considered it useful to introduce this concept in the sense of "a preliminary caution and advice to translators". The recommendation could run like this: "Beware of anisomorphism when translating legal texts".

Anisomorfism is the opposite of isomorphism, which roughly speaking makes reference to the symmetry in the patterns of things in nature, life and, accordingly, in language. The concept of isomorphism originated in modern algebra (Lewandoswki 1982: 195–96) and it was so productive that it rapidly spread its influential power to other epistemological areas, such as linguistics and translation studies (Delabastita 1990; Franco Aixelá 1996). On the other hand, anisomorphism, that is, the opposite of isomorphism, makes reference to the gaps in the neat, beautiful patterns of nature. We understand rules because there are exceptions and, accordingly, we understand isomorphism because of the existence of anisomorphism.

Let us examine a few examples. At a lexical level we find neat pairs of words in Spanish formed by a noun and an adjective, like *coloso/colosal*, *especie/especial, proceso/procesal*, etc., but the pair *derecho/*derechal* does not exist. So we might say that there is linguistic isomorfism in the first three examples, and linguistic anisomorfism in the last one, as it has not been possible to form an adjective from a noun. However, the other way round also works: for example, we have the adjective *benéfico* coming from the noun *beneficio*, or *ideológico* coming from *ideología*, but there is no formal originator of the adjective *jurídico*. In this case, we might conclude that we must make a linguistic jump in order to construct a logical semantic pair, which in this case would be formed by *derecho/jurídico*.

Expressed with more common words, isomorfism is equivalent to symmetry, and anisomorfism to asymmetry. These two terms, isomorfism and anisomorfism, are being used in this article because they have been long-established in linguistics. Structural linguistics assumed the discovery (procedures) of the orderly patterns of language as one of its main research goals. European structural linguists, like Martinet (1965) or Lyons (1977), believed in the isomorphism of linguistic patterns; the former devoted more attention to isomorphism in questions of form, the latter in questions of meaning, in particular to semantic fields. The same could be said of anthropological linguists, like Sapir (1921), Malinowski (1935), or Whorf (1956), who approached the study of language as included in the cultural patterns of a community.

Does isomorphism really exist? It does, if we are prepared to accept the existence of anisomorphism. They go hand in hand, and one is understood in function of the other. Anisomorphism exists at all levels. As Gómez González-Jover (2006: 215) has clearly pointed out, we cannot close our eyes to the examination of this productive concept in the translation of legal English into other languages. For our purpose, we will consider two types of anisomorfism: linguistic anisomorfism and cultural anisomorfism.

2.1 Linguistic anisomorfism in legal language

Linguistic anisomorfism exists, for several reasons. One could be that English is two languages in one: words coming from a Latin source and from a Germanic source live happily together as partial synonyms. For example, we have *shy* and *timid*, *put in* and *introduce*, *suitable* and *appropriate, enough* and *sufficient*, etc. A great deal of the English vocabulary could be arranged into doublets, where the first term is more common, and sometimes more informal, than the second one. In other words, Latin-root words are ordinarily more formal than their Germanic

counterparts. This double root of the English language, Latin and Germanic, can be seen in many legal terms, for example in 'order' and 'warrant', 'rob' and 'steal', and 'permission' and 'leave'.

> Order: The London firm took out *a freezing order* against the German contractors, blocking all their London assets.
> Warrant: A European arrest *warrant* has been issued against three international criminals.
>
> Rob: My mother was *robbed* of all her jewels.
> Steal: The secretary *stole* money from the cash register.
>
> Permission: The holder of the copyright gave them *permission* to reproduce some pages.
> Leave: They applied for *leave* to proceed out of the jurisdiction.

On the other hand, this characteristic of the English language has created many emblematic lexical doublets in legal English, such as "fair and equitable", "full and complete", "last will and testament", "fit and proper", etc.

The same issue of anisomorfism might arise when English is the target language. For example, in the translation of the Spanish word *legal* (*légal* in French; *gesetzlich*, *gesetzmäßig,* in German) into English we encounter three possibilities at least: 'statutory', 'legal' and 'lawful'.

'Statutory' relates to what is recognised or supported by an Act or statute coming from Parliament or Congress, not from Common Law. For example, 'statutory sick leave' makes reference to the permission given to sick people thanks to an Act.

'Legal' is the general term; in this sense it is the opposite of 'illegal', which is something violating a law or regulation. Sometimes it makes reference to rights, decisions, etc. coming from Common Law, unlike 'equitable' rights, decisions, etc., coming from 'equity'.

'Lawful' means the same as 'legal', but it has a different connotation. 'Legal' may make more reference to formal aspects, whereas 'lawful' carries the connotation of 'rightful' – *de pleno derecho* – (*de plein droit* in French; *rechtmäßig* in German), legitimate or ethical. To this effect, the current 'legal holder' of something may not be its 'lawful holder'.

One disturbing feature of this linguistic anisomorfism is the so-called "paronymous temptation". Translators are said to suffer from "paronymous temptation" when they cannot avoid the alluring attraction they feel towards the cognate words of the target language. This temptation is not infrequent with words belonging to the common core of the language. For example, 'adequate' is not *adecuado*

but *suficiente*; 'extemporaneous' is not *extemporáneo* but *improvisado*; 'invidious' is not *envidioso* but *ingrato* o *injusto*; 'egregious' is not *egregio* but *mayúsculo* o *atroz*; 'notorious' is not *notorio* but *de mala fama o reputación*. Words like *certain, particular; apparent*[1] (visible), *apparent*[2] (presumed), *observable*[1] (*visible*), *observable*[2] (considerable, important), etc. deserve a similar analysis.

The situation may become critical with ordinary legal terms like 'consideration', 'conviction', 'constructive', and many others. 'Consideration' may mean 'deliberation' (what judges do before they decide), or payment (in a contract); 'conviction' (the opposite of 'acquittal') derives from the verb 'convict', but 'conviction' (belief) derives from 'convince'; similarly, 'constructive' may derive either from 'construct' (to build) or from 'construe' (to interpret).

In order to overcome this irresistible temptation, translators should submit all paronymous terms to a thoughtful critical screening. There is no other medicine than the constant doubt and verification with a trustworthy monolingual or bilingual dictionary before deciding which term to adopt in the target language.

2.2 Cultural anisomorfism

When we compare the Anglo-American legal system with its Continental counterpart, the number of cultural anisomorphisms that arise is incredible. Let us think, for example, of the peculiar terms *barrister* and *solicitor*, which co-exist with *advocate* and *counsel* (*counsel for the defence, counsel for the prosecution*) and attorney-at-law in the United States, all of them having 'lawyer' as the general term. Another clear example is the existence of a stage in Continental Law criminal proceedings called *la instrucción* in Spanish (*instruction* in French; *Ermittlung* in German), which does not exist in English, although something approximate, like 'committal proceedings' may be useful in the translation of this term.

Many other clear examples of legal anisomorfism may be found in the analysis of the English legal system. For the simple purpose of illustrating cultural anisomorphism, let us examine three genuine English legal concepts (*Common Law, Statute Law and Equity*), which are unambiguous representatives of the AngloAmerican legal system.

a. Common Law

Common Law is judge-made law. The actual contribution of a judge or court is called a precedent. When translators read sentences containing expressions like *Wallis v. Smith (1882) or Congress v. Home Office [1976] QB 629*, they know they are dealing with precedents and, consequently, they are in the realm of Common Law.

b. Statute Law

However, when translators read sentences containing expressions like *Section 1(1) section 111(1),* etc. they know they are translating the sections of an Act and therefore they are dealing with Statute law, which consists of sections. Here are some examples:

> Section 5(1) (a). "A worker may present a complaint to an industrial tribunal, etc."
> The council relied on Section 111(1) of the Local Government Act 1972.

c. Equity

Equity is the third branch of Anglo-American justice. It is another peculiar feature of this system, when examined from the Continental-law point of view, as it is based on the sense of fairness of courts. According to Equity courts have the discretion to skip the content of a legal rule, when they consider that its application would produce a greater damage or simply because it would be totally unfair.

To make things more complicated from a linguistic point of view, Equity has created its own genuine vocabulary. The 'claimant' or 'plaintiff' in law (both Common Law and Statute Law) is called the 'petitioner' in equity; the 'defendant' is known as the 'respondent', and the 'judgment' has become a 'decree'.

3. The nature of legal language. The main features of legal language

Legal language is the subject-matter of legal translation. 'Abstruseness' is probably one of the words that best defines the nature of any legal language, whether English, French, Spanish or any other. Two main features contributing to this abstruseness will be commented here: lexical obscurity and syntactic anfractuosity.

3.1 Lexical obscurity

Here are some of the reasons justifying the lexical obscurity of legal English:

a. *Latinisms*: *Nulla poena sine lege, res judicata, bona fide, onus probandi,* etc.
b. *Terms of French or Norman origin*: *profit à prendre, chose, feme sole, lien, on parole*, and many legal terms ending in '-age', like *damages, salvage, demurrage*, etc.
c. *Formal register and archaic forms*. Translators should be prepared to find syntactic oddities, as in the following extract from a deed: "This indenture made

the ninth day of May 1887 .... *witnesseth* that ...", or in the legal English adverbs such as *hereinafter, thereunder, thereby, whereby, thereunto*, etc.

d. *Redundancy ('doublets' and 'triplets')*. In Section 2.1 we said that one distinguishing feature of legal language is the emblematic presence of doublets, such as 'fair and equitable', 'full and complete', 'last will and testament', 'fit and proper', 'false and untrue', 'sole and exclusive', 'null and void' etc. Triplets also exist: 'full, true and correct', 'I give, devise and bequeath'. Translators will have similar combinations in their own languages. When this is not the case, they have two options open: silent simplification by dropping the less general term, or simple reproduction.

e. *Frequency of performative verbs*. According to speech act theory (Austin 1962), by using performative verbs, such as 'agree', 'admit', 'pronounce', 'uphold' 'promise' 'undertake', 'swear', 'affirm', 'certify', 'overrule' and so on, the speaker carries out or performs the actions expressed by such verbs:

> Both parties of the contract hereby agree to the following conditions ....
> I hereby solemnly swear to tell the truth, the whole truth and nothing but the truth.

3.2 Syntactic anfractuosity

According to the dictionary, "anfractuous" is applied to what is tortuous, sinuous, full of windings and intricate turnings. Garner (1991) used the expression "syntactic anfractuosity" applied to legal English syntax, full of twists and turns. The text that follows, provided by Bhatia (1993: 116), is an excellent example of how the normal flow of the main sentence may be interrupted by constant twists and turns, in this case, restrictions or limitations. Here is the main sentence:

> The Chief Land Registrar shall (1) supply him (2) with an office copy of any document required by the State Secretary (3), etc.

The main sentence has been interrupted by the following restrictions:

(1) where the dwelling-house with respect to which the right to buy is exercised is a registered land

(2) if so requested by the Secretary of State

(3) on payment of the appropriate fee

And the final result is this puzzling sentence:

> The Chief Land Registrar shall, where the dwelling-house with respect to which the right to buy is exercised is a registered land, supply him, if so

requested by the Secretary of State, with an office copy of any document required by the State Secretary on payment of the appropriate fee, etc.

4. A descriptive model of translation. Awareness of the Anglo-American legal system

In order to offer a reasonable account or explanation of any aspect of the world around us we resort to theories and models. A model is a device that offers a clear pedagogical framework and it consists of categories. The translation model I am proposing here consists of three categories:

a. Awareness of the English-American legal system.
b. Awareness of a bottom-up process: legal vocabulary and syntax.
c. Awareness of a top-down process: legal genres.

Translators of legal English do not need to know all the intricacies of the Anglo-American legal system. When specific problems arise there will be personal and bibliographic resources around to help them. However, it is advisable to be acquainted with the general framework of the legal system. As the extent of this article does not allow us to enter a detailed account of this system, the outline presented in Section 2.2 will suffice.

5. Awareness of a bottom-up process: The problems of translating legal vocabulary and syntax

In our model, as translators start reading the legal text, language, mainly words and syntax, will experience an upward movement from the text to their minds, that is, a bottom-up process. In this movement both vocabulary and syntax will try to look for a place in their cognitive domain so that things make sense. However, on their way upward, they will be met by a top-down process, as explained in Section 6. In our opinion this is the moment to examine the problems arising in translating legal vocabulary and syntax.

5.1 Vocabulary

Legal vocabulary, as all technical languages, is rather idiosyncratic. Like all specialised vocabularies, it is usually classified into three groups: technical, semi-technical, and those of general use, which are very frequent in the speciality.

a. Technical vocabulary

This first group, also called terminology, is formed by monosemic lexical items, i.e. having only one meaning. The meaning of the lexical items of this group only makes sense in the realm of a theory. Technical-vocabulary words differ from those of ordinary speech in that the former are monosemic while the latter are polysemous, ambiguous, and carry connotations. Technical vocabulary is probably the easiest to learn, as it is monosemic. The number of technical legal terms is pretty large: *estoppel, injunction, tort, mortgage, dismiss an appeal, allow an appeal, examining magistrate, power of attorney*, etc**.**

b. Semi-technical vocabulary

The second group, consisting of semi-technical vocabulary, contains lexical items belonging to everyday language, but which have acquired one or more new meanings within the speciality. For example the legal term 'defence/defense' has three senses: (a). self-protection, that is, a self-protective plan or argument against the claimant's or plaintiff's action; (b) the answer or reply to a civil claim; (c) in criminal proceedings it refers to exculpatory/exonerating circumstances or grounds for acquittal.

Words in this group pose greater difficulties, because they come from the mainstream vocabulary pool, and have acquired new meanings without losing their old ones. A clear example of this phenomenon is the word 'discharge':

> **discharge**[1] (GRAL/MERC descarga; descargar ◊ *The cargo was discharged within 48 hours of the ship's arrival at the port*; V. *unload, empty*), **discharge**[2] (GRAL/PENAL disparar, descargar [un arma] ◊ *He discharged his pistol*; V. *shoot, fire*), **discharge**[3] (CIVIL/MERC extinción o anulación de un contrato; anular, resolver o extinguir un contrato ◊ *The contract will be deemed to be discharged if any of these conditions are not satisfied*; V. *termination; terminate, repudiate*), **discharge**[4] (PROC anular; esta acepción es similar a la anterior, aunque el contexto en este caso es el procesal o de los tribunales ◊ *The freezing injunction was discharged on appeal*; V. *set aside, annul*), **discharge**[5] (ADMIN/GRAL cumplimiento [de las funciones] ◊ *It was done in the discharge of his duties in the planning authority office*; V. *perform, performance, course*), **discharge**[6] (GRAL/LABORAL despido, baja; despedir, dar de baja [de un hospital, el ejército, etc.] ◊ *He was discharged from the army*), **discharge**[7] (GRAL [dar el] alta hospitalaria ◊ *The patient will be discharged tomorrow*), **discharge**[8] (PENAL perdón o absolución; absolver, exonerar, liberar, poner en libertad), **discharge**[9] (CIVIL/MERC rehabilitación [del fallido o quebrado]; rehabilitar ◊ *Bankruptcy is terminated when the court makes an order of discharge in bankruptcy*), etc.

c. Everyday vocabulary frequently used in the speciality

This third group, the most extensive of the three, contains words from the general lexicon which, like those of the second group, maintain their original meanings but have a central or peripheral function in the speciality. The limiting borders of this group, however, are difficult to define. These lexical items are not technical in the strict sense of the word because, as we have already explained, they are used with their original or primitive meanings, but it could be said that they belong to the legal realm: 'agency', 'office', 'chapter', 'section', etc.

5.2 Syntax

In Section 3.2 we spoke about the anfractuosity of English syntax. Many pages could be written about this anfractuosity and the problems it poses to the translator (Campos 2007). Here are two as a sample:

a. In the sentence that follows three conjunctions (*if, as, when*) convey the notion of "a hypothetic state of the situation"; they only have an emphatic value, as if they were a triplet (see Section 2.1). Since they do not add any special value, the translator could easily reduce them to one (Torrents 1976).

> He said that the time had come for him to guarantee the future of himself and his family if, as and when he decided to withdraw from public life (*si algún día decidiera retirarse de la vida pública*).

b. However, on occasions, the solution is the opposite. The translator may decide in the following sentence that for the sake of a clear understanding it will be convenient to write two subordinate sentences where there is only one in English:

> When and so long as such parties were in the throes of negotiating larger terms. *Cuando las partes se encuentren en pleno proceso de negociar la ampliación de los plazos, y mientras dure esa situación* ...).

6. Awareness of the top-down process: Legal genres

In Section 5, we said that words and syntax in their upward movement from the text to the translator's mind are met by a top-down process. This process is influenced by the macrostructure and all the conventions of a legal genre, namely the

macrostructure of a judgment, a contract or any other legal genre. It is now the time to discuss the elements of the macrostructure of the contract (based on Borja 2000: 402–49), for the sake of illustration of this section:

a. Commencement or premises
In the introductory section there is usually a descriptive phrase identifying the type of undertaking ("This Sale and Purchase agreement") and the parties to the contract ("by and between X and Y").

> This SALE AND PURCHASE AGREEMENT is made this fourteenth day of March 2000, by and between X and Y ..

b. Recitals or preamble
The recitals or preamble section consists of clauses beginning "Whereas" when the historical, social or economic reasons that have led them to take this step are established:

> Whereas (One) Lotsastock Inc. (hereinafter referred to as "the Company"), domiciled in Canada, is a commercial stock corporation of mixed economy organised and existing under the laws of Canada and having its registered office at 12, Easy Street, Vancouver, British Colombia, Canada.
>
> (Two) Seller is the beneficial owner of 3,786,583 series B shares each of a nominal value of 1.5 Canadian dollars, representing forty-six and seven hundred and seventy-five thousandths per cent (46.775 %) of the issued and outstanding share capital of the Company (hereinafter called "the Shareholding").
>
> (Three) Seller desires to sell and Purchaser desires to purchase the Shareholding and those shares to which Seller would otherwise become entitled on and subject to the terms and conditions contained in this Agreement ...

c. The operative provisions
This section begins with a clause declaring the existence of an agreement between the parties and giving force to it by the use of a performative verb (e.g. 'agree', 'promise', 'undertake', 'commit oneself to') governing the following clauses:

> NOW IT IS HEREBY AGREED by and between the parties as follows ...

d. Definitions

Definitions are necessary to make the parties' intentions absolutely clear. They can be by extension or by intension. In the first case, the individual categories or subtypes comprehended in a generic term are given:

> 'expenses' include costs, charges and necessary outlays of every description;

Definition by intension, on the other hand, gives the semantic features of the concept:

> 'business day' means a day on which banks and foreign exchange markets are open for business in London and New York.

e. Consideration

Probably this is the most important part of a contract, the consideration, which makes reference to what the parties lose and gain in the transaction:

> In consideration of Seller's undertaking to sell the shareholding, Purchaser shall pay Seller on the date hereof an amount equal to the sterling equivalent of twenty thousand U.S. dollars ($20,000).

f. Representation and Warranties

This clause (or clauses) contains assurances as to the quality of the goods sold or the services provided, the right of each party to act in the contract, the legal assumptions on which the contract is entered into, and so on.

> Seller represents and warrants to Buyer that Seller is legally constituted under the laws of England with adequate power to enter into this agreement ... .

g. Applicable law

It is usual, especially in commercial contracts, for the parties to state which set of laws is to govern the agreement in case there is an action for breach of contract to be heard in a court of justice:

> This Agreement shall be governed by, and construed in accordance with, the law of England.

h. Severability

This is an optional section in which the parties may agree that if any part of the contract is deemed inoperative or unlawful, the rest of the agreement will remain valid and binding:

> Any term, condition or provision of this Agreement which is or shall be deemed or be void, prohibited or unenforceable in any jurisdiction shall be severable herefrom [...] without in any case invalidating the remaining terms or conditions hereof ... .

i. Testimonium [testing clause]
This is similar to the testing clause of a will. Here are two examples:

> IN WITNESS WHEREOF the said parties have hereunto set their respective hands and seals the day and year first above written.
>
> IN WITNESS WHEREOF the parties hereto have duly executed this agreement this 22nd day of June nineteen hundred and ninety-nine.

j. Signatures
The signatories' names are printed legibly above or below their signatures:

> SIGNED by
>
> John Smith
>
> for and behalf of
>
> Peter Stuart
>
> under a power of attorney dated 15 October, 1998.

k. Schedules
These are also known as 'exhibits', 'appendices' or 'annexes' and they contain miscellaneous information of interest to the parties (e.g. shipping documents, copies of deeds or certificates relating to the subject-matter of the contract, etc.).

7. The use of traductological techniques in the translation of legal texts

One of the previous questions that emerge in many handbooks on legal translation is whether it is a science or an art. The answer is very easy: anything might be anything, because, as Saussure (1945) taught us, the point of view creates new realities ("*Le point de vue crée l'objet*"). Therefore there are answers in favour of the first option (Wills 1982) or the second option (Leighton 1984). There is a third possibility: translation as a skill (Wills 1996). As a skill, the process of translation could methodologically be broken up into several of its components, that we will call traductological techniques. Vinay and Darbelnet (1958) and Vázquez Ayora

(1977), two classical figures of authority in the field of translation, have provided us with a long list of useful techniques. We shall comment only on three: transposition, modulation and amplification.

7.1 Transposition

This technique consists in the substitution of one syntactic category for another, and it is based on the belief that the same semantic density can be found in two different grammatical categories:

a. verb → noun: *asked for the deposit to be returned* (solicitaron la devolución del depósito); *it was argued that since ...* (el argumento utilizado fue que puesto que ...), *He held that ...* (*en su opinión*).
b. adjective → noun: *when the invoice is overdue* (al vencimiento de la factura).
c. noun → verb: *After payment* (tras abonar).

7.2 Modulation

Modulation consists in the finding of equivalence by the substitution of a semantic category for another. In the example given in section one, the translation of "Users of the transport system need to be put back at the heart of the transport policy" as *devolver el protagonismo* a los pasajeros, etc. there has been a clear modulation.

7.3 Amplification

Amplification means the insertion of additional information in the target language, most of the time by means of a word or phrase. In the translation of the following sentence the translator has considered it convenient to add the words *de acción*:

> *Whereas since the Treaty has not provided the specific powers to establish* such *a legal instrument…*
>
> Considerando que, al no haber establecido el Tratado poderes de acción específicos para la creación de …

8. The application of communicative strategies and linguistic devices in the translation of legal texts

Intentionally or unintentionally we all resort to some communicative strategies in our daily communication with our counterparts in order to play down the meaning of some words or expressions, to highlight the importance of a concept, to conceal the agent of an action, etc. All these communicative strategies make use of several linguistic devices. Some of them are very relevant from the point of view of translation. Here are four linguistic devices that may be applicable when translating from English into Spanish (or most Romance languages): lexical repetition, passivisation, thematisation and nominalisation. All of them carry many additional meanings and deserve a deeper analysis that cannot be discussed in this brief article. For example, repetition and thematisation tend to highlight some information, whereas passivisation and nominalisation make an attempt to present an objective message (Alcaraz 2000: Chapter 3). The purpose of the comments that follow is to underscore that the translator of English legal texts should not needlessly adopt a submissive attitude towards English syntax.

8.1 Repetition

Legal English makes use of lexical repetition for several reasons. One could be that words are not loaded with as many morphemes as Spanish or any other language. For example, 'old' could be *viejo, vieja, viejos, viejas* in Spanish. Some translators from English try to respect this lexical repetition. In our opinion, it is not always correct to do so, as most Romance languages do not allow as much lexical repetition as English. In the text that follows the expression 'Insider trading' has been repeated four times. Romance languages have devices to avoid this unwanted repetition:

> The SEC has reinforced the insider trading restrictions with promulgation of Rule 14e-3 of the SEC, an independent provision prohibiting insider trading in connection with tender offers. Congress has further reinforced these trading restrictions by providing the SEC with the power to seek a treble penalty under the Insider Trading Sanctions Act of 1984 (ITSA). This legislation empowers the SEC to base enforcement actions on any recognized theory of insider trading restriction.

8.2 Thematisation

Subject and predicate are the two main syntactic categories of a sentence. From the point of view of information the two chief parts of a sentence are theme and rheme. The theme is the starting information or old information. English is one of the languages where there is a greater coincidence between theme and subject. Spanish, for example, does not work in the same way, as seen in the following example:

> *Slavery, colonialism, anti-Semitism, and extreme nationalism can be seen across centuries and countries.*
> En todos los países y en todas las épocas, se ha conocido la esclavitud, el colonialismo, el antisemitismo y los ultra nacionalismos.

8.3 Passivisation

Passivisation is a valuable linguistic device that can be used for some communicative strategies, for example, to conceal the agent of an action if so desired. However, from a stylistic point of view, it should be underscored that some languages, like Spanish, have got other linguistic resources, including the active voice:

> Slavery, colonialism, anti-Semitism, and extreme nationalism can be seen across centuries and countries
> En todos los países y en todas las épocas *se ha conocido* la esclavitud, el colonialismo, el antisemitismo y los ultra nacionalismos

8.4 Nominalisation

As mentioned before, nominalisation may have many communicative intentions that cannot be discussed in this short article. However, from a stylistic point of view it should underlined that some languages, like Spanish, prefer nominalisations to verbs:

> The Treaty has not provided the specific powers to establish a legal instrument;
> El Tratado no ha ofrecido poderes de acción específicos para la creación de un instrumento jurídico …
> This proposal includes a set of rules for reinforcing and improving the rights and obligations…
> La presente propuesta consta de una serie de normas destinadas al fortalecimiento y la mejora de los derechos y obligaciones…

9. Conclusions

The translation of legal texts raises the same general problems as the translation of any other text, such as the use of appropriate translation techniques (Section 7) and of suitable communicative strategies (Section 8). However, it encounters specific problems arising from the nature of this language such as linguistic and cultural anisomorfism, the abstruseness of legal language, both in its obscure vocabulary and anfractuous syntax, and the idiosyncratic macrostructure of legal genres.

References

Alcaraz Varó, E. 2000. *El inglés profesional y académico*. Madrid: Alianza Editorial.

Álvarez, R. & Vidal, A. (eds.). 1996. *Translation, Power, Subversion*. Clevedon: Multilingual Matters.

Austin, J. L. 1962. *How to Do Things with Words*. London: Clarendon Press.

Bhatia, V. K. 1993. *Analysing Genre. Language Use in Professional Settings*. London: Longman.

Borja, A. 2000. *El texto jurídico inglés y su traducción al español*. Barcelona: Ariel.

Campos, M. A. 2007. El lenguaje de las ciencias jurídicas: Nuevos retos y nuevas visiones. In *Las lenguas profesionales y académicas,* E. Alcaraz, J. Mateo & F. Yus (eds.), 155–165. Barcelona: Ariel.

Delabastita, D. 1990. There's a Double Tongue. An Investigation into the Translation. of Shakespeare's Wordplay. PhD dissertation, Catholic University of Louvain.

Franco Aixelá, J. 1996. Culture-specific items in translation. In *Translation, Power, Subversion,* R. Álvarez & Á. Vidal (eds.), 52–78. Clevedon: Multilingual Matters.

Garner, B. 1991. *The Elements of Legal Style*. Oxford: OUP.

Gómez González-Jóver, A. 2006. Meaning and anisomorphism in modern lexicography. *Terminology* 12 (2): 216–234.

Leighton, L. 1984. *The Art of Translation*. Knoxville TN: The University of Tennessee Press.

Lewandowski, T. 1982. *Diccionario de Lingüística*. Madrid: Cátedra.

Lyons, J. 1977. *Linguistic Semantics*. Cambridge: CUP.

Malinowski, B. 1935. *Coral Gardens and their Magic*. Vol. II. London: Allen Unwin.

Martinet, A. 1965. *Eléments de linguistique génerale*. Paris: Presses Universitaires de France.

Saussure, F. de 1945. *Curso de lingüística general*. Buenos Aires: Losada.

Sapir, E. 1921. *Language*. New York NY: Harcourt.

Torrents dels Prats, A. 1976. *Diccionario de dificultades del inglés*. Barcelona: Juventud.

Vázquez Ayora, G. 1977. *Introduccción a la traductología*. Washington DC: Georgetown University Press.

Vinay, J. P. & Darbelnet, J. 1958. *Stylistique comparée du français et de l'anglais*. Paris: Didier.

Whorf, B. L. 1956. *Language, Thought and Reality*. Cambridge MA: The MIT Press.

Wills, W. 1982. *The Science of Translation*. Tübingen: Narr.

Wills, W. 1996. *Knowledge and Skills in Translation Studies*. Amsterdam: John Benjamins.

PART II

The language of the court

Questioning in common law criminal courts

John Gibbons
University of Western Sydney

Questions in everyday discourse consist of a situated exchange in which the questioner and answerer are in a roughly symmetrical relationship in which each is entitled to request information from the other. Questioners typically do not have the information that they are requesting. The answerer is not obliged to answer, but there is a normal Gricean expectation that the answer will provide the information requested. Courtroom questioning differs markedly, in that lawyers usually have a particular version of events in mind that they are attempting to confirm with the witness. Usually witnesses are compelled to answer, and do not have the right to ask questions. Therefore courtroom questions differ from everyday questions in both their social and their information characteristics.

These differences mean that courtroom questions are different from everyday questions along a range of linguistic parameters. At the overall narrative or spoken text level, the lawyer is constructing a version of events element by element – neither he nor the witness normally provides a full narrative during the interaction. At the exchange level, normally only the lawyer asks questions, and only the witness answers questions – an asymmetrical pattern – and evaluative lawyer third parts are common. At the level of question structure, coercive grammatical forms are strongly over-represented when compared to everyday conversation.

1. Introduction

In their most basic forms, questions occur when the questioner seeks a piece of information that the questioner does not have, and the answerer does have, i.e. questions are a request for information. This definition implies two types of relationship between the questioner and respondent: a social relationship in which the questioner may make requests, and an information relationship involving shared and unshared knowledge. This most basic use of questions, for instance in everyday speech, generally assumes first a social relationship that permits the

request but does not demand a reply, and second that the respondent has access to a piece of information that the questioner does not have. However, in many spheres of life, particularly in institutional discourse, questions differ widely from this basic type. Perhaps the best known example is the teacher to pupil question, which is normally a form of checking, in which the teacher has the information already, and is checking to see whether the student has it (in particular whether the student has acquired it through instruction). Courtroom questions similarly deviate widely from the basic form, and are part of the extreme difference between legal language and everyday conversation: Tiersma (1999) states that legal language "diverges in many ways from ordinary speech, far more than the technical language of most other professions".

2. Purposes of questioning in common law criminal courts

This paper will limit itself to questioning in Common Law Criminal Courts, particularly the examination of witnesses. The Common Law is used in English speaking countries and countries influenced by them, including England and Wales, the USA, Canada, Australia and New Zealand, India, Singapore and Malaysia, and much of anglophone Africa and the Pacific Islands.

In the Common Law system, a well established understanding of what happens is that the two sides are attempting to construct competing versions of the same event or state (Bennett and Feldman 1981). In criminal cases, the prosecution is usually trying to construct a version that will prove that the accused person is guilty, while the defence is usually trying to construct a competing version of the same events that means their client is not guilty, or is worthy of lenient treatment.

In the Common Law system, when lawyers are cross examining a hostile witness, they have to play a complex game, where they are attempting almost simultaneously to construct and support their version of events and attack the version of the other side. In practice it can be quite difficult to separate out these agendas, since one question may be serving both of them. In either case, a hostile witness is often attempting to do the exact reverse, so cross examination is a verbal battlefield between the lawyer and the witness, in which lawyers have the upper hand, since they are in control of the questioning process.

This purpose of constructing a particular version strongly affects the social and informational relationships, causing them to differ substantially from those found in everyday conversation. The social relationship, rather than being roughly equal, is one of power asymmetry in which the lawyers have control of the questioning process and witnesses are obliged to reply. Lawyers are also in a position to pressure witnesses to agree with their version of events. The information

relationship is also different, because the questioners (lawyers) usually assume that they already have the information, rather than being in the position of eliciting information they do not have. With a friendly witness, counsels are mainly attempting to elicit information that they have already outlined in their opening statement. With hostile witnesses, counsel often attempt to pressure them into agreeing with counsel's prepared version of events. Stygall (1994: 146) states "For lawyers, the focus of attention to question forms is on how to control witnesses. Their assumption is that by controlling what the witnesses say, they will also control what the jurors think". Goffman (1981: 226) provides the following analysis of the various participation roles played by speakers:

> The term "speaker" is central to any discussion of word production, and yet the term is used in several senses, often simultaneously and (when so) in varying combinations, with no consistency from use to use. One meaning, perhaps the dominant, is that of *animator*, that is, the sounding box from which utterances come. A second is *author*, the agent who puts together, composes, or scripts the lines that are uttered. A third is that of *principal*, the party to whose position, stand, and belief the words attest.

The objective of much legal questioning is to make the lawyer, rather than the witness, the *principal*, the person whose "position, stand, and belief" are expressed, leaving the witness in the role of *author*, and sometimes even *animator* only.

In summary, in everyday questions we have a social relationship that permits a request for information but does not demand a response, and an informational relationship in which the respondent has the information and the questioner does not. However in courtroom questioning, questioning counsel have the right to demand a reply, and often assume that they already have the information that is to be supplied by the respondent. These atypical personal and information relationships have a significant impact on the nature of both questioning exchanges and the form of questions. I will examine these, exemplifying from Hong Kong Common Law discourse.

3. The data

The data mostly come from Common Law courts in Hong Kong and were recorded and transcribed[1] as part of a joint project on courtroom discourse in some sexual assault cases. I have not included the Cantonese material, since the lawyers'

1. The transcriptions of the courtroom recordings are part of a joint research project with Ester S. M. Leung. They were transcribed by Leonard Y. Y. Yip, Eva Y. T. Wong and Yama Y. N. Wong,

questions were asked in English; for the witnesses' replies in Cantonese I have given the court interpreter's translation in English.

4. Narrative construction

As noted above, the two sides in a court case are usually attempting different constructions of the same reality, often in a narrative form. The construction process is to some extent joint, although the lawyer, even when questioning 'friendly' witnesses, will often contribute much of the content. In Example 1 we can see how counsel painfully constructs the narrative element by element (the transcription conventions are given at the end of this paper).

(1) 1. BD: can you say that started from the summer holiday you approximately how many occasions that you take her out on her own during the summer holiday
2. W/I: many times i can't recall
3. BD: **and em on those occasions still during the summer 97 em (1.0) those occasions** (2.0) were they (.) on your initiative such as you rang her or something like that (1.5) or vice versa
4. W/I: at the beginning it was me who took the initiative … later she called (unintelligible)
5. BD: em (1.5) **on those occasions when you (1.0) took the initiative** did you use any false excuse such as aa you come over we'd discuss badminton (1.0) er techniques or badminton coaching or whatever

In first half of turn 3 counsel reformulates previous replies from the witness in the **bold** section, and uses them as a starting point to question the witness as to how the meetings were arranged. In turn 5 the witness's reply that he "took the initiative" is again built in as a starting point in the **bold** section, before asking for the next point of information. This slow process of recycling the previous information then adding to it, is common in courtroom questioning. It should also be noticed that the lawyer gives almost all the information in the questions, and offers very limited scope for the witness to contribute. So turn 1 looks for only a number, turn 3 offers in essence an 'either-or' choice, and turn 5 expects a 'yes' or 'no' answer. The linguistic means by which this limited scope for answers is managed will be discussed later. The lawyer's questions are mainly an account constructed by the lawyer, piece-by-piece.

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5. Questioning exchanges

Questioning exchanges are usually described as having two main parts, a question and a reply. They are an 'adjacency pair' (Schegloff and Sachs 1973). There may be some deviation from this pattern, for example 'insertion sequences' (Schegloff and Sachs 1973). The issue here is how legal discourse differs from everyday conversation. This description is influenced by Atkinson and Drew (1979).

In everyday turn taking, it is assumed that all participants may ask questions. In courtroom examination however the atypical social relations mean that the underlying assumption, subject to certain exceptions, is that the lawyers and the judge ask the questions, and the witness replies.

Turning to the second part, the reply, in everyday conversation the preferred response is one which contains all and only the requested information (see also Grice's maxims). However, dispreferred but possible responses include replies that do not contain the requested information, and no reply at all. In courtroom discourse however, witnesses are usually not permitted to reply off topic or to refuse to reply (unless a reply would be self incriminating). This is stated explicitly by a judge in our data (Example 2).

(2) JE: as a witness in the witness box i'm directing you're obliged to answer the questions that are put to you er truthfully
…
but if a question is asked of you the truthful answer to which may well incriminate you you're not obliged to answer it and you can say i do not wish to answer this question on the grounds the answer may incriminate me

To refuse to reply on other grounds could be contempt of court, a punishable offence. In other words the second part of the exchange is obligatory, and its nature is constrained.

In normal conversation, according to Grice's maxims, we assume that the reply is truthful and contains the requested information. However normal conversation also includes "white lies", exaggerations, and partial information. In contrast, in court witnesses swear "to tell the truth the whole truth and nothing but the truth", and may be punished for committing the offence of perjury if they fail to do so.

A third 'part' can also form part of questioning. This consists of a follow up by the questioner on the respondent's reply. The following are examples, where the third part is in **bold**.

(3) BD: THAT /will you agree wi me\ AGAIN cause you concern /with it?\ (0.5) two of you alone in the same house?

W/I: yes
BD: escap (0.5) **exactly** i am not blaming you because ...

(4) BD: AY (1.0) em (.) just showing back (2.0) the (0.5) first time you said you were attacked, is that right you told police (0.5) that (2.0) T (3.5) had (1.5) sexual intercourse with you (2.0) for about twenty minutes (1.0) remember?
W/I: around
BD: **okay** and the next occasion as you (0.5) er (1.0) recall you told the police that was about fifteen odd minutes

This type of third part was first widely discussed in relation to another form of institutional discourse – that of the classroom. Perhaps the best known description is that of Sinclair and Coulthard (1975), who describe an Initiation-Response-Feedback exchange structure, of which questioning is one exponent. Some analysts refer to this third part as 'Evaluation'. This is significant, because evaluation usually implies the equal or superior power status of the evaluator. Teachers may evaluate students' Responses, but students usually may not evaluate the teacher's Responses to questions without appearing to challenge the teacher's authority. In an important paper, Eades (2000) shows that lawyers commonly use this third part during courtroom questioning. Particularly during hostile examination, the third part may be used to cast doubt on the witness's testimony, but the witness may be asked another question without being given an opportunity to refute it. It may also be used to pounce upon and stress a response that lawyers feel aids their case, as in Example 3 above. Example 4 is a much less emphatic acceptance of the witness's reply.

To summarise, the questioning exchange in the courtroom differs in a range of important respects from questioning exchanges in everyday language. Major differences are that only one party is normally allowed to ask questions, and the other party is only allowed to respond, and normally must respond. These responses are also legally constrained to be full and true. Evaluative third parts also manifest the unequal social relationship.

6. Questioning forms

The unequal social relationship, and lawyers' attempts to gain the reconstruction and validation of their particular prepared version of events, also have a range of linguistic manifestations within the question part itself. In particular they lead lawyers to include much of the information in their questions, and to exert pressure on witnesses to go along with the lawyers' version (pressure on witnesses to agree is sometimes referred to as 'coercion'. Danet and Kermish 1978). A broad

description of types of question in legal contexts is given in Gibbons (2003: 102–107), so I will limit this description to those of particular interest.

Declaratives

One unusual way of asking a 'question' in court in such a way that it contains the lawyer's version, and puts pressure on the witness to agree, is to put the question as a blunt statement – in declarative rather than interrogative form – and await the witness's agreement. One instance follows "okay" in Example 4 above, where the lawyer is simply reciting a version of events. Similarly in Example 5 below, the lawyer makes it clear that he is providing his own version of events by saying "I think", and is making a bald statement of his version for the witness's agreement.

(5) BD: and likewise (0.5) when you reached the door STEP (.) of his quarter i think it it was (1.0) dark (0.5) before you two ENtered (0.2) the premises.

This type of question may sometimes have a rising question intonation, making it more question-like, as in Example 6.

(6) BD: so (.) it never occurred to you on THAT phone chat (.) when he told you come over to MY house (3.0) to watch the video (.) about badminton (.)
that you should (.) at least (.) see if he (1.0) he could lend you the video and so that you can watch it at home?

Although in courtroom parlance this is called a question, it reads much more like an accusation – one that the witness is obliged to respond to by the rules of procedure.

7. Tag questions

Perhaps the most widely discussed type of courtroom question is the tag question. The first part of such a question takes the form of a statement, in which the lawyer can include his/her version of events (the information). The second part consists of a tag, which exerts various forms of interactive pressure upon the witness (the social). This form of courtroom question is therefore a paradigm example of linguistic form matching pragmatic function, and in consequence it is not surprising that many questions in cross examination take the form of tags, and that there are many types of tags – some of them unusual in everyday discourse.

7.1. Modal verb tag questions

There are two types of modal question tag – reverse polarity and same polarity. Reverse polarity tags are often used in court to place pressure on a witness to agree. This is exemplified in the tag "did you not" in Example 7, and by "wasn't it" in Example 8.

(7) BD: e-e This may be e obvious but you knew when you (.) before you started to have a shower that you would need a towel **did you not**

(8) BD: and it was a surprise he was R **wasn't it**

(9) BD: i just want to remind everybody here in this court room you: identified some pictures (2.0) that the: (.) pathologist examined your body (2.0) you were wearing a skirt but in fact you were not dressed like this the night of the: twelfth of june **were you**

The reverse polarity tag "were you" in Example 9 challenges the witness's claim about her clothing.

Same polarity tags may be used in the same way, but they are particularly used to cast doubt on the witness's version of events. In Example 10 below, the barrister is showing that he disbelieves the witness's previous answer

(10) BD: it's not a question of asking for his consent **isn't it**

7.2 Agreement tag questions

These operate in a similar way to modal tag questions, but use expressions such as "isn't that right?" "am I right" and "is that correct?" or simply "right?" or "true?". Like modal tags, they can have positive (Examples 11,12, and13) negative (Example 14) or 'either-or' polarity (Example 15).

(11) BD: yes (1.0) all the games are associated with drinking **am i right**
W/I: yes

(12) BD: and then there's the deFENdant (1.0) who you told us you didn't know before **right**

(13) BD: ... the defendant CARRIed on as late as three e or four o'clock **is that true**

(14) BD: THAT purpose to you was the original purpose why you want to go to a private home instead of going drinking beer in one of your favourite homes the karaoke lounge or bar becau::se you K [softer] and R wanted to smoke cannabis **isn't that true**

(15) BD: i'm just trying to describe if there's misunderstanding that you (2.0) actually enjoy drinking is it true whether it relaxes or for whatever purpose you enjoy drinking **true or not**

7.3 Full verb tag questions

One unusual variant of tag questions is the full form tag question, where a full form of the verb rather than a modal verb is used. This hyper-explicit language places pressure on the witness to reply in a similarly exact way, allowing no scope for partial disagreement.

(16) BD: the defendant is a younger person than you **do you agree or disagree**

(17) BD: are you suggesting the defendant forbids people to go and use the bathroom in his room so the people had to queue just to use the one outside **is that what you're saying**

(18) BD: did you see where the defendant passed you his t-shirt and his kimono for you to put on **or did you not see**

7.4 Yes or no tag

Another unusual tag, explicitly demanding a 'yes' or 'no' reply, is the 'yes or no' tag, shown in Example 19.

(19) BD: have you ever heard any (.) before in your work in the karaoke lounge or (.) her places you drinking at you've never heard this term before **yes or no**

8. Amount of information and pressure

One variable that is particularly important for courtroom questions is the degree to which they include information. The more information that is included in the question, the less the witness is able to communicate a version of events that differs from that of the questioner. We have already seen various types of question that include ALL the information, and where the witness is licensed only to agree or disagree. Other familiar question types can be assessed similarly for the amount of information they allow the witness to contribute, and by the level of pressure they place for agreement.

Polar Yes-No questions
These include all the information, but usually exert no pressure for agreement, as in Example 20.

(20) J: did he tell you why he was taking (1.5) did he tell you why he was driving you to his home?
W/I: no

Choice questions
In this type of question the witness is given a choice of two alternatives, but no other answer is licensed. Sometimes, as in Example 21, the choice is given as a positive/negative choice.

(21) BP: were the: (1.0) doors of the other rooms in the premises **closed or not closed at that time**
W/I apart from (.) the room from where i came (1.0) the doors to other two rooms were closed

In Example 22 the witness is given a choice between people.

(22) BD: did he ring you **or** did he ring KP?
W/I: first of all he rang me

In Example 23 it is a choice of timings.

(23) BD: did you start drinking bee::r immediately upon your arrival **or** did that happen actually later
W/I: shortly after we arrived

On other occasions, there may be a choice between single words, as in Example 24 where the witness is given choice between "light" "medium" or "heavy" rainfall, and she chooses "heavy" in her reply.

(24) BD: you recall whether (0.3) it was a heavy RAINFALL **or** light rainfall (.) **or** medium
W/I: when i alighted from the car (0.2) there was a heavy downpour (.) but the rain stopped (1.0) very (0.2) soon after that

These choice questions license in the response only information provided by the barrister.

Who, where and when questions
These license the contribution of only a person, place or time, and not a challenge to other information embedded in the question. In Example 25 the question does

not licence a discussion of whether or when the woman took off her clothes – these aspects of the lawyer's version are presupposed. The witness responds to 'where' by providing the place only.

(25) BD: **where-where** was it that you took your clothes off (.) before you had the bath
W/I: inside the bathroom

Similarly in Example 26 the witness gives an account of the timing of events when asked 'when' question.

(26) BD: \he took off/ your glasses (.) on the last occasion (1.0) **when** did he do that
W/I: when he pushed me down to the bed he took off my glasses(.) after that he took off my clothes
BD: **how** did he take (.) off your glasses?
W/I: with his hands

How and why questions
These enable the witness to supply more information about circumstances and motives. In Example 26 above the "how" is answered with all and only the required information on the manner in which the action was done. Similarly in Example 27 the 'why' question receives the 'because' response.

(27) W/I: a blond milk girl
BP: [whispering] alright [normal] **why** did you choose that name = for
W/I: =because i dyed my hair blond then

Projection questions
Another very common feature of courtroom questions is that they contain verbal projections (reported speech) and mental projections (reported thought and belief). They are a particularly effective way of including a large volume of information from the lawyer's version of events, and depending on their structure, may place high levels of pressure for agreement upon witnesses.

In a verbal projection like "You say that he entered the room", there is an assumption that the speaker is committed to the truth of the core proposition ('he entered the room'), making it difficult to deny without painting oneself as a liar. Therefore, if the person answers "No", this denial is primarily a denial of **saying** this, but does not deny that he entered the room (although the denial may affect this core proposition if there is no other evidence for the fact). The core information (he entered the room) is to some degree presupposed or embedded.

Let us look at some example where this resource is used.

(28) BD: **and you told us just now** (1.0) where those places were that you had sexual intercourse with her

This question in Example 28 presupposes that the witness has recounted where sexual intercourse took place, and the sexual intercourse itself is very difficult to deny.

(29) BD: **and indeed** (.) **i suggest to you** (.) **em** (1.0) **perhaps you remember saying so** (.) this was not the first visit **as you CLAIMED** (.) you went to his house
W/I: i disagree

The basic form of the question in Example 29 is "Was this your first visit to his house?" The question is modified away from this base form by several layers of projection "I suggest to you" (lawyer's projection) "you remember"; "saying so" and "you claimed" (witness projections). The witness cannot answer 'no' since it would be most unclear which of the many propositions she is denying – she is forced to find another means "I disagree".

(30) BD: **you told us** (7.0) he was taking a shower (.) whilst you were staying inside that quarter (0.2) is that right?

The basic form of the question in Example 30 is "Was he taking a shower while you were in the quarters?" Once more the projection "you told us" makes it hard to deny, and the final positive agreement tag places further pressure for agreement.

The difficulty in denying information can even more pronounced when the verb is a mental process like 'remember', 'know' or 'be aware'. Kiparsky and Kiparsky (1971) describe these types of projections as "factives" since they presuppose that the core proposition is a 'fact'. A denial often indicates only a flaw in one's memory, knowledge or alertness, leaving the core proposition strongly presupposed. For instance the question "Do you remember him entering the room" assumes or presupposes the core proposition, that the person entered the room. A "No" response to this question would usually be interpreted as a problem with the respondent's memory, and tends to assume that he really did enter the room. In consequence the core proposition in a question like this is often entered unchallenged into the discourse, and therefore into the account of events.

(31) BD: **did it occur to you indeed** what you were doing what was (.) NOT permitted by the law

In Example 31, the illegality is presupposed.

(32) BD: **can you recall** (.) since when you started having sexual intercourse with X

In Example 32 the sexual intercourse is taken as a presupposed 'fact'.

Another permutation that was mentioned above is, who is reporting – the questioner, the witness, or a third party.

Projection (questioner)	(33) BD: **and indeed as i said**-em (4.5) this just carried ON (2.0) until (1.5) summer (1.0) nineteen ninety EIGHT (1.0) when **you said** (4.0) [in a softer voice] *obviously* to your surprise (1.5) he (.) raped you
Projection (witness)	(34) BPE: **you said** you FELT fully-fully penetrated (3.5) **can you explain** why that was why you felt that (35) BD: **you still remember** you celebrated (.) his-em (2.0) nineteen ninety (2.0) eight birthday? (.)
Projection (other person)	(36) BD: **yes she said** shortly (.) two weeks (.) may be three weeks (.) four weeks later after the first attack?

It can be harder to deny with certainty that other people have said a certain thing (they may have said this not in your presence), than to deny that you said it yourself. When it comes to challenging the core proposition, this is also difficult, since this often implies that the other person is a liar, or at least ill informed.

Special formulas

One final characteristic of courtroom questions is that there are occasions when lawyers specifically mark the fact that the information is their version of events, not that of the witness, then challenge the witness to disagree. This is done by the use of legal formulas, the most common of which is 'I put it to you that ...'. Sometimes 'Is it not the case that ...' is used in a similar fashion.

(37) BD: then **i put it to you that** you did because when you found the defendant
was not very good at playing in this game you offered you OFFERed on that occasions to (inaud) in respect of the opponent

(38) BD: **i further put it to you: that** in the course of THAT stage of that evening i'm (1.5) until two to three o'clock in the morning you (2.0) always found the excuse to get close to the defendant do you agree or disagree ...
W/I: i disagree

9. Conclusions

As with so many aspects of legal language, perhaps the most striking aspect of questions in Common Law criminal courts is that they are so different from everyday questions. Rather than genuine requests for information from a person who does not know the answer, put to a person who is under no obligation to answer, instead we have questions in which the questioner assumes that s/he already has the answer, in which the answerer is obliged to answer, and where the answerer is pressured to answer in the way the questioner wishes by means of a wide range of linguistic resources. The reason for these differences is the purpose to which these so-called questions are put – the questioner is attempting to have the answerer either contribute to or agree with a version of events predetermined by the questioner.

As we have seen, these differences produce linguistic consequences at a range of linguistic levels (this include phonology, which has not been discussed here). At the discourse level, rather than an 'elicitation to narrative' type of question, lawyers often construct the narrative element by element, by a series of questions that recycle preceding information and ask for very limited pieces of new information. In normal conversation such a procedure would probably cause social difficulties. At the exchange level, the questioning/answering relationship is asymmetrical, and may include a lawyer evaluative third part. At the question structure level, we see an over-representation of questions that limit the scope for response in a range of ways, in an attempt to control the information provided by the witness.

The justification that lawyers usually give for this type of questioning is that it 'tests the evidence'. There are strong reasons for doubting this justification, since the questioning process described here seems more likely to distort the evidence of witnesses (particularly vulnerable witnesses) than test it.

Transcription conventions and abbreviations

Symbol / Abbreviation	Meaning	Example
=	latch (no pause between turns)	C. could take it = J. = yeah =
CAPITAL LETTERS	Emphasis or anonymised names	FIVE … ONE AY
bold	element under discussion in this paper	**as i said**
colons	drawn out syllable	so different in he:re?=
( )	unintelligible	cuz Curtis (sat and) talked
?	upward intonation	said take it?
.	downward intonation	What? would your mom and your sister have told you about tonight with the cash.
(2.5)	pause, timed in seconds to the "rhythm" of the talk	Y'know (.) a few pieces of candy (2.5) still? I never seen that
(.)	brief pause – around 0.5 seconds	kinda money (.) before.
BP	Prosecution Barrister's English Utterance	
BD	Defence Barrister's English utterance	
W/I	Interpreter's English Translation of Witness's Language	

References

Atkinson, J. M. & Drew, P. 1979. *Order in Court: The Organisation of Verbal Interaction in Judicial Settings*. London: Macmillan.

Bennett W. L. & Feldman M. S. 1981. *Reconstructing Reality in the Courtroom*. London: Tavistock Publications.

Danet, B. & Kermish, N. C. 1978. Courtroom questioning: A sociolinguistic perspective. In *Psychology and Persuasion in Advocacy,* L. N. Massery (ed.), 413–441. Washington DC: Association of Trial Lawyers of America, National College of Advocacy.

Eades, D. 2000. *I don't think it's an answer to the question*: Silencing Aboriginal witnesses in court. *Language in Society* 29: 161–195.

Gibbons, J. 2003. *Forensic Linguistics An Introduction to Language in the Justice System*. Malden MA: Blackwell.

Goffman, E. 1981. *Forms of Talk*. Oxford: Blackwell.

Schegloff, E. & Sachs, H. 1973. Opening up closings. *Semiotica* 8: 289–327.

Sinclair, J. M. & Coulthard, R. M. 1975. *Towards an Analysis of Discourse: The English used by Teachers and Pupils*. Oxford: OUP.

Stygall, G. 1994. *Trial Language: Differential Discourse Processing and Discursive Formation*. Amsterdam: John Benjamins.

Tiersma, P. 1999. *Legal Language*. Chicago IL: The Chicago University Press.

Bilingual courtrooms

In the interests of justice?

Richard Powell
Nihon University, Tokyo

Bilingual courtrooms are generally associated with the use of interpreted oral testimony to support monolingual judicial proceedings. Yet several postcolonial jurisdictions accord *de jure* or *de facto* standing to more than one language in court. The most studied is Malaysia, but the literature is far from exhaustive. Further research is to be encouraged because the way different legal systems accommodate bilingualism throws light on many questions central to forensic linguistics, including language rights, language planning in legal domains, cultural disadvantage before the law, genre-based communication strategies, and transparency of legal processes. This chapter reviews current evidence of and research into bilingual courtrooms and discusses the problems and potential benefits of including data on bilingual discourse in debates about language and justice.

1. Introduction: The bilingual courtroom revisited

Legal practitioners and linguistic analysts alike tend to take monolingualism as the norm for courtroom discourse, even for courts situated in multilingual societies. French, but not German, is the language of the court in Luxemburg; English, but not French or Kreol, is used in Mauritius; and Portuguese is being reinstated in Timor Leste to replace Indonesian. Switzerland has monolingual French, German and Italian courts at cantonal level, and cases going up to the Tribunal Fédéral are heard in the language they were initiated in. English is the sole working language of most of the world's common law courts, with English-based interpreters playing an active and crucial role in the many polities like Hong Kong and Brunei where only a minority of litigants and witnesses prefer to speak in it. Thus debate on the subject of language disadvantage before the law has been dominated by translation issues. Neither Berk-Seligson's seminal *The Bilingual Courtroom* (1990), nor the Australian Law Reform Commission's report on language barriers to equality (1992) problematises the question of courtroom code-choice itself.

Yet a growing body of evidence suggests that bilingual discourse, unmediated by translation, is common in many courtrooms around the world and worthy of co-ordinated investigation.

Bilingual discourse is found in a variety of forms, including divergent language choice by different participants, as in Example (1) where counsel's English questions are understood by the witness but answered in Setswana:

(1) C: Where did you say the accident happened?

W: *Gone mo Broadhurst fa o hapaanya strata se tswelang ko…*

'Here in Broadhurst when you come to cross that street that goes out to…'

(Botswanan Magistrates Court, Thekiso 2001:141)

Another common pattern is the use of different languages for different interlocutors, as in Example (2) where the judge, who understands Malay (and indeed has used it to address the witness) decides on English when admonishing counsel:

(2) C: *Selain dari tiga orang* *yang tinggal serumah* *dengan kamu*
'Apart from the three people who live at the house with you

ada sesiapa yang mengguna *kereta kamu?*
was there anyone who used your car?'

W: *Setahu saya tak ada.*
'No one as far as I know.'

C: *Setahu kamu?*
'As far as you know'

J: Well she can only answer what she knows.

(Malaysian Sessions Court, Powell 2008)

We can also find language alternation within the same passage of speech, as in the following example where defendant and judge alike mix English with Kiswahili:

(3) D: Your honour *naomba unipunuzie* bond *kwa sababu*
'I beg you to reduce the bond because

family *yangu* *imeshindwa kufikisha* two hundred thousand.
'my family cannot come up with

J: *Siwezi kupunguza* bond *kwa sababu* *umekuwa* accused
'I cannot reduce the bond because you were accused

umeiba gari *na ninaona* *shilingi elfu mbili* *ni* fair.
of stealing cars and I believe 2000 shillings is fair.'

(Kenyan Magistrates Court, David and Powell 2003)

Transcription key[1]

J	= Justice (judge, registrar, magistrate)	//	= overlap
W	= Witness	()	= pause
D	= Defendant	‘ ‘	= translation (not in the original courtroom proceedings)
C	= Counsel		

De facto bilingualism is typical of oral discourse in many postcolonial judicial systems where a language other than that of the court is understood by most courtroom participants and tolerated by justices. Some *de jure* support for bilingualism is also found in African and Asian jurisdictions that accept more than one language for written submissions. Bilingualism sanctioned by national legislation is rare, however, the most notable examples being Hong Kong, Sri Lanka and Malaysia. Bilingualism adds an important dimension to enquiry into power relations within and beyond the courtroom, especially with regard to language rights, transfer of legal genres and registers across cultures, and communicative strategies employed by advocates. In turn, the institutionalised constraints of the courtroom provide an interesting site for examining aspects of bilingualism such as language planning, language preference and language alternation. Despite this, the literature on bilingual courtroom discourse remains sparse. The only jurisdiction to have received much linguistic analysis is Malaysia's, where language policy promotes the use of Malay in the legal domain while tolerating the continuance of English "in the interests of justice" (National Language (Amendment and Extension) Act, 1983). In practice, Malaysian lawyers primarily use Malay in the lower courts, but favour English or code-switching in higher courts and civil cases. Yet there has been little examination of whether this compromise is calculated to serve the interests of justice (lower court defendants usually having better Malay, and higher court litigants better English) rather than the convenience of legal practitioners.

This chapter will review various instances of bilingualism that have been studied or at least identified in courtrooms before considering methodological issues involved in gathering data on them. There will then be a discussion of how analyses of courtroom bilingualism may enrich investigations into language rights and language planning, linguistic transfer and preference, and communicative strategies involving language alternation. The chapter will conclude by evaluating how bilingualism serves or subverts justice.

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1. Phrase-level translations – my own except where another author is cited – are added underneath word-groups that are in or include languages other than English. Words deemed to be loans from English are not italicised.

2. Where and how courtroom bilingualism arises

2.1 Monolingualism as the courtroom norm

Many multilingual societies give official status to more than one language in the legal domain. French and Dutch have standing in Belgium, Sinhala, Tamil and English in Sri Lanka, and as many as 22 regional languages in India. But few admit more than one untranslated language in the same courtroom. The inference is that courts represent the culmination of state-enforced linguistic rationalisation: courtroom monolingualism serves not only to minimise potential ambiguity in rulings but also to assert the authority of one way of codifying meaning.

Examples of monolingual rationalisation in multilingual societies abound. While allowing conditional use of English, Malaysia gives Malay higher status in the courts and makes the Malay versions of post-1967 legislation authoritative. Similarly, while leaving some provision for English, the Maltese constitution enshrines Maltese as the language of the courts and prioritises Maltese over English texts in the event of conflicts of interpretation. In Quebec, French texts have priority over English and although the Canadian Supreme Court struck down the section of Quebec's Bill 101 that declared French the sole language of that province's courts, recent litigation (e.g. Charlebois vs City of St John 2005) attests to the difficulty of maintaining substantive equality between two languages in a legal system. Hong Kong is unusual in giving equal authority to Chinese and English drafts of the same laws.

The judiciary in most former American, British, French and Portuguese colonies remain heavily Anglophone, Francophone or Lusophone. Where a local language is more widely understood, and especially where it has official status, exoglossic legal systems appear suspiciously like last bastions of colonialism. However, historical analysis of British imperialism reveals several instances of support for local languages. Persian was replaced by Bangla in the courts of Bengal; further east, Burmese was made the language of the courts and colonial officials were pressed to learn it. Such evidence seems to support Powell's (2002) contention that while British imperial language policy was rarely systematic or centralised, it favoured restriction rather than promotion of English as an instrument of control. Nevertheless the colonisers left powerful legacies of English case law and entrenched classes of Anglophone lawyers. Many of the bilingual courtrooms studied so far have resulted from postcolonial initiatives to introduce local languages into inherited legal domains. These include jurisdictions that remain predominantly exoglossic but accord a role to local languages; those where language planning has produced an officially bi- or multilingual judicial system; and those where language planning has largely achieved language shift away from the colonial language.

2.2 Exoglossic systems that allow the use of local languages in the courtroom

In these jurisdictions, case law, statute, court records and legal training remain in the colonial language, but most courtroom practitioners understand the national language and oral evidence in it is admitted without translation. For example, Botswana's Magistrates Courts Act (04:04 Part I s.5(1)) requires English for court proceedings and records, but with most citizens proficient in Setswana, language alternation is common in the lower courts (Thekiso 2001). Kenyan law also provides for the national language (Kiswahili) to be used orally without translation, but English remains the only language of legal documents: several attempts to produce a Kiswahili version of the constitution have come to nothing. Language alternation is common in oral discourse there (David and Powell 2003), although police prosecutors are continually "tortured by defence lawyers insisting on English" (Kutete-Matimbai 2002).Tanzania has gone further in promoting Kiswahili, which was reported to be the language of 92% of discussion in Primary Courts and 79% in District Courts (Yahya-Othman and Batibo 1996: 384). There are Kiswahili versions of the constitution, Land Act, Political Parties Act and some subsidiary legislation, and it is also the language of most documents submitted to the primary court and used alongside English for proceedings in the District and Principle Magistrates Courts. But only English is used for the drafting of pleadings and for proceedings in the High Court and Court of Appeal (Maosa 2006). Courts in the Philippines accept documents filed in Filipino, although Filipino oral testimony is often translated into English. Beyond the Anglophone postcolonial world, French is "ostensibly the language of the courts [in Francophone Africa], although in practice many judges have been observed using French only perfunctorily while depending on vernacular languages for most courtroom communications" (Salhi 2002).

2.3 Bilingual judicial systems

In several former British colonies of Asia, language planning has produced courtrooms where languages other than English are used not only for oral argument but for filing lower-court pleadings, some of them also having standing in superior courts. Several Indian state-level courts admit Hindi or official regional languages: both Telegu, and in some districts, Urdu, are used in the subordinate courts of Andhra Pradesh, and Hindi, Punjabi and Urdu in courts under the High Court of Delhi. While English is overwhelmingly the language of pleadings and affidavits (Sen 2004), the use of other languages for proceedings is reflected in

Indian Supreme Court provisions (Order XV, 14 (1)) for English translation of appeal cases. Pakistan's Supreme Court similarly provides for the translation of documents submitted in anything other than English or Urdu (Supreme Court Rules, Order VII, 2). Its constitution, statutes and higher court pleadings are in English (Shadab 2003), but Urdu is the language of the subordinate courts in Punjab, Balochistan and North West Frontier Province and Sindhi is used in Sindh (Hafizur Rahman 2005). At district level in Punjab, for example, both English and Urdu are used for charges, discussion, judgements and records (Moksin Reza Mohamed 2005), with various factors influencing the choice such as the type and seriousness of the case (Ayub Sohail 2005). Even in Pakistan's High Courts some proceedings and drafting may be in Urdu (Shadab 2003).

Sri Lankan policy aims at a more clear-cut separation of languages, both regionally and hierarchically. The Supreme Court and Court of Appeal function almost entirely in English while the High, District, Magistrates and Primary Courts use either Sinhala or Tamil, depending on their location. As in the English/Sinhala/Tamil streaming at law college, these language divisions are not rigidly adhered to in practice, with High Court counsel frequently using English among themselves and with judges, even though they are required to question witnesses in Sinhala or Tamil. But language alternation appears limited: Sinhala and Tamil are never mixed and Sinhala/Tamil-English code-switching is mostly confined to reference to written authorities interposed into oral argument (Faazil 2006).

In contrast, rather than allocate specific languages to specific courts, Malaysian language policy officially sanctions Malay in all common law courtrooms (it has little to say about the *syariah* and traditional *penghulu* courts) while leaving room for English as the main language of case law and statutes. The balance begins to tilt toward English from the High Court. Patterns of language alternation have been the focus of several studies, including Mead (1988), David (1993, 2003) and Powell (2008). There are also studies of language proficiency and preference among lawyers (e.g. Mhd. Ariff Yusof 1993; Faiza 1993; and Nik Ramlah 1993), court interpreting (notably Zubaidah 2002), and corpus planning, for the Malay legal lexicon (Zaiton and Ramlah 1994; Mashudi 1994; and Powell 2004).

2.4 Systems that have undergone comprehensive language shift

Cases of wholescale language-shift within a legal system are rare and usually reflect sociopolitical discontinuity. In contrast to Malaysia, Indonesia achieved independence through extended violent conflict with the colonial power, which may help to explain its ability to evolve a monolingual vernacular system that,

according to Hoadley (2004), nevertheless retains foreign undertones. Myanmar's decolonisation was less violent and many of its current laws, including the Code of Civil Procedure, date from the British era. Authorities such as the All Burma Codes and the bulk of legal commentaries are in English, which is still an official language of the court and can be used for oral submissions (Aung Htoo 2005). On the other hand, Myanmar's international isolation since 1962 and extensive political intervention in its judiciary help to account for a degree of language shift that has produced a system close to the monolingual end of the scale. Inherited criminal, civil and corporate laws have been extensively translated into Burmese, which is the language of all new legislation and nearly all proceedings (Sen 2004).

2.5 Situations conducive to bilingual discourse

Within legal systems using more than one language, the likelihood of different languages coming into contact is heavily influenced by the mode (monologic or dialogic; written or oral), tenor (level of court; kind of case) and field (stage and purpose of proceedings) in which discourse is situated. For example, bilingual discourse seems more likely in oral and dialogic modes, such as in non-convergent A1-B2 discourses between counsel and witnesses. It also arises in monologues when spoken and written modes interface, as in the citing of written authorities within oral argument

(4) C: *Lihat kes* Munusamy v. PP: Failure to call sister of the victim.
'Look at the case of' (Powell 2008)

or in the converse situation where the written judgement of an appellate court includes a summary of proceedings in lower courts:

(5) Rayuan Jenayah 05-42-2002 (W)
'Criminal Appeal'
The facts of the case as summarised by the learned trial judge in his grounds of judgment read as follows: "Pada 23 September 1998 jam 8.25 malam, Inspektor Wan Azlan (SP1) dan 13 anggota polis yang lain….
'On September 23, 1998 at 8.25PM, Inspector Wan Azlan and 13 other officers…'
(Balachandran vs the Public Prosecutor, *Mahkamah Malaysia* 2004)

As far as level of court is concerned, bilingual discourse seems more likely at lower echelons where an exoglossic language remains dominant (e.g. Botswana), at higher levels where the system has been thoroughly vernacularised (Myanmar),

and in intermediate courts where bottom-up language shift is ongoing (Sri Lanka and Malaysia). As for the impact of the type of proceeding, the stages of hearings that cross genre boundaries and lend themselves to style-switching seem also to be those where bilingual discourse, both dialogic and monologic, is more likely. Similarly, courtroom participants who perform a great variety of communicative tasks, such as judges and counsel, seem more disposed toward bilingual discourse than those with more restricted roles such as witnesses and court officials. For example, Malaysian judges are heard talking to counsel with the informality that comes with seniority just moments before admonishing them, or helping a defendant to give evidence at one stage then reading out a sentence and reprimand at the next, and code-switching seems to serve as an adjunct to the style-shifting involved in this. On the other hand, the court usher, whose main speech-role is formally opening and closing sessions, sticks rigidly to one language.

The formality of the legal domain (and perhaps the presence of interpreters) does appear to constrain codeswitching (e.g. its frequency and the number of languages involved), even in societies where it is endemic, but it should be remembered that some courtrooms and some courtroom interactions are less formal than others. Hence one of the few accounts we have of language alternation in a US courtroom comes from the relatively informal situation of a small-claims hearing (Angermeyer 2003), from which we might infer that even in a monolingual system, speakers may bring their everyday bilingualism into the legal domain when the discursive style and content is close to what they encounter outside the courtroom.

3. Methodological issues in analysing bilingual discourse

3.1 Data-collection

While Thekiso (2001) benefited from a change in Botswanan law allowing audio recording of proceedings, few of the jurisdictions where bilingual discourse has been reported permit this. Hence the need for handwritten transcription, with due consideration for the appropriate degree of prosodic detail. In many bilingual jurisdictions the court record is taken down longhand by justices. Interviewed by *New Straits Times* (March 22, 2005, p.27), one Malaysian judge admitted the impossibility of making the "verbatim" record required by law. This need not

compromise justice inasmuch as many justices read out loud as they write to give parties an opportunity to offer corrections, and it may aid linguistic data-collection by limiting the pace of discourse, but it reinforces the controlled nature of courtroom interaction and limits the analytical value of records should they become available. Court records are potentially an interesting object of discourse analysis in themselves, with many Malaysian judges departing from the rule that they be made in Malay and a tendency, identified both there and in Botswana (Thekiso 2001: 199), for the recorder to aim at metaphorical authenticity by using first person forms even while translating testimony.

Thekiso (2001: 4) criticises the paucity of analyses of whole trials and consequent failure of investigators to identify interdiscursivity among the different genres making up proceedings; yet her own study compounds the various stages of a hearing from different cases. The problem is that trials often take place at irregular intervals over many months. Long sessions may also be monolingual. Although this does not reduce the significance of bilingual utterances – possibly the reverse – it does require deciding how much sequential context to include, particularly if a specific pattern, such as shifting between interlocutors or modes, is being addressed.

Another analytical problem is what to count as legal discourse. A great deal of the conversation that goes on in courtrooms never appears in court records. This includes discussions among counsel, clerks and litigants before the court comes formally into session, and between counsel and office colleagues by mobile phone. In societies such as Malaysia this habitually involves bi- and trilingual code-switching. All of this may provide contextual clues about language proficiency and communicational motivation. Powell (2008) refers to off-the-record courtroom conversation in order to show how the constrained bilingual language alternation of Malaysian trials is situated within a wider and less constrained context of multilingualism, with the same participants interacting at different levels of formality according to discursive context. Similarly, analysis may have to take account of conversation in chambers, even though this can only be accessed indirectly.

Powell (2008) also found that focusing on language choice enhances the risk of observers contaminating data: after being identified as some kind of researcher and invited to sit behind counsel, he then heard the judge advising participants to use "the language they feel most comfortable in in view of our international visitor," at which point Malay was largely abandoned in favour of English.

3.2 Conceptualising and analysing bilingualism

Where bilingualism is involved, the problem of selecting analytical models for courtroom discourse – Thekiso 2001, uses different models for different stages of the trial – is compounded by the need for an approach appropriate to language alternation and complicated further by concepts of code itself. Several possible approaches can be seen in the relatively few studies undertaken so far, including language planning at the macro level and code-switching and conversational analysis (CA) for meso- and microanalysis.

Language-planning approaches to bilingualism are still influenced by Cooper's (1989: 34) dictum that languages are manipulated primarily for non-linguistic goals. In contrast, CA aims to shed light on the immediate motivations of courtroom interactants by focusing on shared assumptions revealed in turn-sequences rather than speculating about wider psychological or social constraints. Its view of speech exchange systems having a detailed orderliness is particularly relevant to the adjacency pairs and conversational rules to which courtroom participants orient themselves. (Thekiso 2001: 157, mentions pandemonium breaking out when a witness gives the dispreferred answer to the question "Do you know the accused?".) CA's value for bilingual courtrooms has been demonstrated by Angermeyer (2003), who saw the word-choices of Hispanic American litigants less as code-choices than as cohesive strategies linking speech to previous discourse. CA-based treatments of bilingual courtrooms are rare, however, with Angermeyer's study mostly confined to single-word insertions in passages of speech that are translated by court interpreters. Moreover, some acknowledgement of language policy and societal norms seems unavoidable given that no discourse site is as constrained by external factors as the courtroom, dominated as it is by the communicative needs and customs of the legal profession and ultimately by the interests of the state.

More extensive instances of intra- and intersentential courtroom language alternation have been analysed as code-switching. Defined by Gumperz (1982: 59) as "juxtaposition within the same speech exchange of passages of speech belonging to two different grammatical systems or sub-systems," code-switching is generally taken to be systematic, although its psycho- and/or sociolinguistic motivations are intensely debated. Lexical code-switching is sometimes distinguished as code-mixing, especially when single lexical items are involved, and interlocutor-based switching as code-shifting. For Auer (1998: 32), code-switching is one of several ways different languages can come into contact, including borrowing, transfer, interference, integration and mixing.

One difficulty in identifying bilingualism as code-switching is distinguishing switches from loans, particularly when the item in question is a tag or single word. The degree of integration depends on a complex of factors involving frequency, duration of use and phonological and morphemic transfer. Myers-Scotton (1993) has argued that a code-difference is revealed when an item is less psychologically motivated than the matrix language in which it is embedded. She proposes a continuum along which code-choices have greater or lesser markedness. Combining the concept of integration with that of markedness, Powell (2008) categorised Examples (6) and (7) below as loans and Example (8) as a switch. In (6) morphology and phonology indicate a greater degree of integration, e.g. 'long-sleeve' rather than 'long-sleeved', 'pant' instead of 'pants', while both (6) and (7) show Malay syntactical patterns, i.e. post-modification of 'T-shirt' by long-sleeve' and of 'maksud' (='meaning') by 'saya'(='me')

(6) W: *Dia pakai T-shirt long-sleeve dan long pant, jenis slack milik dia.*
'He wore and long pants, like the slacks he's got.'

(7) W: *Maksud saya..*
'What I mean is…'

J: *Maksud <u>you</u>?* *Tidak ditanya maksudnya.*
'What <u>you</u> mean? You were not asked what you meant.'

But 'court' (Example 8) has largely been displaced by *mahkamah* in Malay discourse and evokes an era, before the witness's time, when the Malaysian legal system and all terminology in it, were in English.

(8) W: Ya, *[S] ada di* court *hari ini.*
'Yes, is in today.'

Similarly, "my client" and "boss" in the following passage from a Nairobi court were transcribed as code-mixes, although the latter seems the more integrated because 'boss' is heard with greater frequency than 'client' and has Kiswahili post-modification (by a pronoun whose form changes according to the noun-class). On the other hand, "*hukosure*" was treated as a grammatically integrated loan, *huko* being a negating prefix:

(9) C: *Kwa hivyo hukosure kama* my client *alimpiga* boss *yako.*
'So you are not sure whether assaulted your boss.'

(David and Powell 2003)

3.3 The concept of code

The validity of the concept of discrete codes itself is increasingly debated. Code-differentiation is sometimes based on grammatical constraints on the points at which switching occurs, but exceptions to most of the rules can be found, as in the following juxtaposition by a Malaysian Sessions Court judge of a Malay adjective before an English noun (Malay adjectives are usually post-nominal):

(10) J: Would a lady, a *pekak* lady, be around driving a car
'deaf'
at 2:00 in the morning? (Powell 2008)

Conceding that conceptualisations of code are problematic, Romaine combines psycholinguistic with sociolinguistic evidence to argue (1995: 157) that there are at least some grammatical constraints on code-switching, while doubting the value of basing grammaticality on surface-level or monolingual models (1995: 326). For Gardner-Chloros (1991: 46–48) it is often impossible to assign a unit of speech to one system or another, code being a symbolic as much as cognitive construct. Using discourse-based critical theory, Pennycook (2004: 8) goes as far as to reject the "pernicious myth that [separate] languages exist," but his empirical data is limited. Beginning with Gibbons' study of Hong Kong (1987), some analysts treat code-switching itself as a code. In Brunei, Ozóg (1995) concluded code-switching to be a fourth option alongside local Malay, Standard Malay and English, while for Gardner-Chloros (1991: 57) it may be an unmarked or neutral choice allowing interactants to negotiate identities.

A further question is what to make of style-switching. It seems to be prevalent in courtroom discourse (e.g. Fuller's 1993, examination of strategic shifts in style by lawyers before American juries) and a comparison of style-shifting with code-switching in courtroom contexts might reveal many common motivations. Indeed, for Romaine (1995: 321), the registers within monolingual speech may be described as codes, while Gardner-Chloros, Charles and Cheshire (2000) see switching among registers as working parallel to but on a different dimension from code-switching. Similarly, cross-talk (e.g. Thetela's 2003 analysis of the impact of culturally-differentiated interpretations of the same utterances in Lesotho courts) is also relevant to the concept of code inasmuch as it reminds us that speech communities are identifiable not only by differential lexis and grammar, but also by divergent attitudes to the same lexis and grammar.

4. Language rights and language planning in the legal domain

4.1 Language disadvantage before the law

It is not unusual for the language of the law to differ from the main language of wider communication. Indeed this seems to be the norm where a socioeconomic elite favours an exoglossic language: Law French remained dominant in English law long after the 1362 Statute of Pleading required the vernacular, and Wolof has made few advances on French in Senegalese law, nor Bangla on English in Bangladesh, even though both have wider currency in many other domains. Ideally, such anomalies are overcome by courtroom interpreters who are "not there to make sure the client understands, but merely to give him the same chance anyone else in his place would have if he spoke the language of the court" (Mikkelson 2000: 2). But the ideal is rarely achieved, and "operational drift" in the form of short-cuts and summarising seems especially likely wherever experienced interpreters are remunerated far less well than newly-qualified prosecutors (Moeketsi and Mollema 2004).

In principle there is a strong case for making the medium of a legal system the language best understood by most people subject to its laws. While language planning in the legal domain is often an instrument of state-building, it may also be applied to this problem of language disadvantage before the law. Indeed the British authorities prioritised Maltese over English when displacing Italian from the courts of Malta in the 1930s, and the Japanese turned to Malay rather than their own language in trying to dislodge English from Malaya in the 1940s.

Unless there is deep-rooted juridical or sociopolitical change, however, language shift tends to be limited. Rewriting laws requires huge resources that governments may be unwilling to spend without substantial evidence that this will improve the administration of justice. Moreover, the risk of changing the substance of the law by putting its wording into a language anchored in different discursive and cultural contexts is a very real one. Myanmar may have gone much further than Malaysia in addressing language disadvantage (at least for its Burmese-speaking majority), but it would be rash to claim that its legal system is more just.

4.2 Endoglossic status planning

Language policy has long influenced political policy in India. Each of the current 28 states gives official status to one or more languages in addition to Hindi and/

or English. Consequently, a number of languages are recognised by district-level courts. This has been noted as a potential cause of injustice whenever the Supreme Court has to rely on translated transcriptions in appeal cases (SARI 2000). Thus the continuance of English as one of the official languages in district courts and the only official language in most High Courts might be justified on communicative grounds, although administrative inertia and professional conservatism play their part.

Sri Lanka has gone much further in displacing English, impelled by Sinhala nationalism and Tamil reaction to it since the 1950s. Following the 1956 Official Language Act which declared Sinhala the official language, the 1961 Language of the Courts Act, established it as the judicial medium. This was amended in 1973 to provide for Tamil in the north and east, an arrangement confirmed by the 1978 Constitution:

> (1) Sinhala and Tamil shall be the languages of the Courts throughout Sri Lanka and Sinhala shall be used as the language of the courts situated in all the areas of Sri Lanka except those in any area where Tamil is the language of administration. The record and proceedings shall be in the language of the Court. In the event of an appeal from any court, records shall also be prepared in the language of the court hearing the appeal if the language of such court is other than the language used by the court from which the appeal is referred:
>
> Provided that the Minister in charge of the subject of Justice may, with the concurrence of the cabinet of Ministers, direct that the record of any court shall also be maintained and the proceedings conducted in a language other than the language of the court; (Constitution of Sri Lanka, Ch IV s. 24)

This pattern of raising the status of endoglossic languages in the legal domain while leaving room for "a language other than the language of the court" (in practice, English) can also be seen in Malaysia. In the 1960s and 1970s the government promoted Malay as the national language and official medium of administration and education. The policy was supported by affirmative action aimed at increasing participation of ethnic Malays in government, higher education and business, but concessions were made to the largest non-Malay communities by allowing Mandarin- and Tamil-medium schools at primary level and instruction of local Austronesian languages in East Malaysia. Moreover, English was consistently recognised as the 'second most important language' because of its official role during the colonial era and its value as a link language both intra- and internationally. The pro-Malay language policy was not applied to the legal domain until the 1980s. The 1983 National Language Amendment consolidated a series of directives from the Chief

Registrar by requiring Malay for all proceedings and documents, while leaving a role for English "in the interests of justice." By the 1990s it was the dominant language in the Magistrates and Sessions Courts of Peninsular Malaysia with a lesser but significant presence in the High Court and in East Malaysia.

4.3 Corpus planning

Raising the status of a language has limited effect without policies to adapt its corpus for the legal domain. The bilingualism of Botswanan and Kenyan courtrooms, where the national languages are used in oral testimony, but rarely in appeal cases and never in judgments, reflects the gap between the relatively non-technical registers of witness examination and the discourses of authority-based legal argument and legislation. Bridging this gap means not only putting resources into legal translation, legal drafting and lexicogrammatical innovation, but also encouraging language shift through policymaking in the educational domain and the development of appropriate discourses in the legal domain.

Tanzania and Bangladesh typify the problem of inadequate resources for corpus planning. Although the former has been relatively successful in promoting Kiswahili as the language of primary education, there are insufficient materials for it to displace English at secondary or tertiary level, and Kiswahili has an insignificant role in legal training. Few laws have been translated from English and although the Institute of Kiswahili Research publishes a legal terminology (Mlacha 1996), few Tanzanian lawyers seem familiar with it (Maosa 2006). In Bangladesh, the Ministry of Law started translating English laws into Bangla and drafting new legislation bilingually in 1987, but the current Director of Codification, Publication and Translation of Laws admits there has been little progress (Mhd Israil Hossian 2006).

In contrast, the legal drafting department established in 1956 to implement Sri Lanka's Official Language Act seems to have been very active translating terms into Sinhala and later Tamil to prepare the way for an endoglossic corpus of law on which to base legal discourse. While the bulk of older laws remain untranslated, since 1988 all new legislation is drafted trilingually (Fazlet Shahabdeen 2006). Some of the innovations in the Sinhala lexicon are phonological and/or morphological modifications of English or Dutch (the language of the Roman-law criminal code until the 1880s), producing such words as *apala* (appeal), *ravukoopaya* (*rouwkoop* = forfeit) and *warenthuwa* (warrant). But most are direct translations or calques using Sinhala or Sanskrit elements, such as *givisum kadakirima* ('contract breaking' = breach of contract) and *ratshana stanaya* ('havenplace' =

asylum). In some ways the new terminology clarifies the old, the various meanings of 'charge', for instance, being rendered by separate terms.[2]

In Malaysia, lack of terminology is often singled out by those who feel language shift in the legal domain is too slow. By 1991 only 89 pre-1967 laws had been translated into Malay, leading Zubaidah (2002: 159) to doubt the possibility of trials proceeding solely in Malay. However, those 89 include the laws most commonly cited in the lower courts, such as the Penal Code and Road Traffic Ordinances. Since 1970 the Institute of Language and Literature has sponsored the creation and updating of a Malay legal terminology (*Istilah Undang-undang*). The 2003 edition has 3,500 pairs of English-Malay/Malay-English entries. Latin and French terms are unchanged; some English terms are transcribed directly (*antitrust*, *bailor*) or remain recognisable visually (*autoriti*, *beligeren*) and/or phonologically (*akses*, *kodisil*); and others are syntactic modifications (*yang digarnis* = garnishee), morphological modifications (*memfraud* = defraud) or translations and calques (*pisah dan umpuk* = sever and apportion; *pekongsi lelap* = 'sleeping partner'). There is wide agreement among lawyers that there are not nearly enough Malay terms (Powell 2007), although PNMB, the official government printer, now offers a data base of 30,000 words. Availability of terminology may be less significant than lawyers' willingness to use it.

5. Language proficiency and cultural preference

5.1 Proficiencies and preferences

Patterns of courtroom bilingualism depend not only on the language policies in place but the ability and willingness of participants to implement them. The bilingualism Thekiso found in Botswana, for example, is possible because most legal practitioners, while trained in English, belong to the 80% of the population who speak Setswana (Thekiso 2001: 15); and this possibility is realised when presiding magistrates are willing to bend the English-only rule in order to create a more relaxed atmosphere for litigants (Thekiso 2001: 193). Similarly, many Malaysian judges give a loose interpretation to the *Gunakan Bahasa Kebangsaan* ('Use the national language') signs on courtroom walls in the knowledge that lawyers and litigants often prefer English.

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2. I am indebted to Fathima Bary, Sri Lankan attorney-at-law, for transliterating and translating various items for me from Moragoda, Wimalachandra, Peiris and Kulatunga's *Glossary of Technical Terms – Law: English-Sinhala.*

The relationship between proficiency and preference is complex. Clearly proficiency is a significant factor when communication falls below a minimum level: Thekiso (2001: 201) gives an example of a witness confusing the court by insisting on answering in inadequate English despite being instructed to use Setswana, and Mead's account of the introduction of language planning into the legal domain is full of English-trained lawyers' desperate attempts to comply, such as the following attempt to achieve the common-law cross-examiner's stock-in-trade 'I put it to you, you are lying.':

(11) C: *Saya taruh* *sama engkau,* *engkau* *terbaring.*
'I put it together with you you are lying down.'

(Mead 1988: 103)

But three decades on, the number of Malaysian lawyers barely able to function in Malay has dwindled and so professional and cultural considerations are increasingly significant in language choice. In 1993, David found language alternation to be a strategy for dealing with proficiency gaps, but her follow-up study (2003) reveals a range of communicative functions not necessarily related to proficiency. Most university law departments teach bilingually, and lawyers who studied abroad and have no school qualification in Malay are required to take a language test before they can practise. But lack of Malay materials (the sole law journal published in Malay seems to have become inactive) and the terminology-centred nature of the Malay test for lawyers inhibit the evolution of a Malay legal register suited to all courts and to written as well as oral modes.

In any case, proficiency itself is a hotly contested construct in bilingual studies. Mackey (2002: 27–37) breaks it down into a number of factors including frequency of use; function across domains; aptitude-related elements such as age, memory and motivation; and the nature of the communicative task at hand. Baker (2001: 31) emphasises the difference between competence and dominance. Ozóg (1995) found situational factors to have more bearing than proficiency on language choice – although he also noted preferences for Malay verbs but English pronouns that might reflect a tendency to avoid grammatical and pragmatic complications. Some of the lawyers interviewed by Powell (2008) who expressed a general preference for English nevertheless admitted being more comfortable in Malay for the routine tasks of the lower courts that are rarely performed in English. In both Botswana (Ex. 1) and Malaysia (Ex. 23), translation-free A1-B2 dialogues are common where speakers understand each other's preferred language but stick to their own.

Even the availability of legal terminology has a range of implications. It is one thing for a term to have been created but another for it to become known and accepted: some lawyers interviewed by Powell (2004) felt a term like *dengar cakap*

lacked the gravitas of 'hearsay', despite being a direct translation. Chan (2004) alludes to a further level of complexity in arguing that a lexical gap in a language has the same psychological impact on a speaker as a gap in an individual's lexicon. For Mead (1988: 74), language planners have confined themselves too narrowly to formal systems such as terminology without taking account of the contextual determinants whereby lawyers aim to "hit the appropriate formal style" while controlling witnesses.

5.2 Professional and cultural considerations

The inadequacy of relating language choice too narrowly to proficiency is illustrated by the fact that in both Botswana and Malaysia, some courtroom roles are more constraining than others. Thekiso (2001: 201) heard police prosecutors being "sternly enjoined to speak English" while defence counsel were allowed to code-switch. Malaysian prosecutors are less likely than the defence to depart from Malay, to some extent reflecting their role as government servants. Powell (2007: 76) found more language alternation among all interactants when presiding judges code-switched. In general, Sessions Court judges appointed from government service are known to be sticklers for Malay, even though many are from the generation that received most of their general education and all their legal training in English, but individuals vary and in some ways the authority of judges within their own courtroom makes them the least psychologically constrained of all participants. That language choice is not simply a matter of orientation to preceding conversation is further indicated by the fact that some lawyers make advance enquiries about the language preference of a judge they have never appeared before (Powell 2008).

In a society such as Malaysia, where language policy is intertwined with ethnic politics, the traditionally Anglophone legal profession is sometimes accused of being isolated from Malay-based national culture and common law seen as being alien to local consensual norms. Hickling (2001: 37) even calls for a confrontation with English legal culture using language as the main weapon. While plausible enough in theory, cultural divisions are more difficult to substantiate than linguistic ones. It is certainly true that the legal profession continues to choose education in English more than the population as a whole, but so does the political elite that enforced the pro-Malay language policy and which, since 2002, has been re-emphasising English. It is also true that non-Malays continue to be overrepresented among lawyers, but Mead (1988), Zubaidah (2002), David (2003) and Powell (2008) all found ethnicity to be a poor indicator of language preference: indeed many Malay lawyers feel freer than their non-Malay counterparts to use English.

Language choice is more readily linked to the culture of the courtroom itself. Language alternation is most evident in Malaysia before the court is formally in session:

(12) Clerk: *Sepuluh minit* ready *ya?*
'In ten minutes ok?' (Powell 2008)

(13) C1 to C2: So what to do? He want me to get my licence *gantung?*
'suspended'
(Powell 2008)

Conversely, language alternation is virtually absent from the ritualised announcement and dismissal of cases. Thekiso (2001: 86) further notes differences among the stages of proceedings related to actual and perceived audiences. Thus the reading of mentions, as an essentially administrative task, is in English, the "language of the court," while the reading of charge sheets is in Setswana, the "language of the defendant." Defendants may be addressed directly in Setswana to make sure they understand verdicts, but judgments are worded in English with appellate judges in mind (Thekiso 2001: 199).

6. Language alternation as a communicative strategy in the courtroom

6.1 Motivations for language choice in the courtroom

Sometimes the motivation behind switching (or refusing to switch) to another language is clear-cut, as in proficiency-based repair strategies:

(14) J: Where do you stay?
W: (hesitates)
J: *O tsoga kae ha re bua jaana?*
'Where have you woken up from as we are speaking?'
(Thekiso 2001: 208)

But the evidence we have so far from bilingual courtrooms suggests a wide range of motivations, many of them distinct from proficiency considerations and some of them multifunctional. While courtroom language alternation to a large extent reflects the transfer of communication practices from the surrounding multilingual society, the particularity of judicial constraints on communication adds motivations and produces patterns (such as non-convergence) that are unusual outside court.

Gumperz (1982) distinguished between transactional motivations, covering situational factors such as interlocutor and topic, from metaphorical ones involving interactants' understanding of wider situational norms, and while he and others have since questioned the clarity of this distinction, it continues to influence the traditional view that code-choice obeys rational social rules. CA has distanced itself from transactional-metaphorical approaches by emphasising speakers' complex orientation to the communicative task of the moment, but rather than be viewed as mutually exclusive, the two perspectives may complement each other. There is also a growing consensus that language choices may be multifunctional, and that switching from one code to another may be more significant than the choice of code itself.

6.2 Lexical insertions

Angermeyer (2003), David and Powell (2003) and Powell (2008) all found insertion of nouns and nominal phrases to be the most common form of language alternation in court. As Example (15) from Kenya suggests, in societies where code-mixing is endemic its occurrence in the courtroom need not have specific forensic significance:

(15) C: *Wakati* my client *aliingia kwa hio ofisi* *alikuwa na*
'When my client entered the office he had
mood *gani?*
what sort of mood'

W: *Alikuwa amekasirika*
'He was angry.'

C: *Ulisikia* noise *yeyote* *ndani ya hiyo ofisi?*
'Did you hear noise from anyone inside the office?'

W: *Alipoingia* *nilienda kuosha dirisha* *za* floo*r ingine*
'He came in and I went to wash windows on another floor
kwa hiyo building.
of the building.' (David and Powell 2003)

Verbs and adjectives also occur in code-mixing, with instances of morphological integration providing further evidence of the frequency of this kind of speech:

(16) W: *Saya* off*kan* handphone *sebab* *takut* *ayah atau* nurse
'I switched off my mobile being afraid that father or his nurse
hubungi saya.
would call me.' (Powell 2008)

The courtroom context may have greater bearing when there is a lexical gap, with the following example illustrating how language alternation stems less from lack of equivalent concepts than from lack of concise terms that all parties agree on – one Malaysian lawyer suggested *hukuman yang memberi pengajaran* (= 'punishment that teaches a lesson') for deterrent sentence:

(17) W: *Minta* deterrent sentence. *Mangsa seorang yang kurang 16 tahun.*
'We are asking for a The victim is under 16.'
(Powell 2008)

Similar insertions of 'mention' instead of *sebutan* and 'material witness' instead of *saksi berkaitan* (Powell 2008) indicate lawyers' concern with sticking to tried and tested registers linked to familiar discourses. However, there are occasions when language alternation is the only plausible solution, as in the case of cultural gaps between Muslim and non-Muslim communities:

(18) W: *Saya difahamkan bahwa OTK jarang minum.*
'My understanding is that OTK rarely drinks.
Hanya seorang social drinker.
He is only a social drinker' (David 2003)

Where terms seem equally available in two languages, another motivation for a lexical switch may be as a cohesive device to link speech to previous discourse, as in the following examples of English embedded in Spanish (19) and Malay in English (20):

(19) ¿*Porqué* Mister O'Leary *no pone el* claim *con el* insurance *de la casa de él*?
'Why don't you put the claim against the insurance of the house?'
(Angermeyer 2003: 7)

(20) C: I'd like to insist, *tuan*, the date she received the letter was before the
'My Lord'
incident.
J: Then put it to her: your *surat akuan* seems to have been made
'statutory declaration'
before the incident. (Powell 2008)

6.3 Codeshifting between interlocutors

The general sociolinguistic assumption that speakers tend to converge in their choice of code seems to explain much of the cooperative codeshifting found

(21) J to C: So what is the purpose of your question? That the zero was originally a six?

C: Yes.

J to C: Then ask him. You see, it is as simple as that.

J to W: *Nombor enam telah ditulis menjadi nombor kosong?*
'Was number six rewritten as a zero?' (Powell 2008)

(22) W to C: *Ndizo* *nguo zake*
'Oh yes her clothes.'

W to J: These are her clothes, I am sure. (David and Powell 2003)

Sharifah (1995) found similar patterns of code-shifting in a Malaysian *syariah* court, with the *kadi* switching among Arabic, Standard Malay and Kedah Malay according to the background of claimants. However, she also noted instances of the judge switching to Arabic in order to undermine women from urban areas who he felt were too confident, exemplifying how the courtroom offers greater scope than society at large for non-cooperative language choices. This may be particularly significant in common law jurisdictions where trials take an adversarial form. There are numerous examples of speakers sticking to different codes, such as the following one of a Malaysian police witness answering defence counsel's untranslated English questions in Malay despite having been heard to use English fluently before court came into session:

(23) C: Sergeant, where were you on the morning of August 2nd?

W: *Saya bertugas.*
'I was working.'

C: Yes, but where were you?

W: *Saya di bilik gerakan.*
'I was in the operations room.' (Powell 2008)

As of yet, however, there is insufficient data to correlate non-convergence with witness hostility. Proficiency considerations cannot be ignored, even where a speaker seems to be bilingually competent; and while there are many instances in Malaysia of prosecuting and defence counsel preferring different codes (Ex. 24), there are also cases of each side using the same language while the judge uses another (25).

(24) J: So I've set your date. But can you stand back? Is that reasonable for you?

C1: Yes, Your Honour.

C2: *Ya, Yang Arif.*
'Yes, Your Honour.' (Powell 2008)

(25) J: *Belum terima arahan mengenai siapakah yang akan mendengar*
'I've yet to be instructed on who is to hear
kes ini.
this case.'

C1: We of the prosecution case and parties are present and ready for submission.

C1: The defence prefers the case to be heard before the previous judge.

J: *Kes untuk sebutan pada 9 September.*
'Case for mention on September 9.' (Powell 2008)

6.4 Codeswitching for coercion or clarification

There are many instances where switching code, particularly intersententially with the same interlocutor, appears to add to the illocutionary force of an utterance. Often the switch is a strategy for repeating or rephrasing the preceding utterance:

(26) C: I wish to make a representation on this.

J: What is the purpose? *Untuk apa?*
'What for?' (Powell 2008)

(27) W: *Saya tak ingat*
'I don't remember…'

C: *//Tak ingat? Soalannya setuju atau tidak.* You agree or not?
'Not remember? It is a matter of whether you agree.
(Powell 2008)

On other occasions the switch adds information that may have been implicit:

(28) C: *Adakah kamu terlibat dalam kemalangan 2 Februari? The one in Cheras?*
'Were you involved in the accident of February 2nd?' (Powell 2008)

(29) C: *Sebelum ini OKT pernah ditangkap pada tahun 1975 dan 1986.*
'OKT was previously detained in 1975 and in 1986.'

There has been a 10-year gap since the last offence. (David 2003)

6.5 Contextualising and textualising strategies

In all of the systems where bilingualism has been reported, there is a strong tendency to switch to the original language of the testimony being reported or legal authority cited. This has practical advantages when a text is available only in one language, but it may also be a strategy to authenticate and strengthen an argument. Thus switches occur not just when whole passages from witness statements and case reports are read out, but when certain key phrases are extracted from them for direct, indirect or metaphorical quotation. Malaysian Sessions Courts, for example, commonly allow expert witnesses to give evidence in English even when most of the trial is in Malay. When counsel make use of such evidence, the insertion of English phrases may serve a variety of functions, including authentication, strategic deference to expertise and – in the case of rape trials – contextualisation of sensitive subject-matter:

(30) C: *Tentang* hymen, *doktor kata* it can happen within minutes to 5 days.
'Regarding hymen, the doctor said' (Powell 2008)

(31) C: *Tentang* penetration of penis, *ada* doubt.
'Regarding there is doubt.' (Powell 2008)

A similar kind of distancing strategy can be inferred from the following examples where it is not clear whether the speaker is reporting words that were spoken or merely switching languages to contextualize them:

(32) W: *Tapi dia kata* *dia nak* try *dengan adik saya*.
'But he said he wanted to try with my sister.' (Powell 2008)

(33) W: *Mula-mula* *saya tak setuju* *tapi dia nak* explain *lagi*.
'At first I didn't agree but he wanted to explain further.' (Powell 2008)

There are also instances where language alternation does not so much contextualise as textualise an utterance by framing or punctuating it:

(34) C: *Merujuk surat ini,* *adakah tanda tangan kamu?* Look at the letter.
'Referrring to this letter is your signature there'? (Powell 2007)

Implicit in such an explanation is the view that the act of switching is more important than the code chosen, and in hypothesising a textualising motivation, as Chan (2004) does, further possibilities are opened up for multifunctional analysis using the ideational and interpersonal categories of systemic functionalism.

7. Bilingualism and the interests of justice

Is justice served better by allowing more than one language in the courtroom or by controlling code-choice and interposing translation into discourse? In practice the two approaches often overlap. None of the bilingual courtrooms investigated so far admits more than two languages without interpretation; and many monolingual courts, while excluding other languages from their records, have difficulty persuading bilingual jurors to disregard foreign-language testimony (Hsieh 2001), especially when the accuracy of translation is in doubt. Ideally, courtroom bilingualism and courtroom interpreting each offer everyone an equal chance of understanding proceedings, but in reality they fall short of this ideal. Training may improve the quality of interpreting but it cannot eradicate gaps between languages and the cultures and discourses in which they evolve. Similarly, pragmatic acceptance of two languages may increase participation in judicial proceedings, but it cannot overcome the fact that individual bilingualism varies widely.

For one thing, bilingual legal systems are not direct reflections of the multilingual societies in which they are situated. Some replicate elements of societal diglossia by, for example, favouring an exoglossic medium for documents, commercial disputes and higher-court discourse, but their rules of speaking are much more constraining than those outside the courtroom. For another, the fit between individual and community bilingualism is a loose one, with the bilingualism of many individuals predicated on the monolingualism of others in the speech communities with which they interact. After more than three decades of language planning, the assumption that Malaysians are competent in Malay and English has increasing validity for legal professionals, but many litigants and witnesses lack basic proficiency in either. While older lawyers are still criticised for their poor Malay, younger ones are said to lack English, and magistrates raise eyebrows at defendants who request Cantonese interpreters despite having attended Malay-medium high schools (Powell 2008).

Bilingual systems *per se* are no more or less just than monolingual ones. Acknowledging societal bilingualism in court may increase public awareness of proceedings and build bridges between technical and conversational registers, but it can also obscure the need many participants have for translation: although Botswanan, Sri Lankan and Malaysian courts allow litigants to express themselves directly in the national language, interpreters routinely fail to intervene when lawyers and judges interact in English. It should also be remembered that language planning in legal systems tends to be motivated more by the interests of the state and the elites who control them than by the interests of justice. Nevertheless, the

main justification for bilingual courtrooms is that they represent attempts, however flawed, to make legal processes more transparent. The degree to which they achieve this has practical implications for the future of exoglossic legal systems, as well as theoretical implications for the question of whether language shift in legal domains is possible without changing the way justice is administered.

A further reason for including bilingual courtrooms in investigations into language disadvantage before the law is that they highlight complexities that exist in monolingual settings. Code-switching is more readily identified than style-switching, foreign terms are more easily questioned than technical terms, and the particularity of legal discourses and cultures is more controversial when it is conveyed in an imported tongue. Thus bilingualism helps to reveal the fact that legal discourse has interpersonal and textual functions as well as ideational ones, integrative as well as instrumental motivations, and diachronic as well as synchronic dimensions.

References

Angermeyer, P. S. 2003. Lexical cohesion as a motivation for codeswitching: Evidence from Spanish-English bilingual speech in court testimonies. In *Selected Proceedings of the First Workshop on Spanish Sociolinguistics*, L. Sayahi (ed.), 112–122. Somerville MA: Cascadilla.

Auer, P. 1998. *Code-switching in Conversation: Language Interaction and Identity.* London: Routledge.

Aung Htoo (Gen. Sec. Burmese Lawyers Council). 2005. Personal interview, October 2, 2005.

Ayub Sohail (Multan District Court Prosecutor). 2005. Personal interview, September 13, 2005.

Australian Law Reform Commission. 1992. Multiculturalism and the Law. Language barriers to equality: Interpreters and the legal system. *Australian Law Reform Commission* 57. (http://www.austlii.edu.au/au/other/alrc/publications/reports/57/chap4.pdf. Accessed January 20, 2005).

Baker, C. 2001. *Foundations of Bilingual Education and Bilingualism*. Clevedon: Multilingual Matters.

Berk-Seligson, S. 1990. *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago IL: The University of Chicago Press.

Chan, B. Hok-shing. 2004. Beyond 'contextualization': Code-switching as a 'textualization cue'. *Journal of Language and Social Psychology* 23 (1): 7–27.

Cooper, R. L. 1989. *Language Planning and Social Change.* Cambridge: CUP.

David, M. K. 1993. Language and law: Communicative strategies in a court of law: A Malaysian experience. In *Legal Education in Malaysia Quo Vadis?*, Khaw Lake Tee (ed.), 111–116. Kuala Lumpur: Universiti Malaya.

David, M. K. 2003. Role and functions of code-switching in Malaysian courtrooms. *Multilingua 22.* (http://www.degruyter.de/journals/multilin/2003/pdf/22_5.pdf. Accessed November 1, 2001).

David, M. K & Powell, R. 2003. Constraints on language choice in postcolonial legal systems: Comparing Kenya and Malaysia. *Symposium on Language, Law and Life*, 30th International Systemic Functional Linguistics Conference, Lucknow, December 15–17, 2003.

Faazil Sheriff (Sri Lankan Muslim Lawyers Association). 2006. Personal interview, January 27, 2006.

Faiza Tamby Chik. 1993. Language and the law: The role of Malay and English in legal education and the practice of law. In *Legal Education in Malaysia Quo Vadis?*, Khaw Lake Tee (ed.), 103–107. Kuala Lumpur: Universiti Malaya.

Fazlet Shahabdeen (Sri Lankan Attorney-at-law). 2006. Personal interview, January 23, 2006.

Fuller, J. 1993. Hearing between the lines: Style switching in a courtroom setting. *Journal of Pragmatics* 3 (1): 29–43.

Gardner-Chloros, P. 1991. *Language Selection and Switching in Strasbourg*. London: Clarendon.

Gardner-Chloros, P., Charles, R. & Cheshire, J. 2000. Parallel patterns? A comparison of monolingual speech and bilingual codeswitching discourse. *Journal of Pragmatics* 32 (9): 1305–1341.

Gibbons, J. 1987. *Code-mixing and Code-choice: A Hong Kong Case Study.* Clevedon: Multilingual Matters.

Gumperz, J. 1982. *Discourse Strategies.* Cambridge: CUP.

Hafizur Rahman. 2005. Poor national language. *The News* [Internet Edition] October 8, 2005. (http://www.jang.com.pk/thenews/oct2005-daily/08-102005/oped/o3.htm. Accessed August 8, 2006).

Hickling, R. H. 2001. *Malaysian Law.* Kuala Lumpur: Pelanduk.

Hoadley, M. 2004. The role of law in contemporary Indonesia. *Lund University Centre for East and South-East Asian Studies public lecture series.* (http://www.ace.lu.se/publications/working papers/mason.pdf. Accessed September 10, 2004).

Hsieh, M. 2001. 'Language-qualifying' juries to exclude bilingual speakers. *Brooklyn Law Review* 66 (4): 1181–1206. (http://www.brooklaw.edu/students/journals/blr/blr66iv.php. Accessed August 8, 2006).

Kutete-Matimbai, W. (OmbogaandCompany Advocates). 2002. Personal Interview, January 12, 2002.

Mackey, W. 2000. The description of bilingualism. In *The Bilingualism Reader*, L. Wei (ed.), 26–50. London: Routledge.

Mahkamah Malaysia (Malaysian Courts Website). 2004. (http://www.kehakiman.gov.my/. Accessed November 20, 2004).

Maosa, T. (Tanzanian Attorney-at-Law) 2006. Personal correspondence, August 24, 2006.

Mashudi Kader. 1994. Peristilahan Undang-undang (Legal Terminology). In *Bahasa dan Undang- undang*, Nik Safiah Karim and Faiza Tamby Chik (eds), 81–91. Kuala Lumpur: Dewan Bahasa dan Pustaka.

Mead, R. 1988. *Malaysia's National Language Policy and the Legal System*. New Haven CT:Yale University Press.

Md. Israil Hossian (Project Director, Codification, Publication and Translation of Laws, Bangladesh Ministry of Law). 2006. (http://www.minlaw.gov.bd/cptlp.doc. Accessed 8 August 2006).

Mhd. Ariff Yusof. 1993. Language and the law: The role of Bahasa Malaysia and English in legal education and the practice of law. In *Legal Education in Malaysia Quo Vadis?*, Khaw Lake Tee (ed.) 117–125. Kuala Lumpur: Universiti Malaya.

Mikkelson, H. 2000. *An Introduction to Court Interpreting.* Manchester: St. Jerome.

Mlacha, S. A. K. 1996. *Kamusi ya sheria* (*Dictionary of Law*). Dar es Salam: TUKI.

Moeketsi, R. & Mollema, N. 2006. Towards perfect practice in South African court interpreting: A quality assurance and quality management model. *The International Journal of Speech, Language and the Law* 13 (1): 76–88.

Moksin Reza Mohamed (Multan District Court Judge). 2005. Personal interview, September 13, 2005.

Myers-Scotton, C. 1993. *Codeswitching. Evidence from Africa*. Oxford: Clarendon Press.

Nik Ramlah Mahmood. 1993. Language and legal education in Malaysia –past and emerging trends. In *Legal Education in Malaysia Quo Vadis?*, Khaw Lake Tee (ed.), 133–146. Kuala Lumpur: Universiti Malaya.

Ozóg, A. C. 1995. Codeswitching in peninsular Malaysia and Brunei: A study in contrastive linguistic strategy. In *Rules of Speaking: Verbal Interactions at Play*, Zainab Abdul Majid & L. Baskaran (eds), 73–93. Kuala Lumpur: Pelanduk.

Pennycook, A. 2004. Performativity and language studies. *Critical Inquiry in Language Studies* 1 (1): 1–26.

Powell, R. 2002. Language planning and the British empire: Comparing Pakistan, Malaysia and Kenya. *Current Issues in Language Planning* 3 (3): 205–279.

Powell, R. 2004. Terminological creation and language shift in Malaysia's legal system. *Current Issues in Language Planning* 5 (2): 109–130.

Powell, R. 2008. *Motivations for Language Choice in Malaysian Courtrooms and Implications for Language Planning.* Kuala Lumpur: Universiti Malaya.

Romaine, S. 1995. *Bilingualism.* Oxford: Basil Blackwell.

Salhi, K. 2002. Critical imperatives of the French language in the francophone world – Postcolonial policy. *Current Issues in Language Planning* 3 (3): 317–345.

SARI (South Asia Research Institute). 2000. The right to our language: Some aspects of how the problem poses itself. *Second World Punjabi Conference,* Prince George, B.C., August 2000. Republished in *Shunpiking* 8(44). (http://www.shunpiking.com/shun0844/ind-lang.htm. Accessed 21 June 2006).

Sen, B. K. 2004. (Executive Committee, Burma Lawyers Council). Personal correspondence: Sept. 29, 2004.

Shadab Jafri, S. (Shadab Law Associates). 2003. Personal correspondence, November 30, 2003.

Sharifah Zaleha Syed Hassan. 1995. The divorce proceedings as a patron-client discourse context. In *Rules of Speaking: Verbal Interactions at Play*, Zainab Abdul Majid & Loga Baskaran (eds), 182–192. Kuala Lumpur: Pelanduk.

Thekiso, E. 2001. A Sociolinguistic Analysis of Communication Processes in a Bilingual Court of Law in Gaborone, Botswana. PhD Dissertation, University of Warwick.

Thetela, P. 2003. Discourse, culture and law: The analysis of crosstalk in the Southern African bilingual courtroom. In *Africa and Applied Linguistics* [*AILA Review* 16], S. Makoni & M. Meinhoff (eds), 78–88. Amsterdam: John Benjamins.

Yahya-Othman S. & Batibo, H. 1996. The swinging pendulum: English in Tanzania, 1940–1990. In *Post-Imperial English. Status Change in former British and American Colonies, 1940–1990*, J. A. Fishman, A. W. Conrad & A. Rubal-Lopez (eds), 373–399. Berlin: Mouton de Gruyter.

Zaiton Ab. Rahman, Ramlah Muhamad. 1994. Penterjemahan karya undang-undang ('Translating the law'). In *Bahasa dan Undang-Undang*, Nik Safiah Karim and Faiza Tamby Chik (eds), 113–121. Kuala Lumpur: Dewan Bahasa dan Pustaka.

Zubaidah, I. 2002. Court Interpreting in Malaysia in relation to Language Planning and Policy. PhD dissertation, Universiti Malaya.

The silent witness

Pragmatic and literal interpretations*

Dennis Kurzon
University of Haifa

The Israeli Supreme Court has changed its decisions several times concerning the evidence of the silent witness in criminal cases, focusing on the interpretation of section 10a of the 1971 Evidence Ordinance – whether or not to admit as testimony what the witness has told the police if the witness is silent on the stand. The article will analyze the judicial opinions of the majority and minority sides of the bench in the 1991 *Haj Yehia* case. The majority opinion, which decided to accept such out-of-court evidence, may be considered to be pragmatic: meaning derives both from the words and from the purpose of the text. The approach of the minority derives from a more literal interpretation of the law.

1. Introduction

The attention that has been paid over the years to the accused or to the witness who remains silent in and out of court does not seem to abate. The Miranda warning in the United States still has constitutional sanctity, partly derived as it is from the Fifth Amendment to the US Constitution (Leo and Thomas 1998). On arrest, suspects are told by the arresting officer that

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to be speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.

* Some of the research for this paper was undertaken while I was Visiting Professor in 2004 at the University of New South Wales in Sydney, Australia. I would like to thank the university, and especially the Linguistics Department, for giving me the opportunity to work under their auspices.

In Britain the matter had been taken up with some fervour in the wake of events in Northern Ireland in the late 1980s, leading not only to the Criminal Evidence (Northern Ireland) Order of 1988, but eventually to the Criminal Justice and Public Order Act of 1994. The arguments over the 1994 Act have kept the entire matter in the forefront (Morgan and Stephenson 1994; Kurzon 1996; Jackson 2003). Changes in the light of the new law have been made in the police warning given to suspects, which has led to the contention that the accused is not as well protected as s/he was in the past (Easton 1991). The present police warning reads:

> You do not have to say anything but it may harm your defence if you do not mention when questioned something that you later rely on in court. Anything you say may be given in evidence.

Silence, especially the right of silence, seems to be a problematic area mainly in the Anglo-American jurisdiction. In France, for example, courts may interpret the silence of the accused in any way they consider appropriate. As it is stated in the French Code of Criminal Procedure (Wise 1988: 22),

> the court interrogates the accused and receives his statements, if any… The accused is not put under oath and cannot be legally compelled to answer any of the questions, but he cannot prevent the questions from being asked, *nor can he prevent the court from drawing adverse inferences from his silence* [my emphasis]

In German commercial law, silence may be interpreted as refusal, as illustrated in the following 1980 case, where it was explicitly declared that

> silence could not by itself in any way amount to an implicit declaration of acceptance, for silence rates as refusal rather than acceptance, given the inapplicability of the rules of commercial letters of confirmation
>
> (OLG Köln, RBKR 1980, 270; BB 1980, 1237; AZ 2 U 95/79)

However, even outside common law countries, problems may arise as to the interpretation of silence. In Kurzon 1998, as part of a comparison with Anglo-American and French cases on the topic of the silence, I related briefly to an Israeli case concerning the silence of a witness. In this article, I would like to analyze this case more fully. It made headlines in the early 1990s as one of a series of cases involving the interpretation of a section in the amendments to the 1971 Evidence Ordinance. The relevance of this case even today may be seen in an appeal dismissed by the Israeli Supreme Court in 2004 (*Vadim Portnoy v. State of Israel*), which stated that the *Haj* decision (see 2 below) still holds.

Israel has a similar jurisdiction to that found in common law countries except for the total absence of a jury at a criminal or civil trial; that is the Israeli criminal (and civil) procedure is adversarial, but the two opposing counsel argue to

persuade the judge or judges, and not a jury, on questions both of fact and of law. The argumentation used by the majority and minority judges in their opinions in the Israeli Supreme Court resembles the type and style employed in Britain, the United States and other common law countries. The Israeli Supreme Court itself is equivalent to the British House of Lords and the American Federal Supreme Court. It is the highest appellate court in Israel. Normally, three judges sit on the bench at any one time, and it is they who reach the final decision by a majority vote. In exceptional cases – involving fundamental legal principles – a larger forum sits on the case (see below).

Against the background of what seems to be an importation of common law principles into a judge-based legal system in Israel, I would like to focus on two linguistic and pragmatic matters in this chapter: firstly, the difference between the semantic and pragmatic interpretation of legal documents, especially legislation, as this may be the dividing line between the majority and the minority opinions in the case discussed here, and secondly the right of silence itself.

Silence as a problem in Israeli criminal procedure had emerged in two contexts: the right of the accused and the right of a witness. The right of the suspect on arrest not to say anything and to have a lawyer present during interrogation is protected in Israeli law (in the Evidence Ordinance and in the Basic Law: Human Dignity and Liberty, passed in 1992), although it needed a recent decision by the Supreme Court – by an overwhelming majority – to remind police officers and prosecutors that suspects have to be told their rights *prior* to interrogation. In the case, the appellant was not informed on arrest and before interrogation that he had the right of silence and the right to consult a lawyer. He was warned in the following manner only *after* he had signed a confession:

> You do not have to say anything if you do not wish to do so, but everything you do say will be recorded and may be used as evidence in court
>
> (*Issacharov v. Military Prosecutor* et al.)

The court accepted the appeal.

After an analysis of the Court's decision in the *Haj Yehia* case (2), I shall address the interpretation of silence in common law jurisdictions in pragmatic and semantic terms (3), to be followed by a discussion of silence in the legal context (4). The two sides to the judicial arguments will be presented in Section 5 with some elaboration in Section 6, which is then followed by the conclusion (7). I would like to focus on the way silence is interpreted in naturally occurring situations, on the one hand, and in courts of law, on the other. This approach will no doubt present another perspective to the problem of the right to silence, not one that is concerned with the safeguards surrounding police investigation, nor one that involves the analysis of the psychological make-up of suspects

(e.g. Gudjonsson 1994; Gudjonsson et al. 2000), but a perspective that pertains to the linguistic and communicative competence of any language user, whether s/he is a judge or layperson on a jury. But, firstly, let us take a look at the law in question.

The Evidence Ordinance 1971. The status of the silent witness is set out in the 1980 amendments to the 1971 Evidence Ordinance. So, without more ado, here is the section in question:

10a. (a) A written statement that a witness has given outside the court will be admissible as evidence in criminal proceedings if the following conditions hold:

(1) the uttering of the statement can be proved in court;

(2) the person who gave the statement is a witness in the case and the sides have the opportunity of examining him;[1]

(3) the testimony is different, in the opinion of the court, from the statement in an essential detail, or the witness denies the content of the statement, or claims that he cannot remember its content.

(b) The court is empowered to admit the statement under subsection (a), although the person who made the statement is not a witness, either because he refuses to testify or is not capable of testifying, or because it is not possible to bring him to court, since he is no longer alive or cannot be found, provided that the court is convinced that it appears from the circumstances of the case that illicit means have been used to prevent the person who gave the statement from giving his testimony.

The wording of this law is similar to that of the British Criminal Justice Act of 1988 (sections 23(3) and 26), as the then Chief Justice Meir Shamgar[2] points out in his opinion (pp. 424–5).

The interpretation of section 10a of the Evidence Ordinance, then, has been the subject of a series of cases over the 1980s and, of more significance, the subject of fluctuating judgments of the Supreme Court itself. In 1985, in a majority verdict of two against one in the so-called *Ashkenazi* case,[3] it was laid down that

1. There is a general provision in Israeli law stating that the masculine pronoun includes reference to females.

2. All the Supreme Court judges mentioned in this article have since retired from the bench. Only one of the judges who issued the 2004 decision maintaining the law as laid down in the case discussed here has retired from the bench at the time of writing.

3. In all these cases, of course, the state was the prosecutor.

in the absence of evidence that illicit means have been used against the silent witness, his or her previous testimony to the police is inadmissible in court. That is, the focus of the decision was on the final condition in subsection (b): "provided that the court is convinced that it appears from the circumstances of the case that illicit means have been used to prevent the person who gave the statement from giving his testimony". This principle was overturned by the Supreme Court in 1990 in the *Levi* case, also by a two-to-one verdict, in which it was decided to allow the admission of previous statements even when there had been no clear evidence of illicit means having been used. Then in 1991, in the *Haj Yehia* case, the case under discussion here, the Court initially rejected the *Levi* precedent and adopted the previous *Ashkenazi* precedent, insisting on evidence beyond a reasonable doubt that illicit means had been used to silence the witness. Because of the circumstances, especially the lack of clarity in the light of two opposing precedents issued by the Supreme Court,[4] it was decided to hold a further review of the case by the entire Court, which at that time consisted of eleven judges. In July 1993 the Court decided by a six-to-five majority to reject Haj Yehia's appeal, and to allow the original verdict to stand, that is the Court adopted the *Levi* precedent which admits previous evidence even when proof of illicit means does not seem proven. The two principal opinions were given by Chief Justice Shamgar, who supported the majority verdict, and Justice Gabriel Bach, who was one of the judges in the original appeal, and a supporter of the *Ashkenazi* precedent, which is now in the minority. The original appeal will be referred to here as 'the first appeal', while the final appeal is 'the second appeal'.

I would like to discuss the two sets of ideas concerning the silent witness not only from the point of view of legal argumentation with regard to the interpretation of Section 10a of the Evidence Ordinance, but also from the point of view of the general approach to interpretation, which is linguistic in essence. It will be shown that Chief Justice Shamgar took a pragmatic stance in his interpretation ("pragmatic" here in its linguistic sense, as I shall explain below), and that Justice Bach gave a more literal (semantic) interpretation of the same section.

2. The *Haj Yehia* case

Firstly, the facts of the case, which is a summary of Justice Theodor Or's minority opinion in the first appeal. In January 1988, a robbery took place in a bank in

4. The need, or otherwise, of consistency between Supreme Court decisions is another issue dwelt with in the *Haj* case and in commentaries on the case, but is not the topic under discussion here.

Taibeh, an Arab town in central Israel. Three men were involved; one remained in the car, and the other two entered the bank stealing some $7,500 in local currency. Three men were arrested, including the appellant, Husam Haj Yehia, who claimed that he had not been involved in the robbery. After their arrest, one of the other men involved, Mundar Mesaarwah, told a fellow cell inmate that Haj had been the driver of the get-away car. This conversation was recorded, and became the principal evidence on which the indictment against Haj as an accomplice in the robbery could be based. However, Mundar, when called as a witness at Haj's trial, did not open his mouth. The trial court decided that the transcript of the recording in the prison cell should be accepted as evidence in the absence of Mundar's oral evidence. It was this decision of the trial judge that led to the appeal.

The trial judge maintained that the silent witness is covered by subsection (b), and added

> from my experience, I can say that in most of these cases, the reason for [the witness's] silence is the fear to testify against the accused and incriminate him

due to unlawful methods used to pressure him. Moreover, even if clear proof of pressure is impossible to obtain, such means may always be assumed. Justice Or in the first appeal rejected the trial judge's reliance on his particular interpretation of subsection (b), claiming, in his minority opinion, that the precedent deriving from the *Levi* case is based on the first subsection of the paragraph, that is to say that the witness is a witness for all intents and purposes, so his lack of evidence – and the way I express it here is my interpretation not Justice Or's (further, see 5. below) – contradicts the testimony he has given to the police; that is to say, the content of the testimony to the police is contradicted by zero evidence in court.

The majority verdict in the first appeal, given by Justices Menachem Elon and Bach, argued on two points for a return to the *Ashkenazi* ruling. Firstly, the testimony given to the police and presented to the court is in effect hearsay evidence, and does not come under any of the exceptions to the inadmissibility of hearsay evidence, for example, as stated in paragraph 10(a)(b), "it is not possible to bring him to court, since he is no longer alive or cannot be found". Secondly, because of the absence of the witness who gave the testimony, and because reasons for his absence are not those set out in the Ordinance, the witness cannot be cross-examined. The content of his statement to the police may be a pack of lies; if the producer of the statement cannot be asked about the content by the opposing counsel, there is no justifiable reason to accept the truth of the original statement.

3. Pragmatic and semantic interpretations of silence

Chief Justice Shamgar, in his opinion in the second appeal, maintains that the interpretation of subsection (b) is not at issue, but Justice Bach, in the minority, points out that is the very issue. So, the central question is in fact whether the silent witness is covered by subsection (a) or (b). I would like to relate to the two interpretations of the paragraph, Chief Justice Shamgar's and Justice Bach's, and suggest that we have two different approaches to statutory interpretation. One, that of Chief Justice Shamgar, may be considered to be pragmatic in the linguistic sense: meaning derives both from the words and from the purpose of the text, and so its interpretation should be appropriate to the circumstances. The other, Justice Bach's approach, derives from a more literal interpretation of the law although some pragmatic, in this case non-linguistic, reasoning is used (see 6 below).

The distinction between these two approaches is parallel to a division of interests and of research in linguistics between semantics – the meaning of words and sentences in terms of truth conditions, semantic components, among other things, and pragmatics – the meaning and appropriateness of an utterance or language in context. Let us look at an utterance to see the difference between the two linguistic fields:

(1) Getting married and having a child is better than having a child and getting married. (Levinson 1983: 35)

In a truth-conditional semantic analysis, the two coordinated phrases "getting married" and "having a child" are coordinated by "and", and the order in which they are coordinated does not affect the truth conditions of the propositions. That is, if p = "getting married", and q = "having a child", then logically, $p \,\&\, q = q \,\&\, p$. If this were so, then the utterance may be considered, if anything, tautological – they mean the same thing; but this is not the case for competent speakers. Using our knowledge of the world, possible sets of moral values, and other relevant knowledge, we interpret the first coordinated phrase "getting married and having a chiId" as "getting married and *then* having a child", and the second coordinated phrase as "having a child and *then* getting married ". The order of the two phrases is of utmost importance. A semantic analysis of the type I have given based on truth conditions does not provide us with the meaning of the utterance; a pragmatic analysis with the interpretation of the coordinator *and* as "and then" supplies the generally accepted meaning.

It should be noted that the coordinator *and* does not have the single meaning of "and then", for in the following, the order of the coordinated phrases does not matter:

(2) a. John and Mary ate chips

for if we say

b. Mary and John ate chips

the meaning does not change; we have one coordinated phrase "John and Mary" which is tautological with "Mary and John". There is no question here of saying that *and* means "and then". John and Mary could have eaten the chips at the same time or not. This example is not as straightforward as all that, however, since for other pragmatic reasons, we can say that the order "John and Mary" is more natural than "Mary and John", although feminists may disagree. In such coordinated phrases (and in other contexts), there is a tendency to place the longer item last, i.e. *Mary* is longer in the number of syllables than *John*.[5]

I shall examine the two ways of interpreting the relevant subsections of the Evidence Ordinance, but my first task is to examine the meaning of silence, not in a broad sense (that is beyond the scope of this paper), but silence as an answer to a question, which I have analyzed in previous work (Kurzon 1994, 1995, 1998). This type of silence I have called elsewhere 'conversational silence' (Kurzon 2007). In brief I shall state the following: A person who is asked a question (the "addressee") but does not answer may be silent for one of two sets of reasons. Firstly, because of personality factors that are not within his (or her) complete control, the addressee cannot answer the question, even with a simple '"I don't know". This type of silence, which I shall call psychological or unintentional silence, may occur in situations in which the very fact the addressee is asked a question puts him or her in the limelight, a situation which is awkward for him or her, or s/he may not know the answer, but does not want to admit ignorance. Other psychological reasons include (1) "the person is in awe, or raptly attentive, or emotionally overcome", (2) "the person's silence marks a characteristic personality disturbance", and (3) "the silence marks sulking anger", which are some of the meanings of silence suggested by Johannesen (1974: 29). The second set of reasons why an addressee may not reply to a question relates to situations in which the silence is intentional, in that either the addressee does not want to speak, or s/he is subject to some external pressure which prevents his or her cooperating with the interrogator, e.g. a code among criminals. The first reason for the silence may be glossed "I cannot speak",

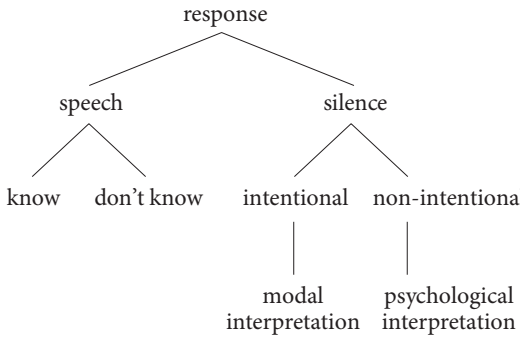
5. A more complicated case would arise if sentence (2a) were

John and Mary ate fish and chips.

One may ask why the word order is "fish and chips" and not the inverse "chips and fish", but this will take us away from the issue at hand, which deals with a problem of the border-line between semantics and pragmatics.

while the second may be glossed "I must/may/will not speak"; hence we may talk of modal interpretations of the silence.

How can the observer, or in our case, the questioner (the interrogator or lawyer), distinguish between the two types of silence? Usually by the appearance and behaviour of the silent addressee. If the addressee stutters, mutters indiscernible words, fidgets, becomes red in the face, we probably have a case of unintentional silence. It may be possible with some coaxing to eventually elicit an answer out of him or her. If the silent addressee, on the other hand, stands or sits without moving, without showing any intention of cooperating in what is going on, or – as a vocal alternative – sings or declaims poetry, then the addressee's silence (or irrelevant vocalizations) may be interpreted as intentional in that s/he has no intention whatsoever of cooperating – of answering the question. We may set out these two types of silence in the following diagram:



4. Silence in the legal system

If the matter were as clear as the above discussion seems to imply, then we may ask what all the fuss is about. The actual interpretation of an addressee's silence is, however, not as conclusive as described. That is the main reason for rules of evidence that prohibit a court from taking a witness's silence, or even an accused's silence, into account. Such a restriction evolved in the common law tradition, and seems, firstly, to protect the defendant from self-incrimination, and secondly, to reflect partly the measures taken to protect juries, i.e. laypersons as far as the law, and especially the law of evidence, is concerned, from basing their conclusions on unproven or on unclear evidence. In the continental system, where qualified judges consider both law and fact, sometimes with the aid of trained assessors, the accused is granted the right of silence, but is warned that his silence may be taken into consideration (see 1 above). In such cases, decisions of fact, and of

law, are not being made by a group of ordinary citizens, who may be misled due to their ignorance of the subtle demands of the law. The Israeli legal system has adopted many of the common law principles, even though professional judges try the cases on their own or, in serious cases, as a panel of three. The right of silence has been adopted by a judicial system without a jury (the Israeli legal system) from a system with one (the English legal system).[6]

Moreover, the arguments in favour of the right of silence as a fundamental principle are accompanied by two further principles that also derive from the common law system – the restrictions on hearsay evidence (see 2 above) and the right to cross-examination (although they may also be seen as over-riding principles of justice; see 6 below). The first of the principles may also be seen as resulting from the protection a jury should have from evidence that is unproven, or whose probative value is in dispute, while the second is a principle based on the adversarial system of trial proceedings in contrast to the inquisitorial system in continental jurisdictions.

When we look at the two sets of arguments for and against accepting Haj's appeal, and more generally, arguments concerning the interpretation of paragraph 10a of the Evidence Ordinance (see 1.1 above), we see two approaches: the first, of the majority decision in the second appeal, that looks at the silence of the witness from a pragmatic point of view, and the second, of the minority which adopts a more literal interpretation, that looks at the semantics and not at the pragmatics of the legislation (but see 6 below for Justice Bach's claim that he does view the question from a pragmatic perspective).

We may argue that Chief Justice Shamgar and the other five judges rejecting Haj's appeal view the presence of the silent witness as a phenomenon detrimental to the proper running of a trial, regarding such a witness as a person whose motives are suspect from the beginning. The general attitude of the majority judges to the silent witness that such a person is disruptive may derive from the viewpoint that silence is a challenge to the power of the court. Although silence is often seen as a trait that indicates weakness (for example, feminists often speak of the silence, and the silencing, of women), silence may mean power in certain circumstances in which the normal power base is being challenged (Kurzon 1992). To find support in the relevant paragraph for this approach, they adopt subsection (a) as the source of the law, and as the basis of their decision. On the other hand, the minority opinion, as represented by Justice Bach's judgment, looks to subsection (b) as the source of the law in this matter, and claims that the silent witness is a witness who "refuses to testify or is not capable of testifying", i.e. s/he is intentionally silent

6. Although under the British mandate of Palestine (1922–1948), juries were not used, either.

("will not") or is psychologically inhibited to answer ("cannot"), and if so, then the court has to be convinced that unlawful means have been used to silence him.

5. Pragmatic and semantic approaches

Let us deal with the Chief Justice's contention first. Towards the end of his judgment, Shamgar gives what he calls an additional note, but despite its position at the end, it may be regarded as the basis of the majority's claim. He reminds us that an enlightened society is duty-bound to protect the rights of the victims of crime, among whom figure the witnesses:

> The treatment by the legislator of this problem in paragraph 10a was not in the void. In light of the violent nature of crime, the legislators were aware that in the absence of a realistic approach that tries to prevent pressure on witnesses, it would be impossible to prove some of the most serious crimes. The legislative changes stem from reality, and reality should not be ignored. (p. 429)

If that is the proposed interpretation of legislative intention, then the relevant provisions of the Evidence Ordinance should be interpreted in the appropriate manner. If the intention of the law, or more accurately of the legislature, is to admit testimony which in other circumstances would be considered inadmissible, for example, hearsay evidence, then those provisions must be read in such a way that accords with the overall purpose of the legislation (Tiersma 2005). This approach only substantiates that there is cooperation between the addresser, that is the legislature, in this case the Israeli Parliament (the Knesset), and the addressee – the court that has to interpret the will of the legislature. Interpretation that does not fit the general purpose is not appropriate. If we go back to the example in Section 3 above,

(1) Getting married and having a child is better that having a child and getting married,

sense may be made of it only if the addressee, who is the present reader in this case, assumes that the producer of this sentence intends to be cooperative (Grice 1975). If so, then we may interpret the sentence as originally intended, that *and* = "and then". If the reader does not see the point of the sentence, he would regard it as tautological, and assume that the addressee is being uncooperative, and has no intention of communicating interpretable information linguistically. Tautological statements, nevertheless, may be pragmatically meaningful. Statements such as "boys will be boys" do have meaning beyond the plain semantics. But apart from similar utterances, which are usually clichés or sayings to be interpreted

pragmatically, we would not go very far in using tautological utterances in our discourse. Moreover, a speaker who constantly uses tautologies may not be linguistically communicative, but s/he may well be communicating something about his or her character (to be interpreted by a psychologist or psychiatrist).

The majority judges in the second appeal assume cooperation between the legislature and the courts, and the general purpose of the legislation determines the appropriateness of the interpretation of the separate provisions. Hence, a way has to be found to interpret paragraph 10a in the light of legislative intention. In order to accomplish this, Chief Justice Shamgar supports Justice Or's contention in the first appeal that subsection (a) is the provision that relates to the silent witness, and not subsection (b). The question of illicit means, therefore, is no longer relevant. Subsection (a) then refers to the witness who is present in court. Previous testimony may be admissible under three conditions: "(1) the uttering of the statement can be proved in court", "(2) the person who gave the statement is a witness in the case and the sides have the opportunity of examining him", and "(3) the testimony is different, in the opinion of the court, from the statement in an essential detail, or the witness denies the contents of the statement, or claims that he cannot remember its contents." These conditions cover, too, the silent witness, for a trial witness, according to Shamgar's definition, is

> a person who is on the witness stand after being legally summoned and cautioned as the law requires. His status as a witness is not measured and tested according to the content of his words in court but on the basis of his status according to the indictment, the summons and his presence on the stand. (p. 426)

In other words, a witness is a person who appears on the stand; s/he may give relevant answers, or on the other hand, s/he may babble, sing songs, recite poetry, declaim speeches, or be silent. Although not explicitly stated in subsection (a), this would cover the witness who refuses to testify; subsection (b) does not refer to a witness who refuses to testify, but to a person who is not a witness, i.e. not in court, and thereby cannot testify. Moreover, since punitive action for contempt of court may be taken against the witness who refuses to testify, s/he must have some legal status. Subsection (a) attributes the status of a witness to him or her, while in subsection (b) s/he does not have such a status, for s/he is not a witness (although s/he is presumably subject to disciplinary measures for ignoring a subpoena).

Justice Bach, and the other minority judges in the second appeal, contend that the phrase "the person who made the statement [outside of court] is not a witness, ... because he refuses to testify", in subsection (b), also refers to the person who is in fact on the witness stand, but refuses to speak. The silent witness is in effect not a witness at all, so any statement made outside the court is not admissible under subsection (a); that subsection refers to a witness, but the silent

person is not a witness. Their claim is that all three conditions in subsection (a) must be fulfilled. The second condition states explicitly that the person related to is a witness, and s/he may be cross-examined, an activity which is impossible in the case of a person who does not speak on the witness stand. The third condition assumes the normal activities of a witness; in other words, the witness is present on the stand and is answering counsel's questions. The phrase "refuses to testify" is explicitly mentioned in subsection (b) and the silent witness is subsumed under it. In that case, illicit means have to be proven, and not merely presumed, as the trial judge claimed.

Moreover, Justice Bach's literal reading of the disputed subsections of the Evidence Ordinance leads to his insisting, in Section 5 of his opinion (on p. 433), that in the case of a silent witness there should be contradictions between the two testimonies, the one given to the police and the other to the court, so that the witness's reliability may be questioned, as laid down by subsection (a)(3). If the witness does not testify in court, even by being present but silent, then one does not have two testimonies that may contradict each other. This approach, however, ignores the fact that silence has meaning. Chief Justice Shamgar argues that in the context of possible contradictory testimonies there are two possible interpretations of a witness's intentional silence in court: the witness is silent because either (1) there would be a contradiction between the two testimonies and the witness does not want to allow that fact to come out into the open; or (2) the testimony would be the same, but the witness refuses to testify for some reason or another known to him- or herself (but possibly guessed at by others). This may be seen as follows:

witness to police:		"I saw X"
witness in court:		ø
Two meanings:	(1)	"I saw X", i.e. same as the testimony given to the police
	(2)	"I didn't see X", i.e. contradicts the testimony to the police

If the meaning of the silence is (2), then, according to Justice Bach, it is admissible (according to subsection (a)(3)). But, if the meaning of the silence is (1), then there is no difference between the testimony to the police and the silent testimony in court, and so the evidence given to the police is the actual testimony of the witness. Logically, then, it should be considered admissible. Of course, we still do not know which one of the texts is the one intended. However, in more general terms, the witness's silence in court may be seen as contradicting his or her (linguistic and otherwise) behaviour: when s/he was being questioned by the police s/he was willing to cooperate, while in court, s/he refuses to cooperate. Cooperation should be seen as a basis of successful communication (Grice 1975).

6. Protecting rights

My claim that the majority judgment is pragmatically based and the minority one literally based is not as straightforward as all that, for Justice Bach and his colleagues in the minority in the second appeal do bring in extratextual principles in the same way as Chief Justice Shamgar obviously does. The literal interpretation given to the relevant section is supported by Justice Bach's explicitly mentioning two legal principles: the law concerning the admissibility of hearsay evidence should not be extended by the courts (i.e. there should be no judge-made law), and the right to cross-examination should be protected. Both these principles are seen as constraints on the admission of a pragmatic interpretation of the witness's silence. The law has to guarantee a fair trial for the accused. Hearsay evidence which is not within the list of acceptable exceptions should be considered inadmissible. Proof of a contradiction may be one thing, but to rely on previous out-of-court testimony, and not on the testimony given in court, may lead to blatant injustice. The witness or defendant, silent or not, may have deliberately told lies while being questioned by the police, or while sharing a detention cell with another prisoner (as in the *Haj* case). After all, people have been known to brag about alleged past activities that in fact never took place.

Furthermore, to admit such evidence without duly questioning the witness about his or her previous testimony may allow for the lies to become part of the evidence. The cross-examination of prosecution witnesses is a basic right of the accused. Such out-of-court statements have to be verified in some way. The producer of such statements should be closely questioned to ensure that s/he was not simply bragging, but was in fact telling the truth.

Justice Bach's pragmatic – in the sense of "realistic" – reason for his opinion, mentioned in 3 above, is that since the 1985 *Ashkenazi* case, according to which the silent witness is not a witness, witnesses have continued testifying, and have even contradicted their previous testimony given to the police. The cases in which a witness has refused to testify have been few and far between. Most witnesses who may prefer to conceal some of the testimony do not refuse to answer; they cooperate probably because of the punishment they may receive if they do not. They do not want to go to prison. In previous cases of silent witnesses, the prosecution has generally had no trouble in persuading the court that illicit means have been used, since either the court itself has seen the demeanor of the witness (his or her "frightened appearance and behaviour" as Justice Bach puts it, p. 438), or direct or indirect evidence has been submitted that shows that such pressure has been applied. The fundamental question being asked here, claims Justice Bach, is whether basic legal principles, viz. the inadmissibility of hearsay evidence and the necessity for cross-examination, have to be abandoned because of the rare case in

which a person is on the witness stand and refuses to answer questions, and there is no evidence of illicit means used to put pressure on him or her to be silent, as in the *Haj* case.

Justice Bach's argument reflects those heard and published in Britain before and since the changes in the law of criminal procedure against relaxing the law of evidence in the context of silent answers to police questioning while in custody, or to counsel's examination in court. Whatever the normal reaction to such silence may be (see 3. above), the basic legal principle should not be changed even if it means releasing once in a while an accused person who may have committed the crime, but whose conviction would be, or on appeal was, based on the explicit interpretation of a witness's silence, or of his or her own silence for that matter.[7]

Moreover, there are groups of accused persons who require the protection of the court in order that their silence or their incoherent mumblings not be held against them. As Susan Easton writes in her book on the right of silence:

> For weaker, ill-educated, inarticulate and poorer defendants, there may well be genuine fears of making themselves understood during cross-examination and they may prefer to take a risk and remain silent. A nervous and unprepossessing individual, ignorant of criminal procedure and lacking interpersonal skills, intimidated by the atmosphere of the court, is likely to make an unfavourable impression on the tribunal. (1991:61)

Alex Stein (1992), in his paper on paragraph 10a of the Evidence Ordinance, argues in a similar vein, explicitly adopting Dworkin's position on matters of rights:

> Respecting rights grants legitimacy to every judicial decision. Any judicial decision that rejects existing rights for pragmatic reasons is not a legitimate decision, even when the pragmatic reasons offered are weighty considerations.

7. Conclusion

The way in which I have presented the two positions – between a pragmatic and a literal interpretation of section 10(a) – seems to indicate that Chief Justice Shamgar and his colleagues' pragmatic approach is more realistic; it reflects the way people do interpret texts. But in support of the minority judges' opinion, I would like to put forward two points, the first, one that I propose, and the second,

7. This principle, as Justice Menachem Elon in one of the minority opinions in the second appeal states, is found in Jewish law, too. The twelfth-century Jewish philosopher Maimonides states (in *Sefer HaMitzvot* "Book of Commandments") that "it is better and more desirable to release a thousand sinners than to kill one day an innocent man" (cited on p. 443).

one that the judges themselves advanced. Both the majority and the minority judges interpreted the disputed subsections in their published opinions in terms of intertextuality (see, e.g. Allen 2000) – using other texts to interpret the one under discussion, paragraph 10a of the Evidence Ordinance. This is what people do in most situations, and not only in the legal world. The "texts" that Chief Justice Shamgar and his colleagues used were those concerned with (1) the current rise in the crime rate, and possibly organized crime (e.g. of the Mafia variety), and (2) their normal reaction when faced with silence instead of speech as a response to a question (as depicted in the diagram in 3 above). Justice Bach and his colleagues used other texts, but in their case texts that belonged to the legal world – texts concerned with justice, with rights such as the right of the defendant to a fair trial by not admitting hearsay evidence and by guaranteeing the cross-examination of prosecution witnesses, or for that matter, hostile witnesses called by the defendant. One such text (or set of texts) is explicitly invoked by Alex Stein in his article (referred to in 6 above), when he cites Dworkin in support of the eventual minority decision.

The second point is the minority judges' claim that the majority in fact were indulging in law-making instead of law-interpreting; this claim does seem partly justified. In their assertion, and here I am citing, as did Justice Bach in his opinion, the minority opinion in the appeal in the 1990 *Levi* case (see 1 above):

> it seems to me that this time the decision is so far-reaching that it is beyond what a court may do. The proposed interpretation takes the term "refuses to testify" out of subsection (b) and adds it to subsection (a)(3). That is no longer interpretation. That is a change in the law. However desirable and important it may be, it is not within our power.

Despite the powerful arguments against the majority decision, made both by the minority judges themselves and by academic jurists, it may in fact be possible to adopt the majority opinion, which pragmatically makes sense, but not by moving "refuses to testify" from subsection (b) to subsection (a), but by broadening the meaning of "illicit means"? One of the best-known – or infamous – examples of the silent witness is among the Mafiosi, and other "Mafia"-type gangs. Their refusal, in the past at least, to testify does not stem from threats of the sort suggested by the courts in one interpretation of "illicit means", but from a code that expresses group-identity – *omertà* is the Italian word for this type of silence. No one orders the witness to remain silent, but it is part of the group's ethic that cooperation with the authorities is harmful to the group as a whole. This type of silence is therefore intentional, not unintentional as implied by the reference to threats. Moreover, *omertà* is not exclusive to the Mafia. Codes of honour among thieves and other criminal groups are widespread (and are also found among non-criminal

groupings, e.g. ethnic minorities). During the Northern Ireland troubles, there were "stay-silent" campaigns among IRA detainees and suspects. In fact, this was the immediate reason for the British government's decision in 1988 to allow the judicial consideration of a witness's or an accused's silence in criminal proceedings that take place in the province. Instead of answering the police's questions, the accused remains silent, or mumbles incoherently, or lists words. This is a version of silence, as given, too, in the *Haj* case.

Not to cooperate with the authorities – the police, the court – seems to be a characteristic of groups that live either on the boundary between law and crime, or beyond that boundary – well into the area of crime. The term "illicit means" may be interpreted to include the unwritten codes found in such groups, whether it is the *omertà* of the Mafia, a code of "honour" among thieves, or social codes among Northern Irish Catholics, or IRA sympathizers. We may view this as another case, albeit inverted, of intertextuality. The text used by such groups is, broadly speaking, the code of thieves, while the majority judges regard the intentionally silent witness who is using such texts as using misguided texts to interpret their attitude towards authority. This lack of cooperation – behaviour that goes against the accepted social code – is suspect.

Pragmatically, then, Chief Justice Shamgar and the other majority judges in the second appeal are probably correct in admitting Mundar's out-of-court statements, but it may be a case of doing, as the Anglo-American poet T. S. Eliot put it in his 1935 drama *Murder in the Cathedral*, "the right deed for the wrong reason". The way silence is generally interpreted is, after all, the one adopted by the majority.

References

Allen, G. 2000. *Intertextuality*. London: Routledge.

Easton, S. 1991. *The Right to Silence*. Aldershot: Avebury.

Grice, P. 1975. Logic and conversation. In *Syntax and Semantics* III: *Speech Acts*, P. Cole & J. Morgan (eds.), 41–58. New York NY: Academic Press.

Gudjonsson, G. H. 1994. Psychological vulnerability: Suspects at risk. In *Suspicion and Silence: The Right of Silence in Criminal Investigations,* D. Morgan & G. Stephenson (eds.), 91–106. London: Blackstone Press.

Gudjonsson, G. H., Hayes, G. D. & Rowlands, P. 2000. Fitness to be interviewed and psychological vulnerability: The views of doctors, lawyers and police officers. *Journal of Forensic Psychiatry* 11 (1): 74–92

Jackson, J. D. 2003. Justice for all: Putting victims at the heart of criminal justice? *Journal of Law and Society* 30(2): 309–326.

Johannesen, R. L. 1974. The functions of silence: a plea for communication research. *Western Speech* 38: 25–35.

Leo, R. A. & Thomas, G. C. (eds.). 1998. *The Miranda Debate: Law, Justice and Policing*. Boston MA: Northeastern University Press.
Kurzon, D. 1992. When silence may mean power. *Journal of Pragmatics* 18: 92–95.
Kurzon, D. 1994. Silence in the legal process: A sociopragmatic model. In *Legal Semiotics and the Sociology of Law* [Oñati Proceedings 16], B. S. Jackson (ed.), 297–332. Gipuzkoa: Oñati International Institute for the Sociology of Law.
Kurzon, D. 1995. Right of silence: A model of interpretation. *Journal of Pragmatics* 23: 55–69.
Kurzon, D. 1996. 'To speak or not to speak': The comprehensibility of the revised police caution (PACE). *International Journal for the Semiotics of Law* 9 (25): 3–16.
Kurzon, D. 1998. *Discourse of Silence.* Amsterdam: John Benjamins.
Kurzon, D. 2007. Towards a typology of silence. *Journal of Pragmatics* 39, 1673–1688.
Morgan, D. & Stephenson, G. (eds.). 1994. *Suspicion and Silence: The Right of Silence in Criminal Investigations*. London: Blackstone Press.
Stein, A. 1992. Hearsay statements as evidence in criminal trials: 'Is' and 'ought'. *Mishpatim* 21: 325–351. (In Hebrew).
Tiersma, P. 2005. The language of legal texts. In *Elsevier Encyclopedia of Language and Linguistics* 6: 549–556.
Wise, E. M. (ed.). 1988. *The French Code of Criminal Procedure*. Littleton CO: Rothman.

Cases (all in Hebrew)

Issacharov v. Military Prosecutor et al. 5121/98 (2006)
State of Israel v. Husam ibn Mujahd Haj Yehia. Reports of Israeli Supreme Court, 4390/91, 419–446.
Vadim Portnoy v. State of Israel. Reports of Israeli Supreme Court, 4478/03, 1–14.

Language and disadvantage before the law

Diana Eades
University of New England, Australia

This chapter draws on sociolinguistic research to examine some social groups whose experience of disadvantage in the legal process is at least partly due to differences in language use: children, intellectually disabled people, Deaf people, and second dialect speakers and other minority group members. The legal contexts include police interviews, courtroom hearings, lawyer-client interviews and alternative legal processes. The chapter argues that it is impossible to address language and disadvantage in the law – whether through research or law reform – without an understanding of the politics of disadvantage, and the rights of people whose difference from the dominant society plays a significant role in their participation in the legal process.

1. Introduction[1]

Equality before the law is central to legal systems around the world, as expressed in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR 1966): 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.

But sociolegal scholars question the extent to which the law does provide equal protection, and their work highlights ways in which the law 'fails to deliver on its biggest promises, especially the equal treatment of all citizens' (Conley and O'Barr 1998: 14). Language is one of the central factors involved in this failure, given that successful participation in the legal system depends to a considerable extent on the ability to manipulate language.

Many people who are usually very fluent and articulate speakers feel that they are at a disadvantage in the legal process, due to such factors as the use of complicated legal terms (see Tiersma, this volume), and the asymmetrical power relations between legal professionals and other participants, which give considerable

1. This paper draws on Eades (2006) which addresses a closely related topic.

control to legal professionals over what people can say in any legal matter which concerns them. But it is clear that some people are at a greater disadvantage than others in the legal process. This paper draws on sociolinguistic research to examine social groups whose experience of disadvantage in the legal process is at least partly due to differences in language use.

2. Children

Perhaps the greatest disadvantage in the legal process is experienced by children. There is a wealth of psycholinguistic research on general child language acquisition, which has established a considerable knowledge base about developmental aspects of child language. There is also a wealth of psychological research on child witnesses, examining such issues as memory, culpability, understanding, and the ability to distinguish truth from fantasy. Drawing on these two significant fields of research, linguists have carried out studies on interactions involving child witnesses in the legal process. Most notable are two books by linguists, written primarily for professionals involved with child care, welfare and protection – one in the US (Walker 1999), and the other in the UK (Aldridge and Wood 1998). Aldridge and Wood's (1998) book is based on 100 transcripts of video-recorded interviews of children in abuse cases by a police officer. Written primarily as a report of research, and richly illustrated with transcript data, this book provides empirically-grounded insights into children's use of language, as well as miscommunications with them in these legal interview situations. Walker's (1999) book is written explicitly as a handbook, so it does not report on a particular study, but rather, it synthesizes an impressive amount of relevant literature from psychology and linguistics in a very accessible and richly referenced handbook (see also Walker 1993; Brennan and Brennan 1988; Brennan 1994, 1995).

While children have often been seen as unreliable witnesses, perhaps the most important research finding is that 'Even very young children can tell us what they know if we ask them the right questions in the right way' (Walker 1999: 2). But asking the right questions in the right way is something that is often not done, whether for reasons to do with rules of evidence, legal manipulation, ignorance or incompetence. In drawing on relevant psychological and psycholinguistic literature (especially Walker 1999), and showing just what happens when children are asked different kinds of questions (Aldridge and Wood 1998), these two books provide practical guidelines about how to ask questions. Some of these guidelines might seem self-evident, such as reducing the processing load that children must carry, by aiming for simplicity and clarity in questions. But others are perhaps less

self-evident, and they reveal the importance both of on-going research on child language, as well as training of those who work with children in the legal process. For example, Walker (1999: 55) cites research which shows that a child's ability to count can not be taken to mean that the child understands the concept of number. Similarly, pre-adolescent children can often talk 'freely, in grammatical and appropriate ways' (p. 56) about time, without necessarily being able to give reliable specific time information. And Aldridge and Wood (1998: 130–132) explain that children acquire proficiency in *what, where* and *who* questions before *when, how* and *why* questions.

Courts in a number of countries have made some provisions for the vulnerability of child witnesses, although these provisions generally do not directly address the linguistic difficulties. Thus, in some jurisdictions, child witnesses are allowed to give evidence on closed-circuit television, in order to alleviate them of the trauma of being face-to-face in court with a suspect against whom they are testifying. However, children are often required to be present in court for cross-examination, sometimes provided with some support by a screen between the child and the accused. Other provisions which attempt to address the disadvantage faced by child witnesses include the modification of the test of competency for a child witness to take an oath in court. Some countries, such as Canada and England, extend such provisions to witnesses who have difficulties in communication because of either a physical or mental disability.

The experiences of child witnesses in adult courts, particularly in cases involving child abuse, have led for calls for 'a radical rethink of the current procedures for receiving children's evidence' (Chaaya 1998: 263). However recent innovations in a number of countries are radically changing the experiences of child *defendants* in the court process. Modelled on restorative justice approaches developed in New Zealand and Canada, 'conferencing' processes contrast to the punitive and/or welfare approaches which typify approaches to juvenile justice (Cunneen and White 2002: 358–359). Such conferencing approaches use several different titles, including 'youth justice conferencing' and 'family group conferencing'. Conferencing can be used for diversionary purposes, to deal with youth offending before it is serious enough to go to court. It is also used in some jurisdictions in cases in which a young person has pleaded guilty to a criminal charge, and in such cases conferencing can replace sentencing hearings in Childrens Court. Conferencing typically brings together the offender and the victim, as well as members of their families or other support people, in addition to a prosecutor or police officer, and others involved in the young person's welfare, which might include certain community members, social workers, teachers and probation officers. Like other restorative justice processes, such conferencing emphasises the restoration

of balance and repairing of harm done to individuals and the community, and the rehabilitation (rather than punishment) of the offender. While conferencing appears to address a number of aspects of the disadvantage experienced by child defendants (Cunneen and White 2002; Findlay et al. 2005), it has not yet received any linguistic attention. Sociolinguistic research could examine the extent to which conferencing approaches to juvenile justice can address linguistic problems involved in courtroom questioning of children – as identified in studies such as Aldridge and Wood 1998, Brennan and Brennan 1988, Brennan 1994, 1995, and Walker 1999.

3. Intellectually disabled people

While a number of legal professionals and governments recognize the disadvantages experienced by people with intellectual disability, it appears to be not yet subject to linguistic research, with the exception of work by two Australian researchers in the mid-1990s, Brennan and Brennan (e.g. 1994). The aim of Brennan and Brennan's work was to address communication issues affecting the ways in which police officers respond to people with intellectual disability. Their work draws on the Australian Law Reform Commission's consultations with intellectually disabled people, as well as their own interviews with police officers. The latter revealed a number of misconceptions about intellectual disability, and it resulted in the production of training materials for police officers. This material provides a framework for assessing communicative effectiveness, which includes such linguistic issues as helping police officers to understand the complexity of certain questions types. This pioneer work highlights the need for sociolinguistic analysis of interactions between intellectually disabled people and legal professionals (not limited to police contexts, but also investigating other legal contexts, such as lawyer-client and courtroom interactions).

4. Second language speakers

Arguably the adult participants who face the greatest disadvantage are those who do not speak the dominant or official language of the country, which is generally also the language of the legal process. The chapters in this volume by Powell and Leung examine issues affecting second language speakers, and the ways in which interpreting and translation can address some of this disadvantage.

5. Deaf people

While all second language speakers can be seen to face disadvantage in the legal process, within this group, Deaf people experience even greater disadvantage, for several reasons. Firstly, many people do not realize that Deaf sign languages are full and complex languages, so that Deaf sign language users are indeed second language users (Brennan and Brown 1997). Secondly, many people fail to recognize hearing impairment or deafness, and can wrongly attribute certain behaviors, including silence, to non-cooperation or resistance (McKee 2001: 132–4). And similarly, facial expressions which convey emotions in hearing people, may function quite differently as part of sign language. Castelle (2003) discusses the implications of such differences for police officers, who are often trained to study facial expressions and other nonverbal behavior of suspects generally, without an understanding of relevant differences between spoken and sign languages. Thirdly, consistent with the dominant monolingual Anglo-centric bias of the legal system in many English-speaking countries (see Eades 2003b), some courts in the US have failed to understand the crucial difference between American Sign Language (a complete language, not related to English), and transliterated forms of English, such as finger-spelling. Thus, in some jurisdictions in the US, interpreters have been directed to use Signed English (rather than American Sign Language) for Deaf jurors, because of the mistaken belief that this would somehow make the interpretation more accurate (Mather and Mather 2003). This is the same as interpreting from one spoken language to another by interpreting a string of individual words, rather than the utterance as a whole. This can easily result in non-sensical 'interpretations', for example in dealing with idioms.

As with speakers of second languages, sign language users often face difficulties in having access to competent interpreters. Hoopes (2003) points to difficulties in one large US city where Deaf suspects are interviewed by police officers who have inadequate training in American Sign Language (ASL). The police officers' attempts to use ASL in giving the Miranda Rights (= police caution), and in carrying out the interrogation, indicate a positive development in recognizing communication needs of Deaf people. But the results – in such cases where the police officer is not a fluent sign language user – can be disastrous for Deaf suspects, in terms of lack of understanding of their rights, as well as the charges against them, and particular questions during the interrogation.

Important linguistic differences between signed languages and spoken languages present particular challenges for interpreting in the highly constrained communicative events in the legal process. While spoken language is linear – comprising one meaningful unit spoken after another – sign languages use several different

signs in combination to make meaning. Thus, as Hoopes (2003) points out, a sign language interpreter must pay attention to all of these articulators at once: (1) dominant hand, (2) non-dominant hand, (3) eye gaze, (4) eyebrow posture, (5) cheek posture, (6) mouth posture, (7) head movement and posture, (8) shoulder posture. Hoopes reports that second language learners of sign languages have been found to concentrate on manual aspects of the language, with less successful use and interpretation of the other (non-manual) signs, such as mouth posture.

Regardless of the expertise and experience of the interpreter, Deaf people are also disadvantaged in the legal process by the nature of certain linguistic differences between spoken languages and sign languages (Napier et al. 2006). For example, sign languages such as Auslan (in Australia) and NZSL (in New Zealand) use fewer 'category' terms than English. Thus, English generic words which are frequently used in criminal trials have to be interpreted more specifically: for example the English word 'assault' has no lexical equivalent in these sign languages. It would have to be signed as 'punch', 'stab', 'kick', 'slap', or similar. Similarly the English term 'disorderly' would have to be signed more specifically as 'drunk', 'fight' or 'swear'. Napier et al. (2006: 124) point out that 'there is often no simple solution to such linguistic differences'.

6. Second dialect speakers and other minority goup members

Second dialect speakers are people who speak not the language of the legal process, but a related dialect, often an unstandardized dialect which is stigmatized and denigrated in the society generally. Although communication difficulties are not as extreme as with second language speakers, in some ways second dialect speakers can be at a greater disadvantage than some people who speak a second language. This is because they are often wrongly assumed to be speakers of the dominant language, or people who are too uneducated, lazy or ignorant to speak 'properly' (Eades 1995). More than twenty years ago, Wodak-Engel's (1984) study in Austrian courts found that 'justice relates to class', and that the working-class Viennese dialect of working-class defendants contributed to their difficulties with 'image making' in courts where Standard German of the middle class was the norm. This negative relationship between the use of a non-standard dialect and legal reactions to its speakers is also revealed in Jacquemet's (1992, 1996) study of dialect use in the large mid-1980s trial of Mafia gang members (*camorra*) from the Naples area of Italy. Defense lawyers tried to impugn the credibility of prosecution witnesses on the basis of their use of non-standard dialect in their courtroom testimony. However, this use of dialect caused no comprehension difficulties for any of the participants, and the judge refused to disallow its use.

Despite the indications that in many countries a large number of participants in the legal process are likely to be speakers of non-standard dialects, there is remarkably little relevant linguistic research. Indeed, although African Americans in the US are six times more likely to be imprisoned than white Americans (Walker et al. 1996: 1), there is virtually no linguistic research which examines African American interactions in the legal process. And Morrow's (1993, 1996) work with Yup'ik Alaskans shows that even when these people speak 'local Yup'ik influenced English', the norms of interaction relating to the management of talk are fundamentally different from those of mainstream American speakers of English. This has serious consequences for the delivery of justice, particularly in relation to the central role of interviews in the legal process, and the sociolinguistic mismatch with Yup'ik ways of speaking.

Most of the research on speakers of non-standard dialects in legal contexts has focused on Australian Aborigines, who are twenty times more likely to come into contact with the criminal justice system than non-Aboriginal people (Findlay et al. 2005: 326). There are many factors involved in this over-representation, including effects of dispossession, over-policing, and selective application of the law. Further, the situation applies throughout the whole country, with speakers of traditional Aboriginal languages, as well as Aboriginal English varieties. Linguistic work which examines speakers of traditional indigenous languages shows the need for well-trained interpreters, as well as a legal system that understands not only how to work with interpreters, but also the significance of considerable cultural differences in the effective use of interpreting. (See Cooke 1995, 2002, 2004; also chapters in this volume by Powell and Leung). Further, it has become clear that cultural differences impact the effectiveness of the legal process itself (Cooke 1996; Walsh 1994).

But many indigenous Australians do not speak a traditional language – they use a dialectal variety of English in their dealings with the law. Most of the research on Aboriginal English in the legal system has focused on speakers of acrolectal varieties, which overlap to a considerable extent with other varieties of Australian English. Despite the fact that these Aboriginal English varieties do not sound very different from General Australian English, there are important pragmatic features, which are often unrecognized or misinterpreted, and which can affect speakers in their dealings with the law. This may well be a major reason why the participation of second dialect speakers in the legal system has not attracted much linguistic research – where lexical and grammatical differences between the stigmatized and the standard dialects are not great, the pragmatic and cultural differences can be overlooked.

For example, in the Anglo legal system and society generally, silence in answer to a question is generally 'interpreted to the detriment of the silent person',

for example as implying that the person asked the question has something to hide (Kurzon 1995: 56; Kurzon this volume). In contrast, many speakers of Aboriginal English (as well as traditional Aboriginal languages) use silence as a positive and productive part of communication. But this use of silence is often not understood by legal professionals – of whom very few are Aboriginal – and considerable miscommunication can arise in legal interviews, whether in a lawyers' office, a police station, or a courtroom. Many people who interview Aboriginal people are unaware that their answer will often begin with a silence. Not hearing an immediate reply to the question, the interviewer often moves on to another question. In effect, the interviewer has interrupted the first part of the reply, and thus prevented the Aboriginal interviewee from providing an answer (see Eades 1994, 2007).

Another pragmatic feature found to be crucial in understanding Aboriginal participants in the legal process is 'gratuitous concurrence' – namely, freely agreeing to a Yes-No question, regardless of either the speaker's understanding of the question, or their belief about the truth or falsity of the proposition being questioned (Eades 1994; Liberman 1981). One reason that this pragmatic feature is particularly prevalent in Aboriginal societies, relates to the widespread cultural norm that harmony and agreement should be preserved at an immediate level, and differences can be worked out in due time. But the use of gratuitous concurrence in legal contexts can be very problematic for Aboriginal interviewees. Once a person has agreed to a proposition in a context such as a police interview, it can have life-changing implications. It is likely that this pragmatic feature which has been observed in inter-cultural communication in indigenous Australia for many decades, is also found in many other inter-cultural communication situations around the world. Further, it is undoubtedly more prevalent in situations of power asymmetry, which characterize interactions in the legal process. In such interactions it can have disastrous consequences for the minority participant (see Gibbons 2003).

An interactional sociolinguistics approach, examining such features as silence and gratuitous concurrence, was part of the successful appeal case of an Aboriginal woman in Queensland in the 1990s, who claimed to be wrongfully convicted of murder (Eades 1996). This claim was based on the appellant's lawyers inadequately representing her because their pre-trial interviews with their client were so marred by inter-cultural misunderstanding that they were unable to find out her full story. They asked her questions and did not wait for her answers. She thought that they were not interested in her answers, while they thought that she had nothing to say. An understanding of cultural differences in the use of silence and gratuitous concurrence helped to explain why her lawyers had never found out her story before her trial.

The use and interpretation of silence in interactions in legal settings is an under-researched topic, which is likely to be relevant to many other social groups beyond Australian Aboriginal people. Sociolinguistic research has found distinctive uses of silence in a number of sociocultural groups, including the Amish (Enninger 1987), Japanese (Lebra 1987) and Chinese (Young 1994). There is a possibility of inter-cultural miscommunication in the legal process with immigrants from these groups. Further, a number of sociolinguists and anthropologists have pointed out that Native Americans use silence quite comfortably in their interactions (e.g. Basso 1970; Philips 1993). Gumperz (2001) draws on such research in his analysis of the way in which the silence of a Native American man was used against him in a murder case. Researchers have pointed to legal implications of misinterpretation of silence in other situations of inter-cultural communication. For example, in the Hernandez case in the US in 1990, the US Supreme Court upheld a state court's decision, which had disallowed Spanish speakers from serving as jurors in a case in which evidence was to be given in Spanish and interpreted into English. The main reason for the decision was that two of the Latino jurors hesitated before agreeing that they would accept the interpreter's translation of the testimony (rather than relying on the original Spanish testimony). Montoya (2000) argues that a misunderstanding of the brief silence (or pause) of two jurors in this case, led to a decision which amounted to linguistic discrimination. The decision also prevented Mr Hernandez from being tried by a jury of his peers.

Given the importance placed in the legal process on the 'demeanor' of witnesses as an indication of their truthfulness and credibility, then cultural differences in communicative style can play a crucial role. Such nonverbal behavior as eye contact is widely recognized in sociolinguistic and communication research to vary between different cultural groups (e.g. Bauer 1999; Van Ta 1999; Palerm et al. 1999). To what extent are such cultural differences recognized and understood by legal professionals? And to what extent are they implicated in the effective or non-effective participation of members of minority cultural groups in the legal process? These are some of the questions awaiting further sociolinguistic research.

Most of the research which addresses the disadvantage faced by second dialect speakers in the legal system deals with communicative style. Phonological, grammatical, lexical and semantic differences between related dialects can also lead to miscommunication which may go largely undetected (Koch 1991; Sharifian 2005; Walsh 1999).

Speakers of second dialects are often also members of sociocultural groups which differ significantly from the dominant group. Thus some of the disadvantage faced by second dialect speakers relates to a lack of understanding of legal

professionals of relevant aspects of their lifestyle and culture. Eades (2000) shows how this lack of understanding can be compounded by an obsession on the part of judges and lawyers with the discourse structure of the court, resulting in the silencing of Aboriginal people in court.

There is still much research to be done on speakers of second dialects and people in other cultural minorities in many countries. A related issue concerns speakers of pidgin and creole languages, whose sociolinguistic situation has many similarities with those of second dialect speakers. Many people are unaware of the distinction between a pidgin or creole language on the one hand and its lexifier language on the other, and thus the same issues arise concerning ignorance about differences in language and communicative style, as well as frequent prejudice against speakers.

7. The politics of disadvantage

Most linguistic work on language and disadvantage in the law has been carried out within a 'difference' approach to the relationship between linguistic/cultural diversity and social inequality. Rampton (2001: 261) describes such an approach as one which 'emphasises the integrity and autonomy of the language and culture of subordinate groups, and the need for institutions to be hospitable to diversity'. Thus applications within legal contexts, such as inter-cultural awareneness training for lawyers, assume that an explanation of linguistic and cultural difference can go a long way in addressing the disadvantage faced by second language and second dialect speakers. Eades (2004, 2008) documents ways in which the legal system in the Australian state of Queensland has attempted to be 'hospitable to diversity'.

But, within sociolinguistic research generally, critics of the 'difference' approach to intercultural communication have argued that it ignores the 'social inequality and power relations present in intercultural encounters' (Meeuwis and Sarangi 1994: 310; see also Rampton 2001; Pennycook 2001). Following such scholars, disadvantage in the legal system cannot be understood in terms of difference alone. Questions of social inequality generally, and situated relationships of power specifically, must also be addressed in order to account for disadvantage. Eades (2002, 2003a, 2004, 2008) discusses this issue in a Queensland hearing in which three young teenage Aboriginal boys were prosecution witnesses in the case in which six police officers were charged with their abduction. Pragmatic features of Aboriginal English were exploited in the cross-examination of the boys. Thus, for example, Aboriginal uses of silence and gratuitous concurrence were maximised in gaining the boys' apparent agreements to conflicting propositions,

in situations of extreme harassment and haranguing. The cross-examination in this case was widely seen as raising 'serious questions about the adequacy of the protections offered to vulnerable witnesses in court proceedings' (CJC 1995). But in this case, the inadequacy cannot be explained or addressed in terms of the need for legal professionals to be made aware of relevant cultural and linguistic differences. The fact that the cross-examining lawyers were well aware of these differences was made clear from their prominent display on the Bar table of the handbook for lawyers about Aboriginal English and the law (Eades 1992).

Issues of social inequality and power imbalance are central to the disadvantage experienced by the Aboriginal boys in this case. But, the situational power struggle in the courtroom cross-examination in this case between young teenage Aboriginal boys and highly experienced barristers provides only part of the explanation. This courtroom disadvantage must be situated in an analysis of wider power struggles at both institutional and societal levels. Queensland police officers have been controlling the movements of Aboriginal people since the earliest colonial times. Their continuing removal of Aboriginal people from public spaces is highly contested, and is the focus for ongoing struggle. In this case the struggle moved from the streets to the courtroom, where language is the major weapon. The disadvantage experienced by the Aboriginal boys in this case can be attributed as much to the wider societal power struggle about neocolonial control over police movements of Aboriginal people, as to any cultural and linguistic differences, and situated linguistic power in the courtroom.

8. Lawyer-client interviews and alternative legal processes

Most linguistic research to date which addresses language and disadvantage in the law has been carried out on courtroom interaction, where data collection is relatively straightforward. There is also increasing attention being paid to language issues in police interviews, particularly with children and Deaf people, as we saw above. But, two other legal settings have to date received little linguistic attention: lawyer-client interviews and alternative legal processes.

Trinch (2001a, 2001b, 2003) has analysed interviews by lawyers and paralegals with Latina survivors of domestic abuse. A major concern of her work has been with the discrepancies between the women's oral stories and the written affidavits, produced by the interviewers, to be used in seeking a protective order from the courts. Trinch's study has found that although the lawyers and paralegals enable the women's stories to be heard by the court, they are at the same time selecting those parts of the women's stories that they consider important to the legal process. This results in the silencing or distortion of parts of the women's stories. Trinch's

analysis addresses the politics of disadvantage, showing that the women's powerlessness is reproduced by the ways in which their stories are distorted. In this way, a temporary and individual solution can be found to the widespread societal problem of violence against women. While Trinch's research is with Latina women, her work does not suggest that the role of language in reproducing the powerlessness of survivors of domestic abuse is limited to this sociocultural group.

Apart from Trinch's work, there appears to be almost no research on language and disadvantage in lawyer-client interviews, despite this comprising an important part of the legal process. Further, there does not appear yet to be much forensic linguistic attention to language and disadvantage in alternative legal settings, such as mediation, despite increasing interest in the legal profession and the community generally in alternatives to the formal legal system. Several sociolegal scholars (e.g. Grillo 1991; Fineman 1991) have suggested that the communicative assumptions and practices used in mediation can disadvantage women, and particularly Black women in the US. While there is a little Conversation Analysis research on the language of mediation, it has not yet addressed the situation of members of social groups who are disadvantaged in terms of language. For example, Greatbatch and Dingwall (1999) write about the discursive management of mediator partiality – which they term 'neutralism' – a factor central to the philosophy and practice of mediation. How does this neutralism work in intercultural mediation, especially where second language and second dialect speakers are involved?

A particular kind of alternative legal process in Canada, New Zealand and Australia is found in the Indigenous courts, many of which operate within a restorative approach to criminal justice, similar to the conferencing approaches to juvenile justice discussed above. There are many variations, both in the ways in which these courts operate, and in their names (for example in Australia: the Murri Court in Queensland, the Koori Court in Victoria and circle sentencing in New South Wales). Central to the functioning of these Indigenous courts is the involvement of respected Indigenous community members (who are often Elders) in talking to offenders, and in the determination of sentences. Within both the legal profession and Indigenous communities, there is widespread enthusiasm for these Indigenous courts. These courts are being credited with considerable effectiveness in addressing law and order breakdown in communities, in restoring balance to communities, in giving victims a voice, and in rehabilitating offenders. But more than this, the power imbalance which is so striking in traditional legal processes, is replaced with community 'power-sharing arrangements' (Potas et al. 2003: 4), so that Indigenous community members work with legal professionals to deliver justice.

A number of features of the way in which Indigenous courts operate are seen as central to this effectiveness, and one of these relates to language use. A review of circle sentencing in the Australian state of New South Wales found that the 'use of colloquial language in place of complicated terms and legal jargon was striking' and that this colloquial language 'facilitated communication' (Potas et al. 2003: 10). Aboriginal participants commented favourably on the fact that they can use 'Aboriginal English, rather than the language used in other courts' (Potas et al. 2003: 20), and that 'you can use your own language and [the other circle members] know what you mean or understand, and most importantly you are respected for who you are at the same level' (p. 43). Initial investigations from a sociolinguistic perspective also indicate that there are important differences in discourse structure between circle sentencing and traditional courts. These differences are likely to be of far greater consequence than the avoidance of 'complicated legal terms' (which in my observations in courts do not actually occur very frequently in talk addressed to witnesses, but much more frequently in talk between legal professionals, often about a witness, see also Heffer 2005). In circle sentencing, there is no rigid control of discourse structure. While the magistrate convenes the circle, and acts as the facilitator, the aim is to encourage participants to talk, not to control their contributions. Thus the talk is free-flowing, and typically participants often take long turns. Repetition is not a problem, and relevance is not an issue – there is a widespread recognition that the issues facing the circle are complex, and interrelated, and that many factors need to be considered.

These innovative restorative justice practices are still pilot projects in many jurisdictions. To date, there is little research on their workings (see Stroud 2006 for a sociolinguistic overview of the Koori Court in Victoria, Australia). They are generally limited to sentencing hearings in cases where the defendant has pleaded guilty, and they can not take the place of a trial. Once these processes have become more widely implemented, they have the potential to be modified to suit specific needs of other social groups. The emphasis in these alternative processes on communication and community, rather than propositional content and a rigid discourse structure, marks a significant development in beginning to address some of the language-related disadvantages faced by members of these groups.

9. Conclusion

Arguably the most difficult challenge for any legal system is to provide 'equal protection of the law' to everyone. In this chapter we have seen some of the social groups who experience disadvantage in the legal process, due in part to differences

in language use. Sociolinguistic research has made some headway in the analysis of aspects of this disadvantage, which at the same time is being addressed to some extent by a number of practical initiatives in different jurisdictions. But much more remains to be done, in terms of both research and change to legal processes. Addressing language and disadvantage in the law – whether through research or law reform – requires an understanding of the complexities of multilingualism, as well as dialectal and cultural difference, and the needs of those who are not proficient in the dominant language variety. But further, it requires an understanding of the politics of disadvantage, and the rights of people whose difference from the dominant society plays a significant role in their participation in the legal process. Recent innovations in alternative legal processes which have been influenced by Indigenous people and practices in Australia, Canada and New Zealand give cause for optimism that the experiences of non-dominant social groups can have an increasingly positive impact in improving the provision of equality before the law.

References

Aldridge, M. & Wood, J. 1998. *Interviewing Children: A Guide for Child Care and Forensic Practitioners.* Chichester: John Wiley and Sons.

Basso, K. H. 1970. 'To give up on words': Silence in Apache culture. *Southwestern Journal of Anthropology* 26 (3): 213–230.

Bauer, J. 1999. Speaking of culture: Immigrants in the American legal system. In *Immigrants in Court*, J. Moore (ed.), 8–28. Seattle WA: University of Washington Press.

Brennan, M. 1994. Cross-examining children in criminal courts: Child welfare under attack. In *Language and the Law,* J. Gibbons (ed.), 199–216. London: Longman.

Brennan, M. 1995. The discourse of denial: Cross-examining child victim witnesses. *Journal of Pragmatics* 23: 71–91.

Brennan, M. & Brennan, R. 1988. *Strange Language: Child Victims under Cross-examination,* 2nd edn., 1998. Wagga Wagga: Charles Sturt University.

Brennan, M. & Brennan, R. 1994. *Cleartalk: Police Responding to Intellectual Disability*. Wagga Wagga: Charles Sturt University.

Brennan, M. & Brown, R. 1997. *Equality before the Law: Deaf People's Access to Justice.* Durham: Deaf Studies Research Unit, University of Durham.

CJC (Criminal Justice Commission). 1995. Media release. 3rd March 1995.

Castelle, G. 2003. Misunderstanding, wrongful convictions and deaf people. In *Language and the Law in Deaf Communities*, C. Lucas (ed.), 168–176. Washington DC: Gallaudet University Press.

Chaaya, M. 1998. Children's evidence in sexual abuse cases: The need for a radical reappraisal. *Current Issues in Criminal Justice* 9 (3): 262–278.

Conley, J. & O'Barr, W. 1998. *Just Words: Law, Language and Power*. Chicago IL: University of Chicago Press.

Cooke, M. 1995. Aboriginal evidence in the cross-cultural courtroom. In *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia,* D. Eades (ed.), 55–96. Sydney: University of New South Wales Press.

Cooke, M. 1996. A different story: Narrative versus 'question and answer' in Aboriginal evidence. *Forensic Linguistics* 3 (2): 273–288.

Cooke, M. 2002. *Indigenous Interpreting Issues for the Courts*. Carlton: Australian Institute of Judicial Administration Incorporated.

Cooke, M. 2004. *Caught in the Middle: Indigenous Interpreters and Customary Law*. Perth: Law Reform Commission of Western Australia.

Cunneen, C. & R. White. 2002. *Juvenile Justice: Youth and Crime in Australia*. Oxford: OUP.

Eades, D. 1992. *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners*. Brisbane: Queensland Law Society.

Eades, D. 1994. A case of communicative clash: Aboriginal English and the legal system. In *Language and the Law,* J. Gibbons (ed.), 234–264. London: Longman.

Eades, D. 1995. Aboriginal English on trial: The case for Stuart and Condren. In *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia,* D. Eades (ed.), 147–174. Sydney: University of New South Wales Press.

Eades, D. (ed.) 1995. *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia,* Sydney: University of New South Wales Press.

Eades, D. 1996. Legal recognition of cultural differences in communication: The case of Robyn Kina. *Language and Communication* 16 (3): 215–227.

Eades, D. 2000. 'I don't think it's an answer to the question': Silencing Aboriginal witnesses in court. *Language in Society* 29 (2): 161–196.

Eades, D. 2002. 'Evidence given in unequivocal terms': Gaining consent of Aboriginal kids in court. In *Language in the Legal Process*, J. Cotterill (ed.), 162–179. Houndmills: Palgrave.

Eades, D. 2003a. The politics of misunderstanding in the legal process: Aboriginal English in Queensland. In *Misunderstanding in Spoken Discourse*, J. House, G. Kasper & S. Ross (eds.), 196–223. London: Longman.

Eades, D. 2003b. The participation of second language and second dialect speakers in the legal system. *Annual Review of Applied Linguistics* 23: 113–133.

Eades, D. 2004. Understanding Aboriginal English in the legal system: A critical sociolinguistics approach. *Applied Linguistics* 25 (4): 491–512.

Eades, D. 2006. Interviewing and examining vulnerable witnesses. In *Encyclopedia of Language and Linguistics*, K. Brown (ed.), 772–777. Oxford: Elsevier.

Eades, D. 2007. Understanding Aboriginal silence in legal contexts. In *Handbook of Applied Linguistics,* Vol 7: *Intercultural Communication*, H. Kotthoff & H. Spencer-Oatey (eds.), 285–301. Berlin: Mouton de Gruyter.

Eades, D. 2008. *Courtroom Talk and Neocolonial Control*. Berlin: Mouton de Gruyter.

Enninger, W. 1987. What interactants do with non-talk across cultures. In *Analyzing Intercultural Communication*, K. Knapp, W. Enninger & A. Knapp-Pothoff (eds.), 269–302. Berlin: Mouton de Gruyter

Findlay, M., Odgers, S. & Yeo S. 1994[2005]. *Australian Criminal Justice*. 3rd edn. Oxford: OUP.

Fineman, M. A. 1991. *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Chicago IL: The Chicago University Press.

Gibbons, J. (ed.) 1994. *Language and the Law*. London: Longman.
Gibbons, J. 2003. *Forensic Linguistics.* Oxford: Blackwell.
Greatbatch, D. & Dingwall, R. 1999. Professional neutralism in family mediation. In *Talk, Work and Institutional Order: Discourse in Medical, Mediation and Management Settings*, S. Sarangi & C. Roberts. (eds), 271–292. Berlin: Mouton de Gruyter.
Grillo, T. 1991 The mediation alternative: Process dangers for women. *Yale Law Journal* 100: 1545–1610.
Gumperz, J. 2001. Contextualization and ideology in intercultural communication. In *Culture in Communication: Analyses of Intercultural Situations*, A. Di Luzio, S. Gunthner & F. Orletti (eds.), 35–53. Amsterdam: John Benjamins.
Heffer, C. 2005. *The Language of Jury Trial: A Corpus-Aided Analysis of Legal-Lay Discourse*. Houndmills: Palgrave.
International Covenant on Civil and Political Rights (ICCPR). 1966.
Hoopes, R. 2003. Trampling *Miranda*: Interrogating deaf suspects. In Lucas (ed.), 21–59.
Jacquemet, M. 1992. 'If he speaks Italian it's better': Metapragmatics in court. *Pragmatics* 2 (2): 111–126.
Jacquemet, M. 1996. *Credibility in Court: Communicative Practices in the Camorra Trials*. Cambridge: CUP.
Koch, H. 1991. Language and communication in Aboriginal Land Claim hearings. In *Language in Australia*, S. Romaine (ed.), 94–103. Cambridge: CUP.
Kurzon, D. 1995. The right of silence: A socio-pragmatic model of interpretation. *Journal of Pragmatics* 23: 55–69.
Lebra, T. S. 1987. The cultural significance of silence in Japanese communication. *Multilingua* 6 (4): 343–357.
Liberman, K. 1981. Understanding Aborigines in Australian courts of law. *Human Organization* 40: 247–55.
Lucas, C. (ed.). 2003. *Language and the Law in Deaf Communities*. Washington DC: Gallaudet University Press.
Mather, S. & Mather, R. 2003. Court interpreting for signing jurors: Just transmitting or interpreting?. In *Language and the Law in Deaf Communities*, C. Lucas (ed.), 60–81. Washington DC: Gallaudet University Press.
McKee, R. 2001. *People of the Eye: Stories from the Deaf World*. Wellington: Bridget Williams Books.
Meeuwis, M. & Sarangi S. 1994. Perspectives on intercultural communication: A critical reading. *Pragmatics* 4 (3): 309–314.
Montoya, M. 2000. Silence and silencing: Their centripetal and centrifugal forces in legal communication, pedagogy and discourse. *Michigan Journal of Race and Law* 5: 847–941.
Moore J. (ed.). 1999. In *Immigrants in Court*. Seattle WA: University of Washington Press.
Morrow, P. 1993. A sociolinguistic mismatch: Central Alaskan Yup'iks and the legal system. *Alaska Justice Forum* 10 (2): 4–8.
Morrow, P. 1996. Yup'ik Eskimo agents and American legal agencies: Perspectives on compliance and resistance" *Journal of the Royal Anthropological Institute* 2: 405–423.
Napier, J., McKee R. & Goswell, D. 2006. *Sign Language Interpreting: Theory and Practice in Australia and New Zealand*. Sydney: Federation Press.
Palerm, J.-V., Vincent, B. & Vincent, K. 1999. Mexican immigrants in court. In Moore (ed.), 73–97.

Pennycook, A. 2001. *Critical Applied Linguistics: A Critical Introduction*. Mahwah NJ: Lawrence Erlbaum Associates.

Potas, I., Smart, J., Brignell, G., Thomas, B. & Lawrie, R. 2003. *Circle Sentencing in New South Wales: A Review and Evaluation*. Sydney: Judicial Commission of New South Wales.

Philips, S. U. 1993. *The Invisible Culture: Communication in Classroom and Community on the Warm Springs Indian Reservation*. London: Longman.

Rampton, B. 2001. Language crossing, cross-talk and cross-disciplinarity in sociolinguistics. In *Sociolinguistics and Social Theory,* N. Coupland, S. Sarangi & C. N. Candlin (eds.), 261–296. London: Pearson Education.

Sharifian, F. 2005. Cultural conceptualisations in English words: A study of Aboriginal children in Perth. *Language and Education* 19 (1): 74–88.

Stroud, N. 2006. Accommodating language difference: A collaborative approach to justice in the Koori Court of Victoria. In *Selected papers from the 2005 Conference of the Australian Linguistic Society,* K. Allan (ed.). (http://www.als.asn.au).

Trinch, S. 2001a. The advocate as gatekeeper: The limits of politeness in protective order interviews with Latina survivors of domestic abuse. *Journal of Sociolinguistics* 5 (4): 475–506.

Trinch, S. 2001b. Managing euphemism and transcending taboos: Negotiating the meaning of sexual assault in Latinas' narratives of domestic violence. *Text* 21 (4): 567–610.

Trinch, S. 2003. *Latinas' Narratives of Domestic Abuse: Discrepant Versions of Violence*. Amsterdam: John Benjamins.

Van Ta, T. 1999. Vietnamese immigrants in American courts". In Moore (ed.), 140–157.

Walker, A. G. 1993. Questioning young children in court. *Law and Human Behavior* 17 (1): 59–81.

Walker, A. G. 1999. *Handbook on Questioning Children: A Linguistic Perspective,* 2nd edn. Washington DC: ABA Center on Children and the Law.

Walker, S., Spohn, C. & DeLone, M. 1996. *The Color of Justice: Race, Ethnicity and Crime in America.* Belmont CA: Wadsworth Publishing Company.

Walsh, M. 1994. Interactional styles in the courtroom: An example from northern Australia. In *Language and the Law,* J. Gibbons, (ed.), 217–233. London: Longman.

Walsh, M. 1999. Interpreting for the transcript: problems in recording Aboriginal land claim proceedings in northern Australia. *Forensic Linguistics* 6 (1): 161–195.

Wodak-Engel, R. 1984. Determination of guilt: Discourse in the courtroom. In *Language and Power*, C. Kramarae, M. Schulz & W. O'Barr (eds.), 89–100. Beverley Hills CA: Sage.

Young, L. 1994. *Crosstalk and Culture in Sino-American Communication*. Cambridge: CUP.

Interpreting for the minority, interpreting for the power

Ester S. M. Leung
Hong Kong Baptist University

Legal interpreting is more than a service provided to linguistic minorities who do not speak Cantonese (the majority language in Hong Kong), sometimes English interpreting is also a mechanism and establishment to maintain control, by retaining former colonial practices. Despite expectation of change in the legal field in Hong Kong after it was handed back to Mainland China, this study reveals that legal interpreting as a means of providing the linguistic human right to have access to court is a myth that is perpetuated in the still intellectually colonized city.

1. Introduction

Unlike other countries, legal interpreting is more than a service provided to the linguistic minority in Hong Kong. When legal interpreting is referred to in other countries, it is mainly a service provided to the linguistic minorities like immigrants or aliens of ethnic backgrounds to the host countries. It is a way to protect the language right of individuals who do not speak the language of the court and to make sure that their voices are represented in the legal process. However for the former colonial government in Hong Kong, the provision of interpreting services was a way to assert and maintain the power of the authorities who did not speak the language of the majority population in Hong Kong. Having such a history, the purpose, structure and practice of legal interpreting in Hong Kong is rather unique. The first half of this paper reveals how interpreting services was formed and applied during the colonial rule of the British Government in Hong Kong. The second part of the paper examines the notion that it is part a myth that the continued use of interpreting by the post-colonial government of Hong Kong maintains justice.

2. The colonial government and its official language

After Hong Kong was ceded to the British Government in 1842 through the Treaty of Nanking, the laws of England and practice of the English courts, "as existed on April 5, 1843, should be in force in the Colony from thenceforth" (No. 2 of the Ordinance of 1845) (Wilkinson in Wright (ed.) 1908: 102). Despite the fact that Cantonese was the language used by the majority of the Chinese population at the time, English was the only official language up until 1976. As a result of the enactment of The Official Languages Ordinance (1976), Chapter 5, Sections 3(1) and (2), "English and Chinese languages are declared to be the official languages of Hong Kong for the purposes of communication between the Government or any public officer and members of the public and for court proceedings."

Though officials of the British colonial government were strongly encouraged to study Chinese under the Student-Interpreters Scheme and there was also the provision of the Chinese Teacher's Allowance for government officials who wanted to study Chinese, government officials who could speak Chinese at the time were extremely rare (Bickley 2005: 464). Therefore, the implementation of the legislation and the governance of the British government in the colony relied heavily on speakers who could speak both English and Chinese. These bilingual speakers include mainly missionaries like K. Gutslaff, R. Morrison, E. J. Eitel and J. Legg, who translated a number of the Chinese classics into English and acted as the experts and consultants on the Chinese language and culture for the British Government (Cheung 2005: 85). These translators were not just translators of languages but also missionaries who came to Hong Kong to evangelize the local Chinese population. They translated biblical literature into Chinese and established schools to spread Gospel and Christian ideology in Hong Kong and China. Since English was used as the medium of instruction in those schools, they produced a large elite who could communicate in English with the government and in Chinese with the citizens of the colony. This elite was employed by the colonial government as civil servants, and many were paid a high salary. Meanwhile, the superior status of the English language was sustained by the government through a range of policies, for example, only those who spoke English well could become civil servants; only those who had obtained a pass in English in their School Certificate Examination could study for university degrees.

3. Language of the court and the establishment of interpreter's post

English has been stipulated as the language of the courts in Hong Kong since 1842 when the British common law system was imported into Hong Kong. The

use of interpreter in court became almost the only legitimate way to help the English courts to conduct trials in the colony. Discussion regarding the quality and the appointment of court interpreter's services is recorded in J. P. Hennessy, the Governor's Report on the Blue Book in 1881, he pointed out that:

> Having observed in the records of the Supreme Court a few cases where Chinese had been sentenced to death who were subsequently pardoned on the ground that they were innocent, and that other miscarriages of justice had occurred, apparently from the defective interpretation, I invited, in 1877, the Judges and members of the Bar to favour me with their views as to the interpretation in a Supreme Court. They agreed in describing it as *deplorably bad* [my emphasis]. The Chief Interpreter was a Portuguese gentleman, who, in the words of the Chief Justice, "cannot interpret the written language of China," and who "is unable to express himself in correct English.

There was also concern with the low interpreters' salary, which meant that good interpreters soon lost interest and found other jobs. "The others were Chinese, who received small salaries and did not know English very well."

Also, "None of the judges knew Chinese, neither did the Attorney General nor the Crown Solicitor nor any of the Bar except Mr. Ng Choy [who was called in 1877] knew Chinese. The Registrar and Deputy Registrar and the Sheriff were equally ignorant of the native language." Members of the juries were also foreigners who, "in nineteen cases out of twenty, did not understand a word of Chinese."

Yet, the government was dealing with the Chinese population who knew no English and have experienced a completely different legal system of the Ch'ing Government. Governor Hennessy carried on and explained that to provide remedy to the situation,

> a European gentleman, who had been born in Canton and educated in England, as oral Interpreter to the Supreme Court. I also placed the Interpreters of the Police Court at the disposal of the Supreme Court, filled up all vacancies in the staff of Interpreters by strict competitive examinations, and applied to all other Officials the principle laid down by the Secretary of state (dispatch No. 8 of 28 April, 1855), who considered a knowledge of the Chinese language as "essential generally for the Civil Service at Hong Kong …"
>
> (J. P. Hennessy's report on the Blue Book 1881)

The effort of the government in recruiting interpreter was evidenced in an advertisement issued by the Acting Colonial Secretary, Frederick Stewart, in the Hong Kong Government Gazette. It is understood from the advertisement that "the proficiency of candidates will be tested in:1st Translation oral and written from Chinese into English and vice versa, 2nd General knowledge, and capacity

of official work" (1879 Aug 20 Hong Kong Government Gazette, number 83 Government Notification).

Translation/interpreting played a significant role in the history of Hong Kong and became an entrenched practice of the Government and different institutions. Translation/interpreting services were built in as part of all the legislative and executive structures of the colony; for example, there are interpreters for the courts and the police, as well as legislative council meetings. The availability of translation/interpreting is not usually a problem in Hong Kong, however, the quality of the interpreting services is inconsistent.

4. Post 97 court interpreting services

Ten years after Hong Kong has returned to Mainland China, the legislature in Hong Kong still retains much of the colonial era. In a way it is what is expected of Hong Kong after the changeover, to some extent it is even enthusiastically embraced by many people in Hong Kong. After all, it is stated at the beginning of the Basic Law that "The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." (Basic Law: Article 5)

In fact, English still enjoys a higher language status than Chinese in most business sectors in Hong Kong nowadays, though for different reasons. English is still the dominant language for communication among different professions in Hong Kong. Legal professionals in Hong Kong, like many of their counterparts in the world, are keen to support and maintain the high language status of English for the sake of their profession. The legal system in Hong Kong allows them to do so.

5. Language of the jury

According to the Chief Justice of the Court of Final Appeal, Andrew Li Kwok-nang, he reported in 1998 that about 50% of the judges in Hong Kong are bilingual. Only people who are able to speak English are qualified to become jury members. In 1987, before the handover, about one-third of the qualified jury members were foreigners (Duff, Findlay, Howarth & Chan 1992: 57). The requirement for jury member to have knowledge of English was changed through the 1997 Jury (Amendment) Regulation, Article 3, on the day before the handover in June, 1997.

6. The impact of the training of the legal professionals in Hong Kong

Apart from lawyers trained overseas, there are 3 local institutions that train legal professionals in Hong Kong. The Common Law system still forms the major part of the curriculum of the law courses, and English is still used predominantly as the language of instruction in these three universities. Because of their training and the background, the majority of legal professionals still prefer to use English for the main activities of their practice, for examples, consulting precedents, interpreting ordinances, drafting documents and correspondence with clients. English, therefore, is still very much the language of the legal profession even after Hong Kong has returned to Mainland China. The ideology of English as the superior language and the appropriate language to be used for the interpreting, implementation and administration of the Common Law system remains unchallenged. As a result, translation/interpreting is still a necessary evil for the legal profession.

It is best illustrated in the following example where an individual's application to have his trial heard before a bilingual judge or a judge who could understand his language, was considered "Wednesbury unreasonable".[1]

In his application, Cheng Kai Nam, Gary v HKSAR (2001) applied for a judicial review to have his case to be tried before a bilingual judge or a judge who can speak his language – Cantonese. His lawyer's submission states:

> The trial has been set down for hearing before a monolingual judge, that is, a judge who does not speak Cantonese …The applicant's native tongue is Cantonese. He is conversant in English.

At his trial, he chose to testify in Cantonese and therefore he applied to the court to have "his testimony to be considered by a judge who also speaks Cantonese and not by a judge who must receive his testimony through an interpreter."

The applicant explained that in his case "language is more than a mechanical means of conveying meaning: language gives colour, subtlety and texture to that meaning." In his opinion "interpretation, no matter how competent, cannot hope to capture the full dimensions of that colour, subtlety and texture. That being so, all interpretation is an exercise in diminishment." In addition to the fact that for his trial, he would

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1. In English Law, Wednesbury unreasonableness is considered to be "a ground for judicial review of administrative decisions, where the exercise of an administrative power is so unreasonable that no reasonable authority could have so exercised the power: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223." *Hong Kong English-Chinese Legal Dictionary*.

> rely heavily on the evidence of one witness, a past associate … , who appeared on behalf of the applicant, said that in substance the trial could end up being one man's word against another's. That being so, he said, credibility will be a matter of material concern and in the assessment of credibility the judge will have to look to the demeanour of the witnesses … But if the judge is not himself a Cantonese speaker …if he must rely on an interpreter, how will he be able accurately and fully to assess that demeanour? His ability to do so will be materially diminished by the interpretation because that interpretation, no matter how competent, will not be able to capture what I have earlier described as the colour, subtlety and texture of the language spoken by the witnesses. The applicant, as I understand the complaint, is concerned that this may tell to his disadvantage.
>
> [Cheng Kai Nam, Gary v HKSAR (2001) HCAL003568/2001]

The applicant, Cheng Kai Nam, Gary submitted an application to apply his constitutional right to use Chinese in the courts of Hong Kong and argued that his "right would be undermined if the right did not comprise two essential elements; first, the right to speak Cantonese and, second, the right to be understood by the courts in Cantonese without the intervention of an interpreter."

However, though reasonable, his appeal was dismissed because his application was considered "Wednesbury unreasonable". The rationale behind the decision of the judge was that, individual though has the right to choose whatever language to use in court, one does not have the right to choose the language the judge could or would use, and therefore, cannot choose the judge to hear the trial. Since, it is procedural justice that the court has to uphold, procedural-wise the court cannot adjust itself to the necessities of individual cases. An individual who chooses not to use the language of the court can have access to interpreting services which is thought to be sufficient to fulfil the need of individual's language right.

7. Inherent problems of legal interpreting

It is necessary to put into context the practices of legal interpreting so as to understand that there are different restraints and problems of court interpreting due to the unique social and linguistic background of Hong Kong. There are cultural, and linguistic differences when English and Chinese are involved which require professional training and skills to deal with. There are also inherent problems of the adversarial system which are made even more complicated when transported into the Hong Kong Chinese context.

Interpreting challenges posed by the differences of the languages involved in court trials are well studied in other studies like Hale (1997a, 1997b), Hale & Gibbons (1999), Berg-Seligson (1990), Leung and Gibbons (2007 and forthcoming).

Also as evidenced from the data which I have collected for the bilingual corpus on legal discourse on rape trials,[2] even high quality interpreters with the best intentions of facilitating the conduct of the trial, may find it difficult to deal with problems caused by the inherent linguistic differences of the languages involved. In the following example from the corpus, the defending lawyer was asking the witness the whereabouts of her clothes during the attack. The lawyer was trying to avoid linking the defendant's name directly with the attack, see turn 341

(1) 341: BDE: can you point out to members of the jury when you said (2.0) on the occasion (.) where you said after the attack (.) t c s pointed out to you (.) where your clothes WERE? (5.0) can you tell us which part of the bed you said he was pointing at?
342: ICT:嗱妳就話有一次呢 *t c s* 侵犯完妳之後呢佢就向妳*eh*指出呢*(.)*嚮床上面呢啲衫擺咗嚮邊嘅咁妳可唔可以指出嚟就話當時呢*(.)t c s* 呢係指住邊一道啊
'so you said at one point that after t c s has assaulted you, he pointed out to you that your clothes were placed on the bed, can you point out where at that time that t c s was pointing at?'

The interpreter has inserted the name of the defendant t c s directly in front of the word "attack", rather than following the lawyer in avoiding the association of the defendant directly with the more serious crime – attack; instead he mentions him before the verb "point at". "Like other isolating languages, Cantonese has the basic word order [subject-verb-object], or is said to be an SVO language" (Matthews and Yip 1994: 67); because of structural difficulties, the interpreter supplied the name of the defendant (t c s) in front of both the verbs 侵犯 (attack) and 指出 (point at).

This phenomenon is not uncommon in the rendering of English into Chinese interpreting. It can also be found in the Chinese into English interpretation, the following is an example from a case of estate inheritance heard recently also in the High Court of Hong Kong. The complainant of the case wrote two letters to her father to borrow money. In these letters she wrote"日後學成，定當歸還"and "懇請幫忙！日後定當歸還" [the day when the study is completed, will definitely pay back] and [please help! Will definitely pay back'](my translation).

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2. The corpus < http://cpdb-arts.hkbu.edu.hk/>, constructed as a result of the research project "From legislation to translation, from translation to interpretation: the narrative of sexual offences in the Hong Kong courtrooms", is a UGC funded CERG project, which consists of the bilingual versions of the legislation concerning sexual offences and also the hearings of five cases which involved the presence of the interpreters.

> She had submitted her translations for court certification but the translator, being allegedly untrained in law and not appraised of her particular situation, refused to certify them … She also claimed that the translations of the defendant's solicitors, to the effect that she would certainly make repayment, were false."
>
> (Mui Po Chu v Moi Oak Wah, 1995)

The court interpreter's translation was "will definitely be repaid", which rendered the original into passive voice, so mention of the subject is avoided, which is close to the original sentence structure. However, the topic-comment structure in Chinese is common, and as a result the pronouns can be dropped (for details of the pronoun-drop phenomenon, please refer to Matthews and Yip 1994). In this case both the subject 'I' and the object 'debt' are both omitted in the original sentences but could be understood in the original context of the sentences. The argument of the complainant that she has never promised that she would repay the debt herself did not stand, although she cunningly used this feature of the syntactic structure of the Chinese languages as an excuse to challenge the defendant's solicitor, claiming that his translation which suggested that she would repay the defendant, was "false".

Both examples are related to the rendering of sentences without a subject. Different methods were adopted by the two court interpreters; one by adding the subject to the utterance, the other adhere more closely to the original structure. Nonetheless, both interpretations have their own shortcomings. The first interpretation may sound more natural to the target text, however, has diluted the evasive effect of the defence. The second interpretation, though safer in staying close to the original structure, provided an unnecessarily ambiguous interpretation in the target text.

The following example is also from the corpus of legal discourse on rape trials. The witness was using a colloquial Cantonese word '搞' to describe the event of her being raped in her utterance. The interpreter sometimes interpreted it as 'interfere with', sometimes 'rape', and sometimes 'molest'; all three are potential meanings of the word '搞', which therefore has to be interpreted within the context of its occurrence.

(2) 46: BPE: what did you tell her
47: ICT: 妳同佢點講
'what did you say to her'
48: WC:我話阿*h*搞咗我囉
'I said ah h has raped / molest / interfered with me'
49: IET:i said (1.0) ah h (.) has (.) molested me …
56: BPE: i'm not quite sure about that interpretation there (2.0) molest it means imply without consent and the expression is put interpreted =to chinese expression

57: ICT:=搞嘢*(1.0)* 搞嘢啊
'rape / interfere with / molest (1.0) rape / interfere with / molest ah (utterance particle /ah/)'
58: IET: well can (.) it can mean a lot of things

The judge in this case was bilingual, he knew that there are different meanings of the word 搞 in Chinese, so he challenged the interpreter on her interpreting of the word as 'molest'. The interpreter explained that the word搞 itself "can mean a lot of things"; however, in the context of its occurrence it could be understood that the witness used it to mean rape. The witness was actually queried by the judge and given the opportunity to explain later on in the trial that that was what she meant when she used the word 搞. However from the point of view of the legal system that it was actually up to the jury that whether a 'rape' has taken place, and therefore, the word 'rape' has to be used discriminately before the fact could be established.

There are other situations that one grammatical item is used in one language but not available in another language, for instance, the use of utterance finite particle in Chinese which does not have an equivalent grammatical item in English, can only be realized in the intonation of the utterance.

(3) 409: BPE are you saying you don't have your arms round L H Y
410: ICT 咁你意思係咪啫係話呢響七號嗰張相入便你唔係攬住*L H Y*啊
'so you meant in photo no 7 that you were not holding LHY in your arms'
411: DC 我真係唔係攬住佢喎
'I really have not hold her in my arms /wor/'
412: IET i really was not having my arms around i was not embracing her

The utterance particle 喎 /wor/ is used here to emphasize the fact that the speaker was not happy at being asked the question, and also that his answer was affirmative and final. However, the emotional impact of the speaker's use of the utterance particle喎 /wor/ was completely lost in the interpreter's version. Unless the interpreter is aware of the significance of utterance particles, often they are neglected in the interpreting from Chinese to English.

8. Translation of technical terms

The translation/interpreting of technical terms and jargon are the nightmare of many court interpreters. In written translation, a translator may have the time to look up meanings and rhetorical use of words in dictionaries and references. However interpreters, especially interpreters working under the unusual pressure

of the courtroom, do not have the time to check up words during trials unless a request to do is made to the judge. As seen from the following example,

(4) Mr. Mayne: There would be the teeth on the rack and the teeth of the pinion.
Court: She was talking about the motor. Whose teeth are they, madam interpreter?
Interpreter: I believe it is teeth of the rack.
Court: 'Teeth of the rack'. Have you got the official translation there? Looks to be in pidgin English.
Interpreter: 'It seemed that the gear of the motor not reach.' Here, in the translation, '... could not reach'. Could not reach what?
Mr. Plowman: Precisely. I think we'd best take this in two phases. Firstly, madam interpreter should tell us whether we have a correct translation. Secondly, I can then ask the witness what she meant by what she wrote. But I think we must know first whether we have a correction translation. On the documents, I mean. Can you look at the original entry, 2.05 at page 223, madam interpreter? Please compare it with the translation at 224 and tell us whether we need to make any amendment.
Interpreter: 'It seemed that the gear of the motor of the passenger hoist could not reach the teeth of the rack'.
(The Queen v Tam Ping Cheong and Kwong Tim Yau 1995)

The "tooth of the rack" or the "gear of the rack" was the part of the pinion which caused the passenger hoist to fall off and collapse on a podium, causing the death of 12 labours who were working there at the time. Even the witness who put down the information and the translation in her log book was not sure of the name of that particular part of the machine. The interpreter was actually put to the test to provide an appropriate translation into a term that would make sense to the monolingual judge. Since the accurate naming of the particular part of the machine is of pivotal importance to the evidence of this case, it is equally important for the interpreter to come up with an accurate translation for the term which requires further research and enquiries into the term. However, again, it is a decision up to the judge to make whether allowance would be given to the interpreter to look up for the relevant information for the translation. Interpreter has been perceived by judges as "buffer", "conduit pipe", "a button pressed .. one language is put in, out comes the other language" (Morris: 1993 & 1999). The translator/interpreter in this case was not consulted about what research work and how much time is necessary to produce an accurate translation of the term used.

However, in some cases the interpreter's attempt to interpret the meaning of the original text might be considered trespassing into the territory of the legal professionals, as in the following example:

> General condition was stable with tenderness over front of chest cage on the right side and multiple tender **pots** over three quadrants at the back. Also superficial abrasions over the back of **lef** forearm. (emphasis by the judge)
> 「一般情況穩定，胸口骨架右前方有觸痛，背部四分之三部分出現觸痛。另外，左前臂背部有數處表面擦傷。」〔本席突顯文字〕
> *(the general condition is stable, the right side of the front rib-cage was tender, three-quarter of the back was tender, a few abrasion over the back of the left forearm) (emphasis by the judge)* [my translation]

The translator have translated the above text into Chinese following strictly to the original text, except assuming the highlighted words 'pots' to mean 'spots' and 'lef' to mean left. She has therefore provided a translation to that effect, for the word 'lef', she translated as 左 (left) in Chinese, and 數處 (spots) for the word 'pots'. Based on these two translations, the appellant claimed that the translator has changed the wordings of the medical report. His claim was though disapproved by the judge at the end, has taken the judge some time to look up the words 'pots' and 'lef' in The New Shorter Oxford English Dictionary, rather than accepting the translation of the translator. Though the appellant's claim was considered 'ridiculous' by the judge, it is common in court for interpreters to be used as scapegoats for communication breakdown, or to give the witness more time to come up with an answer.

Sometimes an explanation rather than an interpretation into another language is required for some terms and uses of language. As the interpreter's role in the courtroom is not clear and legal interpreting may not be well perceived, an interpreter's choice to explain rather than interpret may face challenges and problems.

9. Provision in terms of theory and practice

There is also a large difference between the provision of the interpreting services in theory and in practice in Hong Kong, as it is best illustrated in a rape case which concerned a 5 year-old girl, and a defendant of 52 years. The defendant was actually the sub-tenant of the victim's family sharing the same flat. The case was taken to court 10 months after the defendant was arrested. The victim appeared in court and did not seem to be able to provide intelligible answers to questions

raised, so the case was dismissed. The judge made an explicit comment on the unnecessary delay of the prosecution in presenting the case in court, causing the significant memory loss by the victim. The prosecution explained that the transcription and translation of the video recording of the witness's interview had actually taken a long time before the case could be taken to court. The Director of Public Prosecution Ian Grenville Cross accepted the comment of the sitting judge that the delay was unacceptable and promised that he would discuss with the police and the departments involved ways to speed up the process (Sing Tao Daily Apr 20, 2006). In this case the translation into English contributed to the delay which led to a miscarriage of justice.

For rape cases like the above example, the trial usually relies totally on the narratives of the witness and the defendant. There is often neither third-person eye-witness nor circumstantial evidence available. The adversarial nature of the common law system would pose serious challenges to such hearings in the courtrooms of Hong Kong. The trial is likely to become the war of words of the witness and the defendant. Given the fact that English is a second / foreign language for some legal professionals in Hong Kong, the demand on their competence in the English language is not easily met. In the following example the lawyer's mistake in English was pointed out by the judge:

(5) 190: BDE: alright (1.5) so has (.) miss T ever bite your penis penis at all
191: JE: bit
192: BDE: bit your penis at all
193: ICT: 咁啊呢:個:: *t*小姐有冇=
'so that this: miss t has she='
194: JE: should be in past tense

It is rather a common phenomenon in Hong Kong. In fact lawyers' inadequacy in the English language has always been a concern. A project funded by the Hong Kong Law Society, the Hong Kong Government and the University was conducted by 'the Steering Committee on the Review of Legal Education and Training' in Hong Kong in 2000. The joint effort actually symbolized the shared observation and worry of the different parties concerned. One of results of the project pointed out that "there has been a marked decline in the language skills of law graduates, generally in English but also Chinese. This is seen as especially serious, both because of the extent of its decline and its serious impact."

To add to the already complicated situation, the interpreter has to deal with the language incompetence of lawyers and at the same time to be vigilant to stay within the interpreter role, which means not influencing the proceedings. However, there are occasions where it is really difficult for interpreter to work out the meaning of the lawyer.

10. Conclusion

As the former magistrate Tallentire explained

> although it is not entirely clear from the reports in *The China Mail*, the Magistrate of the 1880s, like today, had the benefit of a court interpreter …" but for those "who were studying Cantonese had their language teachers with them in court. …In my opinion, the job of the interpreter is possibly the most difficult and demanding of all the officers of the court. .. It seemed to me that I would be in error to try to impose pure Western values on the society of Hong Kong, which enjoys a multi-racial and multi-custom social order.
>
> (Tallentire in Bickley 2005: 151)

It would be indeed too optimistic an assumption to make that equal access can be achieved by simply providing interpreting services to people who choose a language other than the court's.

There are quick and non-drastic measures that can be implemented to facilitate the work of the interpreter, for examples, assigning job to court interpreter according to their experience and specialty of cases; assigning the same interpreter to interpret for cases that the interpreter has edited the written document, allowing more time for the interpreter to prepare for the cases; use Chinese, when requested by the applicant, for cases like rape which relies completely on narratives of the witness and the defendant.

Hong Kong may have the necessary background and experience to actualize bilingual legislation. In fact, experience at lower court level has shown that the justice system can operate in Cantonese, and for the reasons we have seen above, this is clearly desirable. Nevertheless, as long as we see the persistence of both the ideology of that English is the 'rightful' language to be used in the common law system, and the myth that interpreting is the solution to achieve equal justice for all, change will not happen in the use and practice of legal interpreting in Hong Kong.

Convention

' … ' material in single quotation marks is my back translation of the interpreter's Chinese.

Abbreviations

BDE: Barrister (for) Defendant (speaking in) English
BPE: Barrister (for) Prosecution (speaking in) English
JE: Judge (speaking in) English
WC: Witness (speaking in) Chinese
ICT: Interpreter's Chinese Translation
IET: Interpreter's English Translation

Cases and Law

Mui Po Chu v Moi Oak Wah (1995) HCMP001927A
Cheng Kai Nam, Gary v HKSAR (2001) HCAL003568/2001
The Queen v Tam Ping Cheong and Kwong Tim Yau (1995) CACC000355
HCC16/2006 as reported in Sing Tao Daily Apr 20, 2006.
Basic Law: Article 5

References

Berk-Seligson, S. 1990. *The Bilingual Courtroom: Court Interpreters in the Judicial Process.* Chicago IL: The University of Chicago Press.

Bickley, G. (ed.). 2005. *A Magistrate's Court in Nineteenth Century Hong Kong: Court in Time*. Hong Kong: Proverse.

Cheung, M. 2005. Translation and power: A Hong Kong case study. In *Among the Best: Stephen C. Soong Chinese Translation Studies Awards 1999-2004,* Vol. 2., E. Hung (ed.), 82–100. Hong Kong: Chinese University of Hong Kong.

Duff P., Findlay M., Howarth, C. & Chan, T. F. 1992 *Juries: A Hong Kong Perspective*. Hong Kong: Hong Kong University Press.

Hale, S. 1997a. The interpreter on trial: Pragmatics in court interpreting. In *The Critical Link: Interpreters in the Community*, S. Carr, R. Roberts, A. Dufour & D. Steyn (eds.), 201–211. Amsterdam: John Benjamins.

Hale, S. 1997b. The treatment of register variation in court interpreting. *The Translator* 3 (1): 39–54.

Hale, S. & Gibbons, J. 1999. Varying realities patterned changes in the interpreter's representation of courtroom and external realities. *Applied Linguistics* 20 (2): 203–220.

Leung E. S. M. & Gibbons, J. 2007. Purposes, roles and beliefs in the hostile questioning of vulnerable witnesses. In. *Sexual Crimes,* J. Cotterill (ed.), 139–158. London: Palgrave.

Leung E. S. M. & Gibbons, J. Forthcoming. Who is responsible? Participant roles in legal interpreting cases. *Multilingua*.

Matthews, S. & Yip, V. P. C. 1994. *Cantonese: A Comprehensive Grammar*. London: Routledge.

Morris, R. 1993. Images of Interpreter: A Study of Language–Switching in the Legal Process, PhD Dissertation, Department of Law, Lancaster University.

Morris, R. 1999. The gum syndrome: Predicaments in court interpreting. *Forensic Linguistics* 6 (1): 1350–1771.

Tallentire, G. 2005. The Hong Kong (police) magistrate in the 1880s and 1990s. In *A Magistrate's Court in Nineteenth Century Hong Kong: Court in Time*, G. Bickley (ed.), 147–158. Hong Kong: Proverse.

The Steering Committee on the Review of Legal Education and Training. Sept. 2000. *Legal Education and Training in Hong Kong: Preliminary Review.*

Wright, A. (ed.).1908. *Twentieth Century Impressions of Hong Kong*. Singapore: Graham Brash.

Newspaper

Sing Tao Daily Apr 20, 2006, Hong Kong.

Dictionary

Hong Kong English-Chinese Legal Dictionary. Hong Kong Butterworths: LexisNexis

PART III

Forensic linguistic evidence

Approaching questions in forensic authorship analysis

Tim Grant
Centre for Forensic Linguistics, Aston University

This chapter demonstrates diversity in the activity of authorship and the corresponding diversity of forensic authorship analysis questions and techniques. Authorship is discussed in terms of Love's (2002) multifunctional description of precursory, executive, declarative and revisionary authorship activities and the implications of this distinction for forensic problem solving. Four different authorship questions are considered. These are 'How was the text produced?', 'How many people wrote the text?', 'What kind of person wrote the text?' and 'What is the relationship of a queried text with comparison texts?' Different approaches to forensic authorship analysis are discussed in terms of their appropriateness to answering different authorship questions. The conclusion drawn is that no one technique will ever be appropriate to all problems.

1. Introduction

Forensic authorship analysis attracts researchers and practitioners from a variety of disciplines including those working in linguistics, literature, history, theology, psychology, statistics and computer science. Within the research literature on authorship analysis generally, and within the literature on specifically forensic authorship work, there are essentially two types of article; there are published case reports in which a particularly important or interesting case is described and evaluated, and there are descriptions of, or arguments for, the adoption of novel or particular analytic techniques. Sometimes, of course, and rather unfortunately, these two sorts of article are combined and a new method is argued for using the example of a controversial case.

My aim here is not to add to this literature. Rather, the aim of this chapter is to step back and consider the nature of authorship analysis work, particularly given the peculiarities of the forensic context. In this chapter I shall examine two principal areas. First, I shall look at the idea of authorship and I shall argue against

the presumption of a naïve view of the author which too often can be found in case reports. Second I shall examine the different types of question a forensic analyst may face. I shall hope to demonstrate that as there is no single question of authorship analysis, there can be no single technique which should be universally adopted. The final section of the article briefly reviews techniques and approaches which have been applied in forensic casework and attempts to demonstrate that rather than being in competition, different techniques and approaches may usefully be applied to different types of authorship problem.

I shall be discussing authorship exclusively in terms of texts which are written. As phonetic evidence is typically perceived as more robust than textual evidence in the forensic context (Grant 2006; French and Harrison 2006), where there is an available recording of an interaction this will probably take primacy. Written texts, though, vary across a number of dimensions; they may be composed and edited as handwritten or word processed texts or they may originate as records of spoken language. Written texts may be relatively durable and context independent, like wills or business letters, or transitory and more context dependent, like SMS text messages. The variety of written language texts contributes to some of the complication of analysis which forms the basis of discussion of this chapter.

2. The literary text and the forensic text

Some texts, through their content, are clearly of interest to police investigators and the wider judicial process. These texts might include, for example, threatening or abusive letters, ransom notes or sexually explicit internet conversations between middle-aged men and under-aged girls. Many texts, however, which are analysed as part of forensic casework, are not inherently criminal; they may be more mundane including for instance, personal letters and diaries. Such texts may provide an alibi or their content may assist an investigation in a less direct way.

Given the variety of texts subject to forensic analysis there is real danger in attempting to make generalisations about their character. Even given this caution, however, there do seem to be some features of forensic texts which distinguish them from those texts typically analysed in literary, historical or scriptural authorship work. The texts of these more literary analyses are of course also diverse. It might be tentatively argued, however, that this non-forensic caseload concerns texts which are in some way crafted; the author may have spent some time and thought in their composition. Further to this, this crafted feel may be because many of these texts were intended for a wider readership. It also may be the case that these texts are generally written by professional or at least educated writers. Finally it might be thought that these texts are written to impress the reader, in

some way. If any of these assertions can be accepted it might also be accepted that they tend to be points of difference with forensic texts. There is not yet available any substantial data base or repository of forensic authorship cases, however, personal experience has involved examination of SMS text messages, suicide notes, valentine cards, letters and diaries, as well as longer, more 'professional' documents, including detailed 'business proposals' for plans to cause explosions, records of police interviews and other investigative statements and confessions. Features of the more informal, personal documents in these forensic analyses seem to be that they are incidental or occasional texts, that is to say they may be written for a limited audience, produced with immediacy (rather than written over a period of time) and the content can be strongly emotional. It may also tend to be the case that there is less text to analyse in forensic casework although this is by no means always true.

If there are some differences in the character of texts in more literary authorship analysis when compared to those of forensic case work, this raises the interesting question of whether methods and assumptions from the more academic field can be transferred across to the applied setting, and this may in turn require consideration of the nature of authorship.

3. The functions of authorship

Although there is considerable theoretical and critical discussion on the nature of an author much of this is not terribly useful in application to consultancy work in forensic authorship analysis. For spoken texts, in particular Goffman's distinction between *animator, author* and *principal* (Goffman 1981), has been shown to be useful in the more academic analysis of forensic texts (Heydon 2005). In contrast Harold Love (2002) in his introduction to authorship attribution concentrates on providing a framework for written texts and produces a constructive discussion on the functions of authorship. Considering mostly literary and historic attribution cases he makes distinctions between *precursory, executive, declarative* and *revisionary authorship*.

Precursory authorship describes the influence of earlier texts in the production of a contemporary text. This includes not only obvious examples of quotation, borrowings and plagiarism but also prior writings which might have a substantial influence on a text. Love, amongst others, is clearly a precursory author of this chapter in general, and particularly of this section; I have read his work, interpreted his ideas and applied them to my own area of interest. In my writing I am using some of his terms and structures and even if there are occasions where I disagree with Love's analyses, this engagement with his text, affords him the role of precursory

author. Most academic writing includes precursory authorship of this sort; it is perhaps the linguistic equivalent of standing on the shoulders of giants.

I am, however, the sole *executive author* of this chapter; I have engaged in formulating the expression of ideas and made word selections to produce the text. I am, in Love's language the "wordsmith" (Love 2002: 43). The executive author is usually the focus of investigation in forensic authorship analysis when the question posed is '*Who wrote this text?*' Executive authorship does not preclude the possibility of an executive author dictating to an amanuensis who takes down the words, and there is also the possibility of there being several executive authors in a collaborative text.

The third of Love's functions of authorship is that of *declarative authorship*. Declarative authorship typically applies to official documents such as governmental or organisational reports. For such reports the leader of an organisation may sign off a report as theirs and defend it as containing their views and opinions even if they were not executive authors. An example where an authorship analysis reveals a division of labour between executive and declarative authorship is provided by Foster (2001) in his British edition of *Author Unknown*. In this edition he includes a chapter asserting that some newspaper articles 'signed' by UK Prime Minister, Tony Blair, were in fact written by his then press secretary, Alistair Campbell. The suggestion is that although Tony Blair is the declarative author, Alistair Campbell was the executive author. A parallel may be drawn with political speech making where it is typical that these two authorship functions are be separated (between the speechwriter and the politician who delivers the words) but with written texts such a division of labour is perhaps more controversial and less frequently acknowledged.

Revisionary authorship can largely be seen as editorship whether this is carried out by the executive author or by some external reviewer. Revisionary authorship can of course be substantial in the making of a work (Love cites the example of Ezra Pound's editing of TS Elliot's the Wasteland (Love 2002: 47)) or be confined to minor suggestions about phrasing or punctuation. In professionally published writing there is always likely to be revisionary authorship. This will typically involve a lot of reworking by the original author but also input from editors, publishers and reviewers.

Love's unpicking of the separate functions of authorship can be further complicated by the fact that, not only can these various components of authorship be enacted by different individuals, but also that several individuals may fulfil any of the separate functions. Consider an academic research report carried out for a government department. In such a situation as with any academic study it may have many precursory authors – previous work in the field will have to be responded to by the research team. These researchers will carry out their research

and write the report. There may be within the research team different executive authors for different sections and perhaps a revisionary author who edits sections into a whole document. The research team may then have to engage with further revisionary authors in the form of the officials who commissioned the report. Suggestions for changes may be made and accepted or countered before the report is finally signed off. Finally, in the presentation of the document, the department, or perhaps the Minister of State themself, will be declared to have produced the report. For such a report there may be acknowledgment of all the authorship contributions but this is not necessarily the case, for some such reports all the authorship functions are concealed behind the declared authorship.

Such discussions of the disparate functions of authorship are rarely acknowledged in the literature on forensic authorship analysis. In the forensic context this complexity can, however, be easily exemplified. With regard to precursory authorship, within the UK investigative context, witnesses to fairly trivial incidents (as opposed to those interviewed under caution or witnesses to more serious offences) can be surprised that their statement is not taken down verbatim. The police interviewer merely summarises their testimony and asks the witness to sign it as being an accurate account of the events. In this situation the witness might be said to be a precursory and declarative author but the police officer is the executive author of the statement. If there were a dispute over the writing of such a statement it would therefore be next to impossible, on linguistic grounds, to challenge the authenticity of the statement as being of the specific witness.

A further forensic example of precursory authorship in the forensic context involves the letters written by John Humble. In 2006 Humble was successfully prosecuted for sending hoax tapes and letters purporting to be from the 'Yorkshire Ripper.' The Yorkshire Ripper, eventually found to be Peter Sutcliffe, was a serial, sexual murderer active in the north of Britain through the late 1970s and early 1980s, but the materials sent by Humble deflected the police investigation perhaps leading to substantial delay in Sutcliffe's arrest. In police interview Humble claimed that his letters were in some way based upon or influenced by letters thought to be by Jack the Ripper, active in Whitechapel, London in the 1880s (The Ripper Hoaxer 2006). Linguistic examination of the two sets of letters reveals structural parallels and some vocabulary borrowing. It is perhaps unlikely that knowledge of this precursory authorship would have been useful to the original police investigation of the Yorkshire Ripper murders. It is possible, however, that such knowledge might have thrown some light on the psychology and interests of the letter writer.

Foster's (2001) post-conviction reanalysis of the UNABOMBER manifesto is another attempt to analyse the precursory authorship of an evidential text. His analysis suggests that sociolinguistic searches can be used to identify the sources

used to produce evidential documents. The UNABOMBER manifesto was an anonymous tract jointly published by the *The Washington Post* and *The New York Times* as part of an FBI investigation into a series of bombings. Foster examines the language and the themes within the manifesto and on the basis of internet and other searches draws conclusions about the books read and even the libraries visited in the production of the text. By trying to identify precursory authorship influences on a text, Foster builds a picture of the individual who might have been the executive author. Foster summarises this approach in his slogan "*You are what you read*." (Foster 2001: 5). Although criticised (McMenamin 2002) such approaches might receive theoretical support from work on the influence of lexical priming on language production (Hoey 2005).

These few examples demonstrate that understanding forensic texts can depend upon understanding the possible functions of authorship as described by Love. There are many other possible examples from revisionary authorship present in a 'doctored' confession where a single line might be crucial, through to an unexpected separation of executive and declarative authorship. What becomes clear is that when undertaking any forensic authorship analysis the assumption must be that complexity in authorship function is normal; all too often however, published research into forensic authorship methods makes the reverse assumption, of an individual with an identifiable idiolect fulfilling all authorship functions.

4. Questions of authorship analysis

Given the complexity of authorship and the wider complexity of textual production a number of quite different questions might be asked of any forensically interesting text. Each type of question requires a different linguistic approach and a different set of methods and each is considered in turn below.

4.1 How was the text produced?

The question of textual production is perhaps most likely to refer to different forms of precursory authorship. There is the particular and specific question, of one text being substantially based upon another and this is dealt with in detail elsewhere in the discussion of plagiarism. Plagiarism is, however, just a special case of precursory authorship. Not only may there be other sorts of precursory authorship, which would not be counted as plagiarism, but there are also many different ways in which understanding how a text was justifiably based on previous sources might have investigative relevance in plagiarism cases.

One area of forensic analysis in which there have been several cases is that of disputed confessions or witness statements. In these cases the questions asked may not be of plagiarism but of mode of production. The linguistic requirements on statement taking vary between jurisdictions and over time. The current context in England and Wales sees the heavy and increasing reliance on tape and video recorded police interviews of suspects and of significant witnesses (Grant 2006; Rock 2002). Prior to these developments, and still in many jurisdictions, for example, within in the United States, tape or video recording is rarely used. Where there is no recording of an interview, allegations that a written record of the interview is unreliable may be assessed by linguistic means. Linguists can and have argued that they can identify the mode of production of a text and point out discrepancies between legal claims made about a text and the linguistic reality. A good example of this is the closing paragraph of the confession of Derek Bentley:

> I knew we were going to break into the place, I did not know what we were going to get – just anything that was going. I did not have a gun and I did not know Chris had one until he shot. I now know that the policeman in uniform is dead. I should have mentioned that after the plain clothes policeman got up the drainpipe and arrested me, another policeman in uniform followed and I heard someone call him 'Mac'. He was with us when the other policeman was killed.

Coulthard (2002) points out that this can clearly be read as a series of answers to questions, pointing in particular to the number of negatives, yet in court it was sworn that the statement recorded a free and monologic narrative.

In a separate example, Coulthard (2005) reports the case of *R v Robert Burton,* from the English Court of Appeal in 2002. In this case he argued that police notes purporting to be of a remembered telephone conversation had actually been based on a covert tape. This conclusion was drawn because the notes were too good an approximation of transcribed speech. Of particular interest was the fact that the subject of the recording suffered from a stutter and the resulting unusual language patterns of hesitations and fillers were too accurately reported in the supposedly remembered 'transcript'.

In these examples the questions asked of the analysis are determined by the legal claims for made for the texts in court. In the Bentley case the claim of three police officers under oath was that the statement was a verbatim account of a monologue. In the Burton case the claim was that there was no tape. The linguistic analyses in both cases suggest that these legal claims about the mode of production are untrue. Forensic authorship analysis is in these cases about drawing conclusions as to the wider issues of textual production not the identification of idiolect.

4.2 How many people wrote the text?

The question of how many people were involved in writing a text may be separate to that of precursory authorship and can be expressed as a number of questions. In Love's terms this one could ask *Is there evidence of executive authorship by more than one hand?* The obvious example here is the issue of whether an insertion has been made into a text by a second author. An alternative question might be *Is there evidence of substantial or important revisionary authorship?* The identification of light editing can be extremely difficult but might be crucial in changing the meaning of an evidential text such as a suspect's statement. Similarly the spotting of minimal insertions (such as the apocryphal "I done it guv.") to any degree of confidence may be considered too difficult for most forensic authorship analysts but questions of longer insertion have been subjected to a great deal of attention.

In the late 1980s and early 1990s Andrew Morton (1991) and others (e.g. Farringdon 1996) presented an analysis which became known as CUSUM analysis. This analysis was supposed to be able to identify foreign insertions into texts. In time the method was thoroughly undermined (e.g. Canter 1992; Robertson, Vignaux, and Egerton 1994; Sanford et al. 1994) but there still today remains a confusion between the disproving of the linguistic claims made and the parallel discrediting of the presentational device of the CUSUM chart used to present the linguistics. The statistical method of CUSUM charting continues to be usefully applied in chemical and process engineering and if in fact the right kind of measurable difference in style could be obtained between two individuals then CUSUM charting might reliably be used to identify an insertion into a text. However, the issue was not so much the graphical technique as the linguistic claims and Morton's linguistic claims were shown to be false. The presentational method was simply tarnished by association. With regard to the specific problem of spotting of insertions into texts and of marking the boundaries of any such insertions, there has, since Morton, been little methodological work to develop alternative statistical or linguistic techniques. Stylometric research tends to concentrate on relatively easier whole text problems (see below).

4.3 What kind of person wrote the text?

The question of what kind of person wrote a text could be particularly useful in single text problems. A single text problem occurs where there is no realistic possibility of comparison texts being produced. If a single anonymous threatening letter is received with no comparison texts and no external evidence as to authorship the only kind of question which might be asked is *What kind of person wrote*

this letter? In these cases there can be two completely separate kinds of answer each of which draws upon different types of expertise.

Linguists may be able to answer the question *What kind of **linguistic** person(s) wrote this text?* and this might be referred to as socio-linguistic profiling. Some conclusions might draw on assessment of linguistic competence. Such an analysis may discuss the apparent educational level of the writer. When considering questions of levels of linguistic ability it might be necessary to take account attempts at disguise, for example, a pretence may be made of a lower level of competence; deliberate spelling mistakes may be introduced and low status informal expressions included. Such efforts at disguise can be fairly easy to unravel as attempts by the better educated to write in 'poor' English can often be linguistically naïve and inconsistent. Attempts by a writer to disguise their level of competence can, however, only occur in one direction; no-one can successfully sustain writing above their level of competence.

Other than the issue of educational level or competence an additional approach to single text problems might be to comment on register or dialect found in the text. In such cases internet searches can be useful for identifying the cultural origins of dialect items. In a recent case internet searches identified the item 'bad-minded men' as being used predominantly within West Indian and probably Jamaican dialects but with some usage in Ulster Scots. The co-occurrence of other items such as 'innocent girl' in the same text helped confirm the probable Jamacian influence on the author. Such sociolinguistic dialect profiles, however, always need to be tentative taking into account understanding of pressures of accommodation whereby an individual's language is changed by those with whom they come into contact.

In contrast to socio-linguistic profiling psychologists may be able to answer the question *What kind of **psychological** person(s) wrote this text?* and this might be referred to as psycholinguistic profiling. Foster, perhaps, over-steps his competence as a linguist when he describes the author of Primary Colours as being a "white middle-aged, male, ambivalent about women; […] someone who wished to tutor blacks in what's good for them. …" (Foster 2001: 62–63) and so on. A more truly psychological approach to the analysis of texts is provided by Pennebaker (Pennebaker and King 1999) who, as a health psychologist, became interested in the language of an individual's personal narratives in diary entries and the relationship of this language with their health seeking behaviour (such as the number of times they visited a doctor). This research developed into a content analysis dictionary known as LIWC (Pennebaker, Francis, and Booth 2001). Using his methods a person's psychological states can, to a degree, be predicted or tracked though their linguistic production. A nice example of this is the tracking of Mayor Guiliani's anxiety levels though the ups and downs of his tenure as Mayor of New

York (Pennebaker and Lay 2002). Such a system might be developed to have useful applications in the forensic context. There are known links between linguistic production and a range of mental health conditions (Fine 2006) and one possible application might be the prediction of, for example, psychoticism in the author of a threatening letter.

In forensic practice whether a psychologist or a linguist provides profiles such as these, they are more likely to have investigative value than evidential value. Psychological profiles are rarely admitted as evidence in the UK courts (Ormerod 1999; Ormerod and Sturman 2005) and it is equally unlikely that sociolinguistic profiles will fare better. Understanding that different sorts of linguistic evidence may play different roles within the investigative and judicial process can be key in pursuing forensic practice. A sociolinguistic profile might assist a police investigation but have no evidential value.

4.4 What is the relationship of a text with comparison texts?

The final type of question considered here occurs in situations where there might be one or more texts of queried authorship alongside some texts of known authorship. Such questions can take a variety of structures.

First there are consistency questions which might be expressed; *Does this set of texts share a single author?* or, related to this, inclusion questions where it might be asked *Does this query text belongs to this set of texts of known authorship?* It might be noted that both these questions share the naïve assumption of single authorship where all of Love's (2002) functions of authorship are carried out by the same individual. An example of this type of case might occur where a series of letters of known single authorship could be compared with a threatening letter of disputed authorship. The prosecution might argue for the inclusion of the disputed letter in the series, the defence for its exclusion. Any objective analysis must consider the weight of evidence for both hypotheses. A feature of these questions is that there is no suggestion of, or legal interest in, other potential authors.

A second category of comparative questions are categorisation questions, and these tend to dominate the literature (e.g. Grant 2007; Eagleson 1994; Chaski 2001). Such questions tend to assume a relatively closed set of potential authors and ask which author is most likely to have written the query text. There is a methodological or design advantage in answering categorisation questions and this is the fact (or assumption) of a closed set. In open set questions, such as inclusion/exclusion comparisons, the lack of population distribution knowledge make statistical approaches more difficult, but with closed set questions statistical approaches can come into their own. Consider the possibility of a query text having

been written by one of two possible authors. There might be some evidence that the query text was not written by author A. In the closed set this evidence can be reciprocally interpreted as positive evidence that the text *was* written by author B. If however a design error has been made and there are potential further authors such an interpretation is invalid. The question of what evidence defines that a set of potential authors is closed is crucial, and the degree of certainty of any set being closed can raise very real practical questions. In literary authorship analysis, the analyst has a role in evaluating both external and internal evidence of authorship (Love 2002) and typically it is the external evidence which creates the set of possible authors. In the forensic field the external evidence is the domain of police, lawyers or other forensic scientists and it is this evidence that is being used to define the closed set. In these cases it must be made explicit where there is heavy reliance on others, conclusions built into the linguist's statistical analysis.

Authorship analysis questions may take a variety of forms and those discussed above may not be a comprehensive list. Understanding that this variety exists argues against a single 'silver bullet' technique in authorship analysis. The discovery of a stylometric measure of idiolectal uniqueness would only be useful for problems where it was absolutely known that a queried text had a single author fulfilling all the functions of authorship. This situation rarely occurs. A greater toolbox of techniques is required to answer forensic questions as to the origins of texts and this toolbox is provided by a breadth of understanding of linguistic analysis and findings.

5. Approaches to authorship analysis work

Already there have developed a variety of different approaches in forensic case work and these are often considered as being in competition with one another. The purpose of this section is to provide the briefest review of just a few published methods and to indicate that they may be suited to answering different authorship questions.

A lot of research energy has been expended in the quest for a stylometric measure of idiolect. This inevitably draws analogies with linguistic 'finger-printing' (Foster 2001: 4) or more recently a 'stylome' (van Halteren et al. 2005). In the literary field the most convincing work in this area depends upon either the study of the relative frequency of functional or grammatical words (e.g. Burrows 1987; Burrows 2003) or the study of word frequency distributions (e.g. Holmes 1994; Holmes, Robertson, and Paez 2001). Typically these measures can be brought together in some form of multivariate or computational model. The difficulty with

these approaches in the forensic field can be the substantial amount of text required both in query documents and the comparison corpus.

A more useful forensic approach based on the identification of idiolectal style might be Chaski's (2001). Although there are methodological difficulties with Chaski's (2001) paper (Grant and Baker 2001; McMenamin 2002) her more recent work seems to establish her favoured style marker more certainly (Chaski 2004). Chaski uses syntactically classified punctuation as an idiolectal feature and has measured its variation across different authors and within texts by the same author.

Stylometric approaches have in the past tended to draw on more statistical analysis than the more systemic approaches. In forensic analysis there are obvious dangers in computationally pursuing an algorithm which distinguishes authors and yet has no linguistic explanation or validity. A literary example of such an algorithm can be found in Forsyth and Holmes' (1996) article which shows that letter distributions have some (weak) discriminating power between authors. In the computational discipline of text mining it might be reasonable to sacrifice linguistic validity in the rush to discovery of an authorship algorithm, but in the forensic field the analyst must be able to say why the features they describe might distinguish between two authors in general, and why they distinguish between the particular authors of the case.

As has been seen a stylometric measure of idiolect such as Chaski's may have its uses particularly in closed set comparative problems. However, it is argued elsewhere (Grant 2007) that calculating population distributions for such measures may not be possible and without such information the application of idiolectal measures to open set problems becomes statistically difficult.

McMenamin's work (1993, 2002) derives from the linguistic field of stylistics. His conception of language is of series selections between possible choices reflecting a variety of individual and social influences. His forensic authorship analysis is based upon the statistical occurrence of different stylistic choices. In taking a forensic stylistic approach McMenamin eschews the idea of attempting to measure invariant linguistic competence and suggests that stylistic variation is inherent within individuals linguistic competence (McMenamin 2002: 97). By moving away from measures of idiolect McMenamin is able to draw on an individual's past writing and say that they exhibit a tendency to make some stylistic choices and not others. Such an approach can be very useful in considering inclusion and exclusion problems as well as in comparisons but fully statistical solutions may be difficult to obtain.

Both the stylometric approaches and the stylistic approaches tend to make the assumption of single authored texts and both will have difficulty in detecting the existence of precursory or revisionary authorship. In contrast the vocabulary

analysis as espoused by Coulthard (2004) and Woolls (Woolls and Coulthard 1998, 2003) may be more helpful in such situations. Coulthard and Woolls' analyses concentrate on the different use of core lexical items, and in particular words, which are used just once in a text (known as hapax legomena or just as hapax). The interest in hapax is that they are relatively unusual words that might occur across different texts written by an author. Corpus techniques can be used to demonstrate the lower rate of occurrence of such words across comparison texts and some basic statistical comparisons can be made against these established base rates. Recent developments suggest that such measures can even be used at the sentence level to spot insertions by different authors.

In contrast to all of the above approaches Foster's (2001) work specifically examining the precursory authorship of texts remains the only langauge based approach which might be applied to single text problems. The assertion that we are what we read can be confirmed empirically through corpus linguistics (Hoey 2005) and this insight might be used powerfully in an investigative context.

6. Conclusions

The aim of this chapter was to demonstrate the richness and diversity of possible forensic authorship analysis questions. Forensic authorship analysis is not a single activity and attempts at creating silver bullet techniques applicable to all problems will always fail. Authorship is itself not a singular activity but has diverse functions and questions with forensic interest can arise out of all of these functions and in many different ways.

References

Burrows, J. 2003. Questions of authorship: Attribution and beyond. *Computers and the Humanities* 37: 5–32.

Burrows, J. F. 1987. Word patterns and story shapes: The statistical analysis of narrative style. *Literary and Linguistic Computing* 2: 61–67.

Canter, D. 1992. An Evaluation of the CUSUM stylistic analysis of confessions. *Expert Evidence* 1 (2): 93–99.

Chaski, C. 2001. Empirical evaluations of language-based author identification techniques. *Journal of Forensic Linguistics: The International Journal of Speech Language and the Law* 8 (1): 1–65.

Chaski, C. 2004. Recent validation results for the syntactic analysis method for author identification. Paper read at Conference on Forensic Linguistics and Law, at Gregynog Hall, Tregynon, Wales.

Coulthard, R. M. 2002. Whose voice is it? Invented and concealed dialogue in written records of verbal evidence produced by the police. In *Language in the Legal Process*, J. Cotterill (ed.), 19–34. Basingstoke: Palgrave Macmillan.

Coulthard, R. M. 2004. Author identification, idiolect and linguistic uniqueness. *Applied Linguistics* 25 (4): 431–447.

Coulthard, R. M. 2005. The linguist as expert witness. *Linguistics and the Human Sciences* 1 (1): 39–58.

Eagleson, R. 1994. Forensic analysis of personal written texts: a case study. In *Language and the Law*, J. Gibbons (ed.). London: Longman.

Farringdon, J. M. 1996. *Analysing for Authorship A Guide to the Cusum Technique*. Cardiff: University of Wales Press.

Fine, J. 2006. *Language in Psychiatry. A Handbook of Clinical Practice*. London: Equinox.

Forsyth, R. S. & Holmes, D. I. 1996. Feature finding for text classification. *Literary and Linguistic Computing* 11 (4): 163–174.

Foster, D. 2001. *Author Unknown: On the Trail of Anonymous,* 2nd edn. London: Macmillan.

French, J. P. & Harrison, P. 2006. Investigative and evidential applications of forensic speech science. In *Witness Testimony: Psychological, Investigative and Evidential Perspectives*, A. Heaton-Armstrong, E. Shepherd, G. H. Gudjonsson & D. Wolchover (eds.), 247–262. Oxford: OUP.

Goffman, E. 1981. *Forms of Talk*. Philadelphia PA: University of Pennsylvania Press.

Grant, T. 2006. Identifying the origins of evidential texts. In *Witness Testimony: Psychological, Investigative and Evidential Perspectives*, A. Heaton-Armstrong, E. Shepherd, G. H. Gudjonsson & D. Wolchover (eds.), 263–274. Oxford: OUP.

Grant, T. 2007. Quantifying the evidence in forensic authorship analysis. *The International Journal of Speech Language and the Law* 14 (1): 1–25.

Grant, T. D. & Baker, K. L. 2001. Identifying reliable, valid markers of authorship: A response to Chaski. *Forensic Linguistics: The International Journal of Speech Language and the Law* 8 (1): 66–79.

Halteren, H. van, Baayen, R. H., Tweedie, F., Haverkort, M. & Neijt, A. 2005. New machine learning methods demonstrate the existence of a human stylome. *Journal of Quantitative Linguistics* 12 (1): 66–75.

Heydon, G. 2005. *The Language of Police Interviewing. A Critical Analysis*. Basingstoke: Palgrave.

Hoey, M. 2005. *Lexical Priming: A New Theory of Words and Language*. London: Routledge.

Holmes, D. I. 1994. Vocabulary richness and the book of Mormon: A stylometric analysis of Mormon Scripture. In *Research in Humanities Computing* 3 *(Selected Papers from the ALLC/ACH Conference, Tempe AZ, March 1991*), 18–31. Oxford: Clarendon Press.

Holmes, D. I., Robertson, M. & Paez, R. 2001. Stephen Crane and the *New York Tribune*: A case study in traditional and non-traditional authorship attribution. *Computers and the Humanities* 35: 315–331.

Love, H. 2002. *Attributing Authorship: An Introduction*. Cambridge: CUP.

McMenamin, G. R. 1993. *Forensic Stylistics*. London: Elsevier.

McMenamin, G. R. 2002. *Forensic Linguistics. Advances in Forensic Stylistics*. Boca Raton FL: CRC Press.

Morton, A. Q. 1991. *Proper Words in Proper Places.* Glasgow: Department of Computer Science, University of Glasgow.

Ormerod, D. 1999. Criminal profiling: Trial by judge and jury, not criminal psychologist. In *Profiling in Policy and Practice*, D. Canter & L. Alison (eds.). Aldershot: Ashgate Publishing.

Ormerod, D. & Sturman, J. 2005. Working with the courts: Advice for expert witnesses. In *The Forensic Psychologists' Casebook: Psychological Profiling and Criminal Investigation*, L. Alison (ed), 170–193. Devon: Wilan.

Pennebaker, J. W., Francis, M. E. & Booth R. J. 2001. *Linguistic Inquiry and Word Count: LIWC 2001*. Mawah NJ: Lawrence Erlbaum Associates.

Pennebaker, J. W. & King, L. A. 1999. Linguistic styles: Language use as an individual difference. *Journal of Personality and Social Psychology* 77 (6): 1296–1312.

Pennebaker, J. W. & Lay, T. C. 2002. Language use and personality during crises: Analyses of Mayor Rudolph Giuliani's press conferences. *Journal of Research in Personality* 36: 271–282.

The Ripper Hoaxer. 2006. In *Real Story*: BBC.

Robertson, B., Vignaux, G. A. & Egerton, I. 1994. Stylometric evidence. *Criminal Law Review*: 645–649.

Rock, F. 2002. The genesis of a witness statement. *Forensic Linguistics. The International Journal of Speech Language and the Law* 8 (2): 1350–1771.

Sanford, A. J., Aked, J. P., Moxey, L. M. & Mullin, J. 1994. A Critical examination of assumptions underlying the Cusum technique of forensic linguistics. *Forensic Linguistics: The International Journal of Speech Language and the Law* 1 (2).

Woolls, D. 2003. Better tools for the trade and how to use them. *Forensic Linguistics. The International Journal of Speech Language and the Law* 10 (1): 102–113.

Woolls, D. & Coulthard, R. M. 1998. Tools for the trade. *Forensic Linguistics: The International Journal of Speech Language and the Law* 5 (1): 33–57.

Trademarks and other proprietary terms

Ronald R. Butters
Duke University, Durham, North Carolina

Especially in North America, trademark litigation constitutes a prominent area of applied linguistics. As legal consultants, linguists bring their professional expertise to bear upon three issues: (1) **likelihood of confusion** of two marks; (2) categorization of the **strength of a mark** with respect to its place on a continuum of semantic/pragmatic categories technically labeled "generic," "descriptive," "suggestive," "fanciful," and "arbitrary"; and (3) **propriety of a mark**, that is, whether it is "scandalous," or "disparaging." Consulting linguists typically write descriptive reports that analyze the linguistic facts underlying the issues of particular cases – sometimes in rebuttal to other linguists' reports. Often, linguists are also called upon to give sworn testimony based upon the reports they have prepared.

1. Introduction

Trademarks are proprietary words, phrases, and images used in commerce to distinguish publicly offered products and services one from another. In American legal nomenclature, any sort of proprietary identifier may be referred to simply as a *mark*.[1] Technically, the term *trademark* is reserved for products (e.g. *Mustang* automobiles), but the term is also used more generally (as it will be here) to refer as well to *service marks* (which name services, e.g. *FedEx*), *proprietary slogans* (e.g, Maxwell House's "Good to the Last Drop"), and even logos and designs (e.g., Apple Computer's stylized apple-with-the-bite-out-of-it).

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1. The focus of this chapter will be upon the role of linguists in US trademark litigation. It is my understanding that linguists outside the United States, Canada, and Australia are rarely if ever called upon as expert consultants in trademark litigation. Several Japanese scholars have contributed conference papers and at least one doctoral thesis to the linguistic scholarship on trademark issues (see Shudo 2005; Hotta 2006; Hotta and Fujita 2006; Okawara 1999; and Okawara 2006), though linguistics experts in Japan are reportedly not allowed to present reports or testify in court.

Consumers rely on established marks in making purchasing decisions, and trademark owners therefore invest in advertising (in addition to product quality) so that the public will favorably identify their products and services and be able to distinguish them from those of competitors. For a mark's owner, however, protecting what is essentially a valuable property right can be legally complicated. Owners must be continually vigilant if they wish to prevent competitors from subverting their good name, appropriating or spoiling the good will of their customers, and even destroying completely their rights to a proprietary name. Trademark litigation most often stems from (1) conflicts between two companies who are competitors in a particular market or service and/or (2) governmental refusal to allow a company to register a trademark (often in response to the objections of a competing company).

In the United States, as well as in other countries such as Canada and Australia, linguists regularly offer expertise that is intended to be of assistance to a judge or jury in resolving some of the issues in trademark disputes about which the parties are in disagreement. In America, linguists have testified in court about trademark issues since long before the term *forensic linguistics* came into use. The late Raven I. McDavid, an eminent American dialectologist, reports that he testified for the winning side in a "trade-name" case on behalf of "Frito-Lay of Atlanta and Dallas" against "Jay's Potato Chips of Chicago," while an unnamed "distinguished colleague" testified for Jay's (1977:126). In another case dating from approximately that same era, Fred Cassidy testified about the meaning of the word *opry* as used in the trademark *Grand Ole Opry* (*WSM v. Hilton and Country Shindig*, 1984). And Bailey (1984) summarizes the testimony of two eminent twentieth-century scholars, the lexicographers Allen Walker Read and Jess Stein, concerning linguistic issues underlying a lawsuit about the trademark *Air Shuttle* used to designate a type of airplane service. Eastern Air Lines claimed ownership of the term for its exclusive use and sued New York Air, which had begun using the term as well.

In the decades since McDavid, Cassidy, Read, and Stein did their legal consulting, law firms have engaged many other linguists for technical advice about the language of trademarks. Shuy (2002) discusses ten or so of the many cases that he has consulted on in the past 30 years, and I know of over a dozen other linguists, including myself, who have worked on one or more.[2] Linguists have

2. Many of these scholars (and a few other linguists) have presented conference papers or brief online commentaries about their work (Adams 2006; Butters 1997, 2004a, 2004b, 2005a, 2005b, 2005c, 2007b; Butters and Hilliard 2005; Dumas 2004; Eggington 2004; Finegan 2001; Geis 1992; Horn 2006; McKean 2006; Nunberg 2001; Nunnally 2000; Shuy 2004; Westerhaus Adams 2006; and Westerhaus and Butters 2003a, 2003b). As Gibbons (2004) notes, despite the

acted as consultants in trademark litigation on three issues: *likelihood of confusion* (discussed in Section 2 below), *strength of the mark* (Section 3), and *propriety of the mark* (Section 4). No linguist has yet, to my knowledge, dealt as an expert witness directly with a fourth issue of potential interest to linguists, *dilution* (see Shuy 2004; Butters 2007b, 2008). Legally defined as

> the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of: (1) competition between the owner of a famous mark and other parties, or (2) likelihood of confusion, mistake or deception" [15 U.S.C. §1127]

dilution is a relatively new major concern in trademark law (The Federal Trademark Dilution Act was not added in America until 1995). For their part, linguists can assess professionally the relative importance of words and their meanings within various social realms; indeed, lexicographers must assess the relative "fame" of words in determining which words are so obscure and/or specialized that they may be safely left out of desk-top dictionaries. Moreover, ascertaining possible "lessening of the capacity … to identify and distinguish" is central to strength-of-mark litigation, which linguists have often addressed as expert consultants (see Section 3 below). Perhaps linguistics experts will soon more centrally engage dilution as a fourth trademark consulting area (for further discussion, see Butters 2008).

2. Likelihood of confusion

In likelihood-of-confusion cases, Company A generally owns proprietary rights to an established mark, while Company B wishes to create a new, *junior* mark that officials of Company A feel is confusingly close, in the three legally relevant categories of *sight*, *sound*, and *meaning*, to A's established or *senior* mark – so close that the public will mistake the products of A and B for each other, and A's business will suffer as a result.

For example, I was consulted by attorneys for the pharmaceutical firm Aventis who were attempting to prevent a start-up competitor from using the trademark

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large number of conference papers, few actual scholarly publications on linguistics and trademarks are yet available; in addition to Shuy (2002), see Adams (2005), Adams and Adams Westerhaus (2005), Baron (1989), Butters (2007a, 2008), Butters and Westerhaus (2004), Clankie (2002), and Lentine and Shuy (1990). Attorneys sometimes have engaged literature professors as experts on the English language, despite their generally woeful lack of understanding of linguistics (see Butters 2005a, 2005c; Hollien 1990).

Advancis. Although a layman can see that there is linguistic overlap between *Aventis* and *Advancis,* expert analysis can be helpful in demonstrating the factual bases underlying the similarities – in the three legally determinate categories of "sound," "sight" (that is, appearance) and "meaning." It is not the job of the linguist to determine whether the linguistic facts are legally significant enough to sustain or deny the lawsuit: that is a decision that only a judge or jury can make.[3] Rather, the linguist's goal must be to insure that the court is given all of the relevant linguistic evidence upon which to base legal decisions.[4]

As is usually the case, I was asked first of all to write a report analyzing the two trademarks. Later, I would also be asked to testify about my linguistic conclusions if the case came to trial (which does not always happen in trademark cases; frequently, the parties settle out of court). Drawing upon my report and testimony in *Aventis v. Advancis,* the remainder of this section illustrates the use of linguistic expertise in approaching the legal considerations of sight, sound, and meaning.[5]

2.1 The category of sight

This category embraces all aspects of the appearance of a trademark, beginning with spelling (but including also such semiotic features as color, typeface, and design).

Quantification is one approach much favored by the legal system. *Aventis* and *Advancis* share 5 of the 7 graphemes found in *Aventis* and 5 of the 8 found in *Advancis*. Thus 67% (10/15) are identical. Moreover, it is a well-accepted principle of linguistics that the beginnings and endings of words are the most important to

3. In American criminal and civil law, defendants generally are allowed to waive their right to a trial by jury if they feel that it will be to their advantage. In such cases, the judge acts in effect as both judge and jury. Such trials are known as BENCH TRIALS, and they are common in trademark litigation.

4. Similarity with respect to sight, sound, and meaning is just one criterion among a number that a judge or jury must use to determine the degree of likelihood of confusion. For example, courts also may take into account the length of time the defendant has used the mark without evidence of actual confusion arising.

5. I omit throughout this chapter the large amount of explanation of technical terminology and fundamental linguistic concepts that were of necessity included in the original report and testimony.

recognition and memory.[6] The two words begin with the same upper-case letter ("A") and end with the same two lower-case letters ("is"); in addition, the first two letters ("Av") of *Aventis* are found in the same order among the first three letters ("Adv") of *Advancis,* the letter "n" appears in exactly the same place in each trademark (the fourth letter from the end), and the two sets of variant letters also appear in exactly the same place, with vowel symbol paired with vowel symbol and consonant symbol paired with consonant symbol. In short, not only are the letters in the two words substantially the same (67%), but also the high degree of similarity in the identical placement of letters in the two marks greatly increases the difficulty that readers will have in distinguishing between them. Indeed, in terms of the selection and placement of the letters, they are quite close to being the same word.

2.2 The category of sound

In phonology, the two marks are even closer than their highly similar spellings indicate. I analyzed both OPTIMAL (slow and careful) and CONVERSATIONAL (or Allegro) pronunciation. While consumers will be influenced by optimal pronunciations when they think of the two words as spoken as slowly and syllable-by-syllable (as for example in saying the name of each word when reading two product labels placed side by side) the CONVERSATIONAL mode is that which is normally employed in actually speaking the names.

The sequences of IPA symbols that represent the OPTIMAL pronunciations of the two marks are as follows:

[əˈvɛnˌtɪs] for *Aventis*
[ædˈvænˌsɪs] for *Advancis.*

In CONVERSATIONAL mode, the first vowel of *Advancis* is reduced to a schwa and the [d] of *Advancis* is normally pronounced somewhat weakly, coming as it does at the end of the most-weakly stressed syllable of the word and before the consonant that begins the syllable that has the primary stress. The sequences of IPA symbols that represent the Allegro pronunciations of the two marks are as follows:

[əˈvɛnˌtɪs] for *Aventis*
[əᵈˈvænˌsɪs] for *Advancis*.

6. For example, "There is abundant evidence that the initial portions of words are of crucial importance to word identification. … [M]emory storage of words assigns greater weight to the two ends of the words than to the middle, and probably particular weight to the initial positions." (Cutler 1982: 573).

Taking into account the stress patterns as well as the segmental phonemes, I considered a total of 19 phonemes in the two marks. In the optimal pronunciation of *Aventis* and *Advancis*, 12 – 63% – are identical. In conversational mode the number of shared phonemes increases to 14/19 = 73% (the schwas, the two primary stresses, /v/, /n/, two secondary stresses, /ɪ/ and /s/).

Additional aspects of the phonology make the two marks even more closely alike. First, each member of the three contrasting pairs of phonemes is phonologically highly similar to its counterpart: schwa and [æ]; [ɛ] and [æ]; and [t] and [s]. The details of a distinctive feature analysis of the two marks (included in my report) are omitted here for reasons of space, but, in summary, in the highly conservative system that I employed, *Aventis* has 38 distinctive features: 6 for each of the 3 vowels and 5 for each of the 4 consonants; *Advancis* has 33, for a total of 81. *Aventis* and *Advancis* thus share *at minimum* 68 (81–13, or 84%) in *optimal* pronunciation and 72 (81–9, or 89%) in *conversational* pronunciation. And these percentages are even higher – between 90% and 95% for the conversational mode – if one takes into account the weak-to-nonexistent pronunciation of the [d]. Furthermore, the percentages will be even higher for speakers of dialects for whom the "e" of *Aventis* and the second "a" of *Advancis* are uttered alike.

Second, I did not consider in my account of distinctive features the important fact that the two words have exactly the same syllable count. If we replace the [d] of *Advancis* with the vowel [o] (and respell it *Aovancis*) we will increase the number of syllables from three to four (and alter the stress pattern somewhat) – and we would greatly increase the phonological distinctiveness of the mark as compared to *Aventis*.

Yet another similar feature of the two marks is phoneme order. It would be much easier to hear and remember the difference between the two marks if the positionally identical phonemes (/v/, /n/, /ɪ/, /s/ were arranged in different orders. For example, *Aventis* seems far more distinctive (in sight and sound) from *Entisav, Ventisa,* and *Tisaven* than from *Advancis,* despite the fact that these three pairs have exactly the same letters (and corresponding to the same phonemes) as *Aventis*.

All things considered, then, the phonology of *Aventis* and *Advancis* are extraordinarily close. The expert analysis gave the judge bases in linguistic fact upon which to base her conclusion – bases that she referenced in her written decision.

2.3 The category of meaning

Because *Aventis* and *Advancis* are recently coined words, they have no ordinary dictionary meanings in and of themselves. Courts, however, are not bound by dictionary meanings alone but rather by what the marks will mean to ordinary

consumers of the products so described. Because *Aventis* and *Advancis* are pharmaceutical companies, those persons who were exposed to the two marks in commerce will most likely be doctors, potential investors, and professionals in the pharmaceutical industry and related fields, as well as patients and purchasers of drugs. The mark *Aventis* has been in use at least since late 1999, and the company manufactures the well-known allergy remedy ALLEGRA and many other drugs and vaccines. Consumers and investors may therefore know *Aventis* as the name of a global pharmaceutical company. *Advancis* is an American pharmaceutical company; *Advancis* apparently began using the name in the fall of 2001. *Advancis* appears to be in the process of developing improved versions of antibiotics that the firm expects to market eventually under its *Advancis* mark.[7] It thus seems clear that, while *Aventis* would be a familiar term to many consumers, many potential customers would not have been exposed to the term *Advancis* at all.

Whatever additional semantic associations speakers make with coined marks will depend largely on what ordinary words the marks remind them of. For some coined words there may be few such associations, and the hearer or reader may simply assume that the term has no meaning other than as a referent for the company that it is represented as signifying. Many made-up words can have connotations, however, and the greater the extent to which the connotations are similar, the more likely it is that the two marks will be confused. In the case of two words such as *Aventis* and *Advancis* that sound very much alike, readers or hearers may assume that the older, more familiar name is derived from the other.

Moreover, *Aventis* bears a connotative resemblance to words that contain the morpheme *vent*: *adventure, advent, invent, venture,* and *vent* itself, all of which are positive words suggesting forward motion and innovation, both metaphorical and real. In addition, it is well known that Latin and Greek are important source languages for scientific names; given that *Aventis* has a vaguely Latin look about it, speakers may conclude that *Aventis* is somehow derived from Latin. Similarly, *Advancis* bears a phonological and graphemic resemblance to the positive word *advance,* which also suggests forward motion and innovation both metaphorical and real. And *Advancis* likewise has a vaguely Latin look about it, so speakers may conclude that it, too, is derived from Latin.

The high degree of overlap in this common semantic core of meanings assignable to the connotations of *Aventis* and *Advancis* thus further serves to inhibit the hearer's and reader's use of meaning as a way of differentiating the two marks. Indeed, the connotations actually draw the two terms closer together in their common association with forward movement and innovation.

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7. See the web sites of *Aventis* (http://www.sanofi-aventis.us/live/us/en/index.jsp) and *Advancis (*http://www.advancispharm.com/), now Middlebrook Pharmaceuticals, Inc.

2.4 Summary of the use of linguistic analysis in likelihood-of-confusion cases

The methodology used in the case just described is typical of that which consulting linguists use in ascertaining the bases for likelihood of confusion between a senior mark and a junior one. In this case, the discussion of *sight* issues centered largely upon comparisons of the spelling of the two marks. In some cases where brand names are given extensive public exposure through advertising, prominence in packaging, and internet addresses, it may be necessary for the linguist to take into account such sociolinguistic features as appeal to particular social groups and such semiotic display features as color, typeface, and package and logo design. In other cases, data for the treatment of SOUND may be found in spoken renditions of the trademarks as represented in advertising, films, and the like. Finally, the Aventis/Advancis case was relatively simple with respect to meaning, because the two marks are coined words, lacking in dictionary meaning but with fairly obvious connotations that further their confusability.

3. Strength of mark

In strength-of-mark cases, Company A (or, in registration disputes, the government) claims that Company B's trademark (say, *Steakburger* or *Kettle Potato Chips*) is so basic and descriptively necessary that Company A will be unfairly constrained from advertising and promoting its own products. Suppose, for example, that The Walt Disney Company were allowed to register the term *theme park* as a service mark. Such a registration would work a pernicious hardship on Sea World, Bush Gardens, Universal Studios, and other theme-organized amusement parks, who would find it next to impossible to accurately describe their own enterprises to the public without using the words *theme park* as a designator.

Courts and the United States Trademark Trial and Appeal Board evaluate how "strong" a trademark may be by determining its place on a semantic/pragmatic continuum of categories technically labeled (1) *arbitrary*, (2) *fanciful,* (3) *suggestive,* (4) *descriptive,* and (5) *generic.* The terms *strong* and *weak* refer to how safe a mark is from being challenged by a competitor on the basis of its place on the continuum of strength of mark. In such litigation, the parties are disputing which of categories (1)–(5) the mark falls in. Typically, one party will claim that its mark is *suggestive* (or at worst *descriptive* but *famous*); the other party will claim that the mark is *generic* (or at best *descriptive* but not *famous*).

Fanciful and *arbitrary* marks are the strongest because they have no core semantic relationship to the product or service at all. *Fanciful* marks are coined

words – for example, *Exxon,* the brand name of a major oil company, and *Aventis* and *Advancis* (the marks discussed in Section 3 above). In contrast, *arbitrary* marks are real words, but ones that have no ordinary meanings that the speakers of the language can associate with the product or service, either denotatively or connotatively, except as a brand name. A frequently cited example is the use of *Apple* as a trademark for (1) a brand of computers and (2) a music recording company.

Suggestive marks are also considered *strong* in their own right. Trademarks in this class do not literally describe the product or service offered to the public, but they do have meanings that the purchasing public is likely to associate connotatively with the product or service so designated. For example, the trademark *Mustang* as the brand name for a type of automobile presumably conveys positive associations of swiftness and power that stem from the image of a horse that the word *mustang* can convey to speakers of English. Similarly, the names of sports teams, such as *Redskins* and *Vikings,* are intended to convey the positive image of powerful and dedicated warriors.

Membership in either of the other two categories puts a trademark in danger of being lost as a proprietary name. Descriptive marks are the stronger of this weak pair. Their meaning directly describes some important feature of the product or service, and according to law they may gain legal status as protectable trademarks only if they have become famous among the purchasing public. Technically, "fame" is achieved when a mark has acquired a great deal of what is called *secondary meaning,* i.e., the association in the public mind between the company and the brand name is so strong that it has characteristics of being a widely recognized lexical item in its own right. For example, *General Motors* is arguably a descriptive mark for an automobile manufacturer, since *motors* describes one of the most important feature of the company's products (and *general* is a vague and weak adjective that could apply to many commercial enterprises). Even so, *General Motors* clearly enough has secondary meaning for Americans to be protectable.

In other cases, however, fame is not so apparent. For example, I consulted several years ago on a case about the word *zingers,* which in American English can be a concrete noun meaning 'food that has a piquant or spicy flavor'. It could thus be argued that *zingers* is descriptive of such food. Various businesses in the United States use the term *zingers* to designate piquant menu items, including pieces of chicken served in spicy hot sauce. The public does not, moreover, strongly associate this term with any particular commercial source; that is, the term has not acquired significant secondary meaning with respect to a particular seller. To the extent that no one is famous for their Chicken Zingers, it is merely a descriptive term, without legal secondary meaning, when applied to menu items.

Generic marks are impossibly weak: if judged to be a member of this class, a word can never be used as a trademark for the type of thing so designated. Such

words name not a brand of product or service but the *kind* of product or service itself. For example, *automobile* names a kind of product of which there are many brands, and so *automobile* cannot ever be a brand name for an automobile (though it could conceivably be so for a brand of toothpaste). The rationale for this is simple: if merchandisers were allowed to own generic terms, then there would be no straightforward way for their competitors to refer to their own products. This would not only be confusing to the purchasing public, but it would also give the owners of the generic mark an unfair advantage in the marketplace. In two cases in which I was a consultant, for example, courts ruled that both *steakburger* and *kettle chips* are generic terms because they mean, respectively, simply 'burgers (or ground meat) made from steak' and 'chips cooked (by hand) in a kettle or having the recognized qualities of chips cooked in this way'. Likewise, The *Air Shuttle* litigation (mentioned above, §1) involved that mark's alleged genericness. Basing his reasoning at least in part on Stein's testimony (and discounting Read's arguments), the judge in the case denied Eastern's claim to ownership, ruling that *air shuttle* as used in the airline industry has always been *generic,* and thus it is generally available for all airlines to use. Similarly, the alleged "genericness" of *opry* was at issue in the case in which Cassidy participated (see Section 1). Cassidy's testimony and report have not been preserved, but in his decision the trial judge noted that Cassidy testified that *opry* was "generic," a view that, while still subject to legal and linguistic debate, prevailed in that court, though not in others (see Butters and Jackson 2005).

The legal definition of *genericness* is somewhat different from the meaning usually assigned to the term in linguistics (or ordinary English),[8] but the legal meaning can be readily understood in a sociolinguistic and lexicographical framework: a term is *generic* if, in the minds of the members of actual and potential customers, the term denotes the product or service itself (e.g., *aspirin, automobile, theme park*), not the name of a brand of product or service (e.g., *Bayer, Ford, Disneyland*). The problem for courts thus becomes how to ascertain the linguistic knowledge of this relevant population. The law makes a distinction between the commercial meanings that typical consumers actually attach to a trademark and the shorthand (or, to use the technical linguistic term, SYNECDOCHICAL) uses that a consumer may make of that trademark. For example, speakers sometimes use *Xerox,* a famous brand name for photoduplicating machines and related products (paper, ink), to refer in general to photocopies or to the process of photocopying

8. For the technical definition within the field of linguistics, see Crystal (2003), s.v., GENERIC: "A term used in GRAMMATICAL and SEMANTIC analysis for a LEXICAL STEM or PROPOSITION which refers to a CLASS of entities," e.g., "***the bat*** *is an interesting creature,* ***bats*** *are horrid,* ***the English/French.*** ..."

in general (or even to photocopying machines not marketed under the *Xerox* trademark). Similarly, users of internet search engines sometimes use the word *Google* as a verb in the sense of 'perform an internet search' – even when the search is carried out using a Google competitor such as *Yahoo* or *Just Ask*. These usages, however, do not necessarily indicate that most internet users and photocopy customers do not know that *Google* and *Xerox* are trademarks.

Of course – as has sometimes happened in the past – repeated synecdochical uses of a trademark may become so ubiquitous that a lexicosemantic change takes place in which consumers actually lose all meaningful connection between the mark and the company that has been the source of origin of the product. A host of trademarks evolved in this way in earlier days: *aspirin*, *escalator,* and *trampoline,* for example (in the United States, at any rate). Lawyers use the term *genericide* to denote the process whereby trademarks lose their identification as brand names and become generic. Because of modern advertising and marketing techniques, as well as vigilant legal policing by trademark owners, genericide is relatively rare today, though as recently as 1988 the mark *Murphy Bed* was found to have become generic.[9]

Courts thus do not declare a term to be generic merely because speakers or writers may sometimes – or even frequently – use the term in a shorthand way. The legal question of concern in determining genericness is not simply, "What do people sometimes (or even frequently) say and write?" but rather "What do people believe about the meaning of the words that they are saying and writing?" Unlike jurors and attorneys, linguists – especially those with expert knowledge of lexicography – have developed explicit methodologies for distinguishing between (1) the knowledge (conscious and unconscious) that speakers have of their language and (2) their actual linguistic behavior.

When linguists are engaged as experts in strength-of-mark litigation, the courts are usually being asked to determine the putative genericness or descriptiveness of a mark. The role of the linguistics expert is to gather the linguistic evidence that bears upon an assessment of the public's understanding of the mark in question with respect to the categories generic, descriptive, and suggestive, and,

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9. Marks often mentioned as strong candidates for contemporary genericide include *Frisbee, Contact Paper,* and even *Band-Aid.* Clankie (2002) presents a large list of trademarks that he concludes, based on anecdotal evidence, have become "generic." While it is true that many of the terms that he lists are sometimes used in a synecdochical way, in general they have not been seriously contested in courts of law, and thus no one has tried to establish that the public actually perceives them as unrelated to the businesses who own the trademarks. See also Landau (2001: 405–408), who argues that, because *Band-Aid* is often used metaphorically and synecdochically, dictionary makers should treat it "generically." For discussion to the contrary, see Butters and Westerhaus (2004).

in the case of marks alleged to be descriptive, the relative fame of the mark. Frequently, the federal government will reject a proposed new mark on the grounds that it is merely descriptive or even generic, and the applicant will appeal the decision, either to the Trademark Board or in Federal Court. At other times, the holder of a senior mark may bring suit against what they feel to be an infringing mark, only to find that the putative infringer claims as justification that the senior mark is either generic or merely descriptive and without sufficient secondary meaning.

The law recognizes several sources of data in strength-of-mark cases, two of which are especially relevant to the expertise of linguists.

One is direct questioning of the relevant population, which in current legal practice is generally undertaken by market researchers who have typically had little or no linguistic training. Although linguists tend to be skeptical about marketing surveys, knowing that it is easy enough to ask questions that merely generate the answers that one wishes to generate, even so, survey methodology has been fruitful in such well-designed lexicographical projects as the *Dictionary of American Regional English* and other studies of social and regional dialect variation. Reputable market researchers can produce scientifically responsible work, and the involvement of linguists in designing market surveys can be especially fruitful.

The chief contribution of linguists to descriptiveness/genericness disagreements in trademark litigation, however, has come through employment of the traditional inductive, empirical methodologies of lexicographers and sociolinguists: one assembles a relevant and representative body of data and concludes, on the basis of the evidence found in that assembled data, what the meanings of the words are for those who generated the data. Because dictionaries are themselves based upon this methodology, it is understandable that dictionary evidence has long formed a part of what courts have considered valuable evidence. Likewise, courts today consider the rigorous application of lexicographical methodology to be usefully probative with respect to obtaining up-to-the-minute information and to narrowing the field of inquiry down to the relevant population.

Until recently, the problem for the linguistic expert has been how to find a source of reliable, relevant data beyond dictionaries themselves. Such pioneers as McDavid, Stein, Read, and Cassidy, working usually with at best limited access to the resources of a dictionary publishing firm, faced enormous difficulties in trying to put together adequate and reliable synchronic and diachronic data to form meaningful conclusions beyond what they could ascertain from dictionaries themselves. On their own, they could only carry out limited (and potentially biased and anecdotal) reading of current newspapers, magazines, and novels.

Computers and the internet, however, have changed all this. Linguists preparing reports on trademark issues now have a wealth of primary data that they can draw upon. These include millions of machine-searchable small-town newspapers

available on web sites such as NewspaperArchive.com; nationally circulated newspapers and magazines that can be accessed using ProQuest and LexisNexis; the individual archives of most American newspapers and magazines, small and large, generalized and specialist; Google Book Search, which includes many historical dictionaries; a wide swath of scholarly journals that over the years have commented extensively on the changing vocabulary of American English; data banks of literary works; and archives of letters, diaries, journals, reports, and the like. In addition, one can also search the internet itself for examples of contemporary usage: How, for example, do customers themselves use the term *kettle* on web sites dedicated to consumer commentary about potato chips? Where before the linguist researching trademark issues had too little data, now the chief difficulty is narrowing down what is available to the most relevant and reliable.

4. Propriety of mark

Propriety-of-the-mark cases are relatively rare in forensic linguistic work. According to federal statute, trademark registration is not allowed for any mark that "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" [15 USC 1052]. Such cases thus usually stem from the government's refusal to register marks that the United States Patent and Trademark Office's Trademark Trial and Appeal Board concludes violate these provisions. When linguists were consulted in the three cases I know about, the government claimed that the trademark was scandalous (as in *Fat Bastard Wine*) or disparaging (as in the two cases I have worked on: *Redskins*, the name of a professional football team, and *Dykes on Bikes,* the name of a San Francisco lesbian motorcycle club).[10]

One issue is the legal meaning of the statute's word *disparaging,* which in most dictionaries indicates intent to offend on the part of the user. Clearly, neither *Redskins* nor *Dykes on Bikes* is intended to offend. However, courts tend to see this distinction as hair-splitting: if the term in question is deemed significantly offensive to a large enough group of people, that in itself seems sufficient for courts to deem the term *disparaging,* especially if those who feel offended also offer

10. Although no professional organization of linguists has ever taken a position on the issue of disclosing one's consulting history in discussion of cases in scholarly publication, I note here that I have consulted with the attorneys for the side that prevailed in court in all of the cases just referenced, except for *Fat Bastard Wine* (for which I had no role whatsoever).

evidence that the commercial use of the putatively offending term may "bring them into contempt, or disrepute."

A second issue is that of the strength of the offensiveness – in particular, whether the word is intrinsically offensive, or just offensive under certain circumstances. Virtually any epithet can be used in a offensive manner – *liberal,* for example, in recent American political utterances. While *dyke,* a colloquial synonym for *lesbian*, can be offensive when used as a contemptuous epithet, it is difficult to see how it could be seen as offensive when used by members of a lesbian motorcycle club in reference to themselves. Bowing to such explanations of the linguistics of pejorative terms, the Trademark Board eventually allowed the mark *Dykes on Bikes* to be registered.

The owners of the *Redskins* football team have also managed to preserve their trademark rights to the name, but only after the Trademark Board's ruling against them was overturned in federal court. After years of legal wrangling, the case still goes on in various forms. On the challengers' side, a linguistic expert put forth a number of examples of the use of *redskin* as an epithet in racist diatribes, and they also relied upon a telephone survey concerning the use of the term *redskin* in which nearly 50% of those questioned had some concerns about the offensiveness of the term *redskin.* The team's side (for which I served as one of two linguistics experts), argued that the survey was defective and that the racist diatribes themselves were the cause of the offensiveness, not the word *redskin* per se; moreover, the use of a term by racists scarcely tells us what the general population thinks about a word. Further team arguments centered upon the lack of offensiveness within the specific context of the historic use of the name as a sports team name, noting also that sports teams are scarcely selected to convey anything other than positive images of those so named (e.g., *Vikings, Yankees, Packers, Stenlevs*). Numerous citations from literature and the media showed essentially benign uses, as in the classic children's story, *Peter Pan* (a film version of which the opposing linguist testified he had watched more than once with his young daughter). Nor has the putative offensiveness of the word *redskin* forced the abandonment of the term in other uses (*potatoes, peanuts*) as is usually the case with seriously offensive terms (as when Brazil nuts replaced an especially hateful epithet for African Americans).

5. Conclusion

This chapter should only be a starting place for those who wish to become a consulting linguist and pursue the scholarly relationships between linguistics, lexicography, and trademark litigation. Two books should be the next stop for the

interested linguist. Shuy (2002) takes up a number of issues with respect to trademark consulting practice, many of which go beyond what I have addressed here. More recently, Shuy (2006) offers fundamental advice for anyone interested in a forensic linguistic career, whether in trademark litigation or in any other field.

I have no explanation for why the involvement of linguists in trademark cases is apparently confined largely to North America. It is to be hoped that this chapter will offer ideas to linguists in other venues so that applied linguistics can extend to the trademark courts of other countries as well.

References

Adams, M. 2005. Lexical property rights: Trademarks and American dictionaries. *Verbatim: The Language Quarterly* 30: 1–8.

Adams, M. 2006. Lexicographical views. Conference paper, session on The Concept of Genericness in American English: Linguistics, Lexicography, and American Trademark Law. American Dialect Society, Albuquerque NM, January.

Adams, M. & Westerhaus Adams, J. 2005. Surnames and American trademark law. *Names: A Journal of Onomastics* 53: 259–273.

Bailey, R. 1984. Dictionaries and proprietary names: The air-shuttle case. *Dictionaries,* 53–65.

Baron, D. 1989. Word law. *Verbatim* 16: 1–4.

Butters, R. R. 1997. Why dictionaries can't deal adequately with *redskins*. Conference paper, Dictionary Society of North America, Madison WI.

Butters, R. R. 2001. Genericness in lexicography, general linguistics, and American trademark law. Conference paper, 5th Biennial Conference, International Association of Forensic Linguists, University of Malta, July.

Butters, R. R. 2004a. Signs shall be taken for names: The commercial meanings of 'checkerboard'. Conference paper, American Name Society, Boston MA, January.

Butters, R. R. 2004b. Variation in Southern trademarks: Regionalisms that one may can own. Conference paper, 3rd Conference on Language Variation in the South, Tuscaloosa AL, April 17, 2004.

Butters, R. R. 2005a. The credentials of linguists testifying in American trademark litigation. Conference paper, Law and Society Association, June 3.

Butters, Ronald R. 2005b. Similatives in recent English: The case of *whisper quiet.* Conference paper, 1st International Conference on the Linguistics of Contemporary English, Edinburgh, Scotland, 25 June 2005.

Butters, R. R. 2005c. The credentialing of linguists who testify in American trademark litigation. Conference paper, Language and the Law: East meets West, Department of English Language, University of Lodz, Poland, September.

Butters, R. R. 2007a. The American linguistic consultant in American trademark litigation: Current issues. In *Proceedings of the Second European IAFL Conference on Forensic Linguistics/Language and the Law.* M. T. Turell, M. Spassova & J. Cicres (eds.), 29–42. Barcelona: Institut Universitari de Lingüística Aplicada.

Butters, R. R. 2007b. Linguistics, 'forensic' linguistics, and trademark dilution. Conference paper, Trademark Dilution: Theoretical and Empirical Inquiries, High Tech Law Institute, Santa Clara University School of Law, Santa Clara CA, October 5.

Butters, R. R. 2008. A linguistic look at trademark dilution. *Santa Clara Computer & High Technology Law Journal* 24: 101–13.

Butters, R. R. & Hilliard, S. 2005. The dictionary treatment of similatives. Conference paper, Dictionary Society of North America, Boston MA, June 9.

Butters, R. R. & Nichols, J. 2005. What can go wrong when linguists testify in American trademark litigation. Conference paper, International Association of Forensic Linguists, Cardiff, Wales, July 3.

Butters, R. R. & Westerhaus, J. 2004. Linguistic change in words one owns: How trademarks become 'generic'. In *Studies in the History of the English Language* II, A. Curzan & K. Emmons (eds.), 111–123. Berlin: Mouton de Gruyter.

Clankie, S. M. 2002. *Theory of Genericization on Brand Name Change* [Studies in Onomastics 6]. Lewiston NY: Edwin Mellen.

Crystal, D. 2003. *A Dictionary of Linguistics and Phonetics*, 5th edn. Oxford: Blackwell.

Cutler, A. 1982. Guest editorial: The reliability of speech error data. In *Slips of the Tongue and Language Production,* A. Cutler (ed.), 561–82. The Hague: Mouton

Dumas, B. K. 2004. Generic, descriptive and suggestive marks: Some linguistic correlates. Conference paper, The American Name Society Panel on Trade Names, Linguistics and Law, Boston MA, January.

Eggington, W. G. 2004. Trade name protection in the dot com world: The Kelley blue book cases. Conference Paper, The American Name Society Panel on Trade Names, Linguistics and Law, Boston MA, January.

Finegan, E. 2001. Marks generic and descriptive: Linguistic and legal perspectives. Conference paper, 30th Annual NWAVE Conference, North Carolina State University, October.

Geis, M. L. 1992. On the contribution of linguistics to trademark law. Conference paper, Law and Society Association, Philadelphia, May.

Gibbons, J. 2004. Review of Shuy 2002. *Applied Linguistics* 25 (2): 276–278.

Hollien, H. 1990. The phonetician as expert witness. In *The Language Scientist as Expert in the Legal Setting: Issues in Forensic Linguistics* [Annals of the New York Academy of Sciences 606], R. W. Rieber & W. A. Stewart (eds.), 33–45. New York NY: The New York Academy of Sciences.

Horn, L. R. 2006. Generics and creeping autohyponymy. Conference paper, session on The Concept of Genericness in American English: Linguistics, Lexicography, and American Trademark law. American Dialect Society, Albuquerque NM, January.

Hotta, S. 2006. A linguistic exploration of trademark dilution. Conference paper, 2nd European IAFL Conference on Forensic Linguistics/Language and the Law, Barcelona, Spain, September 14–16.

Hotta, S. & Fujita, M. 2006. The psycholinguistic foundation of trademarks: An experimental study. Conference paper, 2nd European IAFL Conference on Forensic Linguistics/Language and the Law, Barcelona, September 14–16.

Landau, S. I. 2001. *Dictionaries: The Art and Craft of Lexicography,* 2nd edn. Cambridge: CUP.

Lentine, G. & Shuy, R. W. 1990. *Mc-*: Meaning in the marketplace. *American Speech* 65: 349–366.

McDavid, R. I., Jr. 1977. Evidence. In *Papers in Language Variation: SAMLA-ADS Collection,* D. L. Shore & C. P. Hines (eds.), 125–132. Tuscaloosa AL: University of Alabama Press.

McKean, E. 2006. Trademarks in dictionaries: What we have done and what we have failed to do. Conference paper, session on The Concept of genericness in American English: Linguistics, Lexicography, and American Trademark Law. American Dialect Society, Albuquerque, January.

Nunberg, G. 2001. That's correct. *California Lawyer.* July. (http://www-csli.stanford.edu/~nunberg/CLRedskins.pdf).

Nunnally, T. E. 2000. Morphology at the motel: Trademark law and Linguistic analysis. Conference paper, Southeastern Conference on Linguistics, November 11, Birmingham AL.

Okawara, M. H. 1999. A trademark dispute in the Japanese courts – the snack chanel case. Conference paper, 4th International Conference on Language and Law, International Association of Forensic Linguists, Birmingham, UK.

Okawara, M. H. 2006. Linguistic Analysis of Some Japanese Trademark Cases. PhD dissertation, University of Sydney.

Shudo, S. 2005. Towards more objective criteria for decisions on similarities in trademark disputes: What linguistic analysis may contribute. Conference paper, 7th Biennial Conference on Forensic Linguistics/Language and Law, International Association of Forensic Linguists, Cardiff University, July 1–4.

Shuy, R. W. 2002. *Linguistic Battles in Trademark Disputes.* Basingstoke: Palgrave.

Shuy, R. W. 2004. Linguistic thoughts on trademark dilution. Conference paper, American Name Society, Boston MA, January.

Shuy, R. W. 2006. *Linguistics in the Courtroom.* Oxford: OUP.

Westerhaus Adams, J. 2006. How does American trademark law understand the concept of genericness? Conference paper, session on The Concept of Genericness in American English: Linguistics, Lexicography, and American Trademark Law. American Dialect Society, Albuquerque NM, January.

Westerhaus, J. & Butters, R. R. 2003a. Conference paper, Trademark, Metaphor, and Synecdoche in Dictionary Labeling. Dictionary Society of North America, Durham NC, May.

Westerhaus, J. & Butters, R. R. 2003b. Conference paper, Trademark Genericide in Specialized Communities. Sixth Biennial Conference, International Association of Forensic Linguists, University of Sydney, Sydney, Australia, July.

WSM, Incorporated, Appellant, v. Dennis E. Hilton and Country Shindig Opry, Inc., Appellees, 1984 U.S. App.724 F.2d 1320.

Deception and fraud

William G. Eggington
Brigham Young University, Utah

This chapter attempts to explore the following multipart research question: What, if anything, can linguistics and linguists offer: (1) in defining deception and fraud, (2) in detecting deception and fraud, and (3) in providing assistance to the various entities involved in legal systems with respect to the nature and detection of deception and fraud? After defining deception and fraud from lay, linguistics and legal perspectives, we explore the linguistic elements of the Nigerian Advanced Fee Fraud in order to see how linguistic knowledge can be used to detect deceptive language. We then critique research aimed at using linguistics to detect deception in real-time contexts. We conclude by offering ways linguistic science can be legitimately employed to uncover deceptive and fraudulent language.

1. Introduction

Like most slaves to the computer, I begin my work day by opening my e-mail account. At least once or twice a month, I receive an e-mail something akin to the following:

Date: Wed, 6 Dec 2006 11:24:27 -0700 (MDT)
From: Alhaji Musa Bello (alh_bello_musa@yahoo.com
Subject: URGENT ASSISTANCE
To: wegg27@yahoo.com
ALHAJI MUSA BELLO.
Tel/Fax: 234 1 2882557
Lagos, Nigeria.
ATTN.: THE MANAGING DIRECTOR / CEO.

Dear Sir,
REQUEST FOR URGENT (CONFIDENTIAL BUSINESS RELATIONSHIP OF THE TRANSFER OF US $46,560,000.00 (FORTY SIX MILLION, FIVE

HUNDRED AND SIXTY THOUSAND UNITED STATES DOLLARS ONLY).

I hope this letter will not embarrass you since we have not had any previous communication. I got your reference from the Nigeria Exports Promotion Council (NEPC) and went further to have it confirmed by your country's trade department under private inquiry that is not related to my aim of writing you this letter.

I, on behalf of my other colleagues from different Federal Government of Nigeria owned parastatals decided to solicit your assistance as regards the transfer of the above stated amount into your bank account.

This fund arose from the over-invoicing of various contracts awarded in my parastatals to certain foreign contractors some time ago. We as holders of official positions in various parastatals, were mandated by this new civilian government to scrutinize all payments made to certain foreign contractors by the past military government and we discovered that some of the contracts they executed were grossly over-invoiced, either by omission or commission.

Also we discovered that the sum of $66,560,000.00 (Sixty-Six Million, Five Hundred and Sixty Thousand United States Dollars Only) was lying in a suspense account, although the foreign contractors were fully paid their entitlements after executing the said contracts. We all agreed that the over-invoiced amount be transferred (for our own use) into a bank account provided by a foreign partner, as the code of conduct of the Federal Civil Service does not allow us to operate foreign accounts.

However, we have succeeded in transferring some of these money, precisely US$20,000,000.00 (Twenty Million United States Dollars Only) into a foreign account in GENEVA (SWITZERLAND) last week. But unfortunately, the provider of the account has severed all forms of contacts with us as he has refused to adhere to our earlier mutual agreement insisting that the total amount be paid into his nominated bank account before disbursement will take effect. If for US$20M (Twenty Million United States Dollars Only) we are not compensated, how can one guarantee full compensation on remittance of the balance of US$46.560M (Forty-Six Million, Five Hundred and Sixty Thousand United States Dollars Only).

We are therefore seeking your assistance based on the balance amount of US$46.560M, which can be speedily processed and fully remitted into your nominated bank account. On successful remittance of the fund into your account, you will be compensated with 25% of the amount for assistance and services and 5% set aside for expenses contingency.

> This transaction is closely knitted and in view of our SENSITIVE POSITION we cannot afford a slip, I assure you that this transaction is 100% risk free. We will avail you with our identities as regards our respective offices, when relationship is fully established and smooth operation commences.
>
> I am at your disposition to entertain any question(s) from you in respect of this transaction, so contact me immediately through the above telephone and fax numbers for further information on the requirements and procedure. Please note that the DEAL needs utmost confidentiality and your immediate response will be highly appreciated and we will use our own share of the money to establish a lucrative firm in your country.
>
> Yours truly, ALHAJI MUSA BELLO

The e-mail is a variant of the infamous Nigerian Bank Scam which, in itself, is a variant of Advance Fee Fraud (AFF). And, like most recipients of this genre, I immediately identify it as a fraudulent scam and send it off to the delete file. However, a close analysis of the text reveals key linguistic variables that allow us to gain further insights into the language elements of deception and fraud. With this in mind, I ask readers, if they have not done so already, to closely read the text looking for indicators of deception. We will return to the text a number of times throughout the paper.

Sadly, many people have fallen victim to the AFF scheme including prominent businessmen, politicians, and a Massachusetts psychotherapist (Zuckoff 2006). Potential victims, or "marks" who respond to the e-mail engage in frequent communication with perpetrators who attempt to establish a trusting relationship by providing "official" documents that validate the proposed arrangements and the bone fides of the various Nigerian entities. Just prior to the "transfer" of funds to the mark, he is told that there is an unforeseen problem (such as tax or transfer fees) that requires the victim to send funds immediately – not a moment can be lost. These "problems" can continue for some time with the mark investing substantial funds in order to remove supposed government or banking roadblocks. Eventually, the victim is lured to Nigeria, or a neighboring nation, where he is immersed in the scam and controlled by the criminals. This can result in large financial losses and sometimes physical abuse.

Incidentally, in one of those twisted moments of irony that causes the inner cynic to dance with glee, in researching for this paper, I discovered that *Wired Magazine* had published an article dealing with a typical Advanced Fee Fraud scheme entitled "How a bank got e-mail scammed" (24 September 2002) written by Michelle Delio. *Wired Magazine* was forced to correct the article when it surfaced that Delio had "repeatedly cited unverifiable sources that couldn't be found

by the inquiries" (Bialik 2005). Apparently, Delio had misrepresented the "truth" in many of her writings by creating fictitious sources whose primary purpose was to add "color" to the story. Her defense was that essential elements of each of her "stories" were accurate.

Ironically, then, in hoping to introduce this chapter with a contemporary example of deception and fraud using manipulative language which would serve as an exemplar touchstone throughout the remainder of the paper, I uncovered another example of deception and fraud. Both of these examples serve my rhetorical purpose and, as noted, will be referred to as exemplar texts.

And what is this purpose? It is to explore the following multipart research question:

> What, if anything, can linguistics and linguists offer:
> 1. in defining deception and fraud (hereafter referred to as "D & F"),
> 2. in detecting D & F, and
> 3. in providing assistance to the various entities involved in legal systems with respect to the nature and detection of D & F?

We will proceed by first providing essential definitions from lay, linguistic and legal perspectives. We will then review a sampling of previous research concerning the linguistic nature of D & F in order to ascertain linguistic traits that may be helpful in detecting the presence or absence of D & F. The chapter will conclude with a discussion of how linguistics may inform the legal professions with regard to D & F issues. As noted above, I will use the Advanced Fee Fraud and Delio's exercise in fabrication as analyzable exemplars of D & F.

2. Definitions

For the purposes of this paper, *The Oxford English Dictionary*'s most appropriate lay definition for "deception" is the "action of deceiving or cheating" where "deceive" is defined as "to cause to believe what is false; to mislead as to a matter of fact, lead into error, impose upon, delude, 'take in.'" "Fraud" is defined as "criminal deception; the using of false representations to obtain an unjust advantage or to injure the rights or interests of another." The "unjust advantage" phrase within this definition implies that the end result of the deception is personal gain on the part of the individual committing the fraud. These definitions appear to accurately align with popular conceptions of the notions. Central to each, is the understanding that perpetuators of D & F are creating falsehoods or lying where "lying" is defined by the Oxford English Dictionary as: "to tell a lie or lies; to utter falsehood; to speak falsely."

In her exploration of the relationship between the semantics of the English language and the culture of Anglo discourse, Anna Wierzbicka (2006), places central importance on the evolution of the semantics of "truth," "fact" and "lying" within Anglo culture. She notes that "truth" and "fact" were often seen as synonymous, but the general acceptance of cultural and societal "white lies" has led to her conclusion that:

> this is not to say that lying is no longer regarded in Anglo culture as something bad, but the meaning of lying appears to have changed – roughly from saying, intentionally, something untrue to saying, intentionally, something untrue and presenting it as information about facts (p. 45).

For example, within the advertising genre, we routinely tolerate statements that we know are not facts even when presented as facts ("the best …," "the most ….," "the greatest …."). These are lies that "go with the territory." My wife and I recently conspired to host a surprise 60th birthday party for a friend. To achieve a desired outcome, I intentionally lied to this friend. Shortly after the traditional denouement ("Surprise!!"), my friend playfully turned to me and asked if he could ever trust me again. I reassured him that he could at least three times that evening and once the following day. Outside of a few clearly defined contexts, however, individuals and general society feel betrayed, deceived and lied to when marketers, politicians reporters and friends falsify actual "facts" to achieve a desired outcome.

Wierzbicka constructs a semantic explication for "lying" which is, in my opinion, closely related to popular understandings of the notion of "deceiving." Thus,

> *When X said it X was lying. =*
> a. X said something like this: "I want you to know that Z" to someone
> b. X knew that Z was not true
> c. **X wanted this someone to think that Z was true.**
> (Wierzbicka 2006: 45)

"Deception" then is what X does when X wants someone to think that Z is true. From a linguistic perspective, it involves the manipulation of language to achieve a desired end, where that end misrepresents the facts.

"Fraud," as noted above, involves criminal deception for personal gain. Adapting Wierzbicka's semantic metalanguage explication for lying, and relying on her semantic primes where meaning is explained in universal irreducible elements (Wierzbicka, 2006: 18) , we might say that "fraud" can be explicated thusly:

> *When X said it X was committing fraud. =*
> a. X said something like this: "I want you to know that Z" to someone

b. X knew that Z was not true
c. X wanted this someone to think that Z was true
d. X knows something good can happen to X if this someone thinks that Z was true
e. This is a very bad thing for X to say.

Obviously, the "very bad" component of this explication frequently involves notions of breaking the law – which means we now have to explore various legal codifications and contexts of the term.

As a representative sampling of Common Law, the following is an abridgment of *West's Encyclopedia of American Law* definition of "fraud":

> A false representation of a matter of fact – whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed – that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury……
>
> Fraud must be proved by showing that the defendant's actions involved five separate elements: (1) a false statement of a material fact, (2) knowledge on the part of the defendant that the statement is untrue, (3) intent on the part of the defendant to deceive the alleged victim, (4) justifiable reliance by the alleged victim on the statement, and (5) injury to the alleged victim as a result.

The definition notes that a belief statement or a seller's "glowing opinion" are not fraudulent. In addition, the nature of the relationship between participating parties in an alleged fraud is relevant in defining fraud. When one party in the exchange has superior information, or is in a position of trust, non-factual statements can be classed as fraudulent. In certain contexts, the withholding of information, or even silence, can be considered as a fraudulent activity.

Note that this discussion of the various definitions of D & F in a range of non-legal and legal contexts refers frequently to issues of language. By and large, D & F are acts involving linguistic manipulation. It is thus natural to proceed with this discussion by asking what linguistics can tell us about these two common practices.

3. Deception and Fraud from a linguistics perspective

My reference to Wierzbicka's semantic explication has touched on at least one approach used by linguists in their discussions of D & F. Semantics, especially theories relying on truth conditions, has an established record of dealing with the nature of truth in human language production (see Kearns 2000). In this tradition,

the truth value of a sentence is whether or not the sentence is true in the actual world. Given the "truth focus" of the truth condition framework, it is not surprising that little direct theoretical development has been undertaken regarding the semantics of D & F. However, applying this model, we may ascertain that, in essence, someone attempting to deceive is trying to convince the potentially deceived that his statements are indeed true in the actual world while knowing that they are not true – that the actual world does not conform to these statements.

Fauconnier's notion of mental spaces (Fauconnier 1994) may be pertinent to this discussion. He defines mental spaces as "constructs distinct from linguistic structures but built up in any discourse according to guidelines provided by the linguistic expressions" (p. 16). Relative to the Nigerian Bank Scam text provided at the beginning of this chapter, in essence, its purported author, Mr. Bello, has constructed a mental space, through discourse, where there is an actual world in which "US$46.560M" is waiting to be deposited in my bank account. All I have to do is telephone or fax, act immediately and keep it all confidential and I will receive 30% of that amount. Applying Fauconnier's theory, actual truth conditions exist within the mental space constructed by the language used in the e-mail. Mr. Bello's communicative task is to construct the mental space through discourse in such a way that I accept his imaginary world as the actual world and act accordingly. This is why he provides so many details including how he found my name, how they accrued the funds, why they sent some of the funds to a GENEVA (SWITZERLAND) (sic) account, how they have lost $20,000,000 because of an unscrupulous third party and why they need my help – because in this fictitious world, I am an honest individual with an intrinsic good nature.

Incidentally, not being a macroeconomist, I had no idea what a "parastatal" is. I did what perhaps most people do when they begin to believe the discourse construct entailed in the e-mail. I searched for the term, "parastatal" on the internet. I found a number of references to these partially state-owned corporations. *Wikipedia* even told me that, "the role of para-statals is explicit in countries like Nigeria, Tanzania" thus providing a form of external verification to the imaginary world constructed by the deceiver. It is likely the case that the most effective deceivers are those individuals who are adept at creating a mental space that is "real" perhaps even within a portion of their own cognitive stance and then building discourse that refers to this mental space as an actuality. They are then able to communicate naturally as if they are unspotted truth-tellers.

Pragmatic treatments of D & F converge around Grice's notions of conversational implicature central to which is the cooperative principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged" (Grice 1975), or as Kearns paraphrases, "Be helpful" (Kearns 2000: 155).

Although the cooperative principle is phrased in such as way as to elicit a notion of prescriptivism, it is actually generally descriptive of actual human behavior. In all but the most dysfunctional contexts, we assume a cooperative stance in our relations with others. Grice elaborates on the principle by providing four maxims: quality (truthfulness), quantity (informativeness), relation (relevance) and manner (clarity). Grice suggests that being truthful takes precedence over the remaining maxims. In other words, we assume that our verbal and textual relations with others are going to maintain acceptable standards of truthfulness. Essentially, in all but a few contexts, we are biased toward the truth. This truth bias forms the default paradigm of human communication. The inverse of this notion must also be valid; namely, that we do not attempt to deceive others and we assume that others do not attempt to deceive us. One can imagine an individual opening an Advanced Fee Fraud e-mail and responding with a cooperative principle stance. This explains why so many fraudulent endeavors are successful. Their foundation is the potential victim's assumption of truth. Having established this foundation by simply opening the conversation, the perpetrators then manipulate the quality maxim as well as the remaining maxims to their advantage.

One final linguistic approach can be utilized to broaden our understanding of deception and fraud. Examination of actual communication in the form of "discourse analysis" can allow linguists to determine the truth value of extended spoken or written texts. Johnstone (2002) provides a useful overview of the contextual variables that are utilized in this approach. She suggests that all discourse, or text, is shaped by and shapes the following contexts:

- the external context, or the world that situates the discourse and the world that the discourse helps creates,
- the linguistic context or the language elements within the text with emphases on how linguistic elements are used to accomplish the text's purposes,
- the participatory context or "tenor" to borrow a term from Hallidayan (Halliday and Hasan 1990) systemics. In particular, the way the text is formed by the participants and the way the text forms or shapes the participants,
- the temporal context, or the way the text makes use of prior texts and prior discourses to accomplish its purposes and also how the text can influence future texts,
- the medium of the text and its context such as the spoken, written, or electronic nature and contexts of the text, and how the medium evokes certain responses,
- the functional context or how the text fulfills its purposes in terms of its primary, secondary, tertiary (and so on) goals.

With these semantic, pragmatic and discursive elements in mind, we can analyze the Nigerian AFF text in order to see how the text accomplishes deception. Table 1 below, provides a summary of the results of this type of analysis.

Table 1. Discourse Analysis of the Nigerian AFF Text

Text	**Comment**
Date: Wed, 6 Dec 2006 11:24:27 -0700 (MDT) From: Alhaji Musa Bello (alh_bello_musa@yahoo.com Subject: URGENT ASSISTANCE To: wegg27@yahoo.com ALHAJI MUSA BELLO. Tel/Fax: 234 1 2882557 Lagos, Nigeria. ATTN.: THE MANAGING DIRECTOR / CEO.	The text is transmitted electronically, but evokes a virtual notion of an official paper document such as a memo. As such it creates a world of officialdom where participants within the discourse are working toward the same purpose and where the cooperative principle and especially Grice's quality maxim (a bias toward truth) are taken for granted. Precise address details are given which further enhances the "truth" value of the text. The memo is for the attention of the "managing director/CEO" presumably of the recipient of the email. This is an appeal to the ego/vanity of the victim who may imagine that his true worth is recognized by the sender thus establishing a positive relationship between the participants in the discourse. The "subject" of the memo, the second mention of the sender's name and the "attention" line are written in an all-caps font. This adds to the official nature of the text, and to its extreme urgency and import.
Dear Sir, REQUEST FOR URGENT (CONFIDENTIAL BUSINESS RELATIONSHIP OF THE TRANSFER OF US $46,560,000.00 (FORTY SIX MILLION, FIVE HUNDRED AND SIXTY THOUSAND UNITED STATES DOLLARS ONLY).	The formal tone continues in the memo's address line. The elaborated subject of the memo is written in all-caps thus reinforcing the official nature of the text as well the evoking a crisis mentality. Along with repeating the urgent nature of the correspondence, the reader is now urged to be confidential, adding a secretive and conspirational facet to the relationship that is being established between the sender and the recipient. The amount to be transferred is given in numerals and then in "spelled out" form, followed by "only" once again enhancing the legal, official and financial nature of the text. The amount chosen by those committing the fraud (FORTY SIX MILLION, FIVE HUNDRED AND SIXTY THOUSAND UNITED STATES DOLLARS ONLY) is designed to imply financial exactness and seriousness.

Table 1 (*continued*)

Text	Comment
I hope this letter will not embarrass you since we have not had any previous communication. I got your reference from the Nigeria Exports Promotion Council (NEPC) and went further to have it confirmed by your country's trade department under private inquiry that is not related to my aim of writing you this letter.	The body of the correspondence begins with the writer assuming a humble stance and apologizing for any "embarrassment." From a native English speaker's framework, one might expect "inconvenience" instead of the word "embarrass" here. This is an early indicator that the writer uses non-standard English which is in accord with the virtual world soon to be established in text. The writer explains how the recipient was discovered by referencing two specific government entities. By so doing, the authors are reinforcing the authentic nature of the discourse world and subtly flattering the potential victim.
I, on behalf of my other colleagues from different Federal Government of Nigeria owned parastatals decided to solicit your assistance as regards the transfer of the above stated amount into your bank account.	Adapting Swales' Create a Research Space (CARS) model for the research article (reference), we may say that this paragraph initiates, or is Step 1 (the opening), in the "Create a Fraudulent Narrative" move by identifying who the sender and who his colleagues are within the discourse world and (Step 2, establishing the relationship) why they have contacted the recipient. I have noted previously how the use of a jargon word "parastatals" adds to the credibility of the text. The non-standard formality of the syntax reinforces the virtual world that is being constructed for the victim.
This fund arose from the over-invoicing of various contracts awarded in my parastatals to certain foreign contractors some time ago. We as holders of official positions in various parastatals, were mandated by this new civilian government to scrutinize all payments made to certain foreign contractors by the past military government and we discovered that some of the contracts they executed were grossly over-invoiced, either by omission or commission.	Step 3 (the narrative) in this narrative offers precise and plausible details on how the funds were constructed.

Table 1 (*continued*)

Text	Comment
Also we discovered that the sum of $66,560,000.00 (Sixty-Six Million, Five Hundred and Sixty Thousand United States Dollars Only) was lying in a suspense account, although the foreign contractors were fully paid their entitlements after executing the said contracts. We all agreed that the over-invoiced amount be transferred (for our own use) into a bank account provided by a foreign partner, as the code of conduct of the Federal Civil Service does not allow us to operate foreign accounts.	Step 3a, (the problem) continues by developing a complexity (the discovered funds), followed by further complexities because of Federal Civil Service restrictions which explains why they needed a "foreign partner."
However, we have succeeded in transferring some of these money, precisely US$20,000,000.00 (Twenty Million United States Dollars Only) into a foreign account in GENEVA (SWITZERLAND) last week. But unfortunately, the provider of the account has severed all forms of contacts with us as he has refused to adhere to our earlier mutual agreement insisting that the total amount be paid into his nominated bank account before disbursement will take effect. If for US$20M (Twenty Million United States Dollars Only) we are not compensated, how can one guarantee full compensation on remittance of the balance of US$46.560M (Forty-Six Million, Five Hundred and Sixty Thousand United States Dollars Only).	Step 4 (the appeal for sympathy), delivers the betrayal by detailing how they were defrauded out of $20 million by the unscrupulous foreign partner. This betrayal narrative is probably designed to evoke an element of sympathy for the authors of the text. The unreal conditional element of the last sentence (if we are not compensated, how can ….) sets the reader up as the rescuer. Note the reinforcement of the authentic official and financial motifs through spelling out the amounts, following them with "only" and presenting GENEVA (SWITZERLAND) in all-caps.
We are therefore seeking your assistance based on the balance amount of US$46.560M, which can be speedily processed and fully remitted into your nominated bank account. On successful remittance of the fund into your account, you will be compensated with 25% of the amount for assistance and services and 5% set aside for expenses contingency.	Step 4 (the plea for help), is offered in the form of a request for assistance. This is followed by Step 4a (the reward) – an explanation of the potential reward for the victim amounting to 25% of $46.560M with an additional 5% for expenses. As the Advanced Fee Fraud proceeds, this 5% expense allocation is used by the perpetrators and probably the victims to justify the advanced fees and expenses that the victim is tricked into providing. Note that it is presented almost as an aside.

Table 1 (*continued*)

Text	Comment
This transaction is closely knitted and in view of our SENSITIVE POSITION we cannot afford a slip, I assure you that this transaction is 100% risk free. We will avail you with our identities as regards our respective offices, when relationship is fully established and smooth operation commences.	Step 5 (plea for sensitivity and trust) in this fraudulent discourse assures the victim that there is no risk.
I am at your disposition to entertain any question(s) from you in respect of this transaction, so contact me immediately through the above telephone and fax numbers for further information on the requirements and procedure. Please note that the DEAL needs utmost confidentiality and your immediate response will be highly appreciated and we will use our own share of the money to establish a lucrative firm in your country.	Step 5a solidifies the trust step and calls for the victim to make contact, not incidentally, through e-mail. The confidential nature of the arrangement is again emphasized.
Yours truly, ALHAJI MUSA BELLO	Step 6 (the closing): The author signs off by evoking normal business practice.

The preceding discussion, and the analysis of the AFF text, has allowed us to see some of the methods employed by linguists in order to define and analyze texts whose rhetorical aim is to deceive and commit fraud. However, the analysis is a prime example of post hoc thinking. I provided examples of the linguistic elements of D & F by examining a text that I knew was clearly deceptive. This begs the question: Is it possible to employ linguistic analysis to detect the presence or absence of D & F without knowing beforehand if the text under examination is deceptive, especially in on-going conversational contexts that demand real-time processing?

4. On-going, real-time processing in deception detection

Postman and Weingartner (1969) popularized Earnest Hemmingway's advice; namely, "In order to be a great writer a person must have a built- in, shockproof – crap detector." Hemmingway as well as Postman and Weingartner accept the notions that human beings can, and should, develop abilities to detect deceptive language behavior. Most of us have been involved in some form of discourse where we sense something is amiss with the truth-value of the information coming from our interlocutor. We then make a judgment that we are being deceived. We are

often sure of our own crap detecting abilities. However, a host of research studies suggest otherwise. For example, Kraut's conclusion, derived from a review of deception detection accuracy studies, tells us that "accuracy scores rarely exceed 65% where 50% is chance level" (Kraut 1980: 209). Furthermore, studies by Kraut and Poe (1980), and Eckman and O'Sullivan (1991) show that so-called trained deception-detection professionals such as customs inspectors, polygraphers, robbery investigators, judges and psychiatrists were no better at detecting lies than control groups consisting of college students. Incidentally, U.S. Secret Service agents were the most accurate at detecting deception with an accuracy rate of 64%, which, in reality, is only slightly better than chance.

The most obvious signifier of deception occurs when presented facts do not match objective, verifiable reality. A slightly less obvious indicator requires the potential recipient of deception to engage in informal content analysis. The deceiver may trip himself by making contradictory statements. However, both of these reliable indicators require recipients to have access to sources of information external to the immediate conversation. Consequently, real-time detection is difficult. Even when exposed, deceivers can claim poor memory, confusion, misunderstanding, or engage in semantic hair-splitting such as former U.S. President Clinton's infamous, "It depends on the meaning of 'is'" defense.

As much as some would wish otherwise, besides these surface level deception indicators, scientifically reliable linguistic or para-linguistic deceptive linguistic features are simply non-existent. Basically, when required, most human beings are fairly adept at deceiving, while some are expert, and we are all poor deception detectors. Yet, linguistic, psychological, physiological and communicative studies research offers tantalizing hints of a deception detection Holy Grail, but, as alluded to above, experimental studies consistently fall far short. Roger Shuy's valuable treatment of the subject (Shuy 1998) refers readers to Miller and Swift's *Deceptive Communication* (Miller and Stiff 1993). And so must I. Even though the book is somewhat dated in that it can only reference research prior to its publication, its findings are still current. For example, Miller and Stiff elaborate on key problems involved in deception research which are summarized by Shuy (1998: 75–76). At the risk of over-simplifying Shuy's summary (and with apologies), these problems can be glibly restated as:

1. The validity problem: The studies measure something, but what is measured is often differences that can be attributed to variability in experimental design rather than deception detection.
2. The faith-based problem: Even though a myriad of studies have been conducted over a long period that confirm that humans are good deceivers and

poor deception detectors, research using the same paradigm continues with results that are often at great variance with each other.
3. The authenticity problem: Most studies are conducted in artificial lab environments where subjects are exposed to far more lies than they would receive in normal authentic contexts.
4. The base-line problem: Human beings exhibit a wide range of behavior within and between each other. For example, some people stammer, or provide unnecessary detail, or too little detail even when they are truth-telling. Unless we have a long-standing relationship with someone, we have no reference point from which to evaluate behavior. Incidentally, this may explain why many people believe they are gifted deception detectors. They may actually be able to detect deception in a spouse, or a child, because they have had a prolonged, sustained and close relationship with that individual.
5. The extraneous variable problem: Gender, age, race, culture, profession, personal values, interlocutor tone and interpersonal style are among many variables that can influence communicative behavior. There may simply be too many variables to control in order to provide research data that can be applied to authentic contexts.

A brief critique of a recent research article entitled "Linguistic styles in deceptive communication: Dubitative ambiguity and elliptic eluding in packaged lies" (Anolli 2003) provides an application for Miller and Swift's list of research problems. The research design required university students "to describe a picture, with varying truth/lie conditions." In one phase of the study, subjects sat at a desk facing the experimenter. The desk contained two standing microphones, an open reel tape recorder, and a camera placed near the subject. Subjects were shown successive images and asked to describe them according to a planned deception sequence. There is an obvious lack of setting authenticity that leads to problems of validity. In addition, no attempt was made to measure consistent subject behavior in natural settings in order to establish base-line markers. All subjects were male which, as the author acknowledges, limits the scope of the conclusions. Given that the author acknowledges gender as a possible contributing variable, could arguments be made for a whole range of sociolinguistic and cultural extraneous variables? Finally, at the commencement of the literature review, the author states that "All previous research has produced conflicting results within this field." Somehow, the researcher believes this piece of research will clear up all the confusion. Sadly, all five of Miller and Stiff's research problems can be located in this one article.

Given the inadequacies of research into deception detection, one could easily conclude that deception detection professionals are skeptical of any over-reaching claims. Unfortunately, as Shuy (1998:76) points out, this is not the case. A deception detection training industry thrives providing law enforcement agencies training in detecting deception based upon linguistic variables including information detail, frequency of speech variables such as repetition and hedging, and pause rates. Porter and Yuille (1996) show that almost all the key markers provided in the deception detection training programs are inaccurate measures. Yet, the programs continue in spite of prevailing evidence that the training they provide is unreliable.

As this review has shown, accurate deception detection is currently unachievable through linguistic analysis. What role, if any, can linguistics play in deception studies within forensic linguistics?

5. A role for linguistics

To some extent, this chapter has developed at cross purposes. It began by showing how linguistic analysis can help uncover fraudulent AFF schemes. It then revealed how, to a large extent, linguistics, or any other social science, is inadequate in providing legitimate deception detection in on-going, real-time processing contexts. However, the Nigerian AFF analysis does reveal a process that highlights a role for linguistics within deception and fraud legal issues. Linguistics can provide scientifically sound deep analyses of texts, whether spoken or written, that enable legal professionals to discover matters of fact contained within those texts. For example, I have just finished assisting in a case involving a disputed contract – a frequent case-type undertaken by forensic linguists. From the behavior of one of the litigants, it was apparent that he originally agreed to the terms of the contract, but when conditions changed, he searched for a loophole. He thought he had found it through a strained interpretation of one clause in the contract. He then constructed a narrative that justified that interpretation. In essence, he constructed a deceptive mental space that validated his textual assertion. Through close textual analysis, I was able to show that his re-interpretation of the contract was inconsistent with other content in the contract as well as inconsistent with grammatical patterns established in the text.

Linguists are trained to undertake deep textual analysis at the discourse, content, syntactic, morphological, phonetic, semantic or pragmatic levels. We do well when we stay within those parameters.

References

Balconi, M., Ciceri, R. & Anolli, L. 2003. Linguistic styles in deceptive communication: Dubitative ambiguity and elliptic eluding in packaged lies. *Social Behavior and Personality: An International Journal* 31 (7): 687–710.

Bialik, C. 2005. What we can learn from Michelle Delio: Lessons from a journalism scandal on color quotes, note-taking, and credibility problems. *Gelf Magazine*. May 19, 2005.

Ekman, P. & O'Sullivan, M. 1991. Who can catch a liar? *American Psychologist* 46: 913–920.

Fauconnier, G. 1994. *Mental Spaces.* Cambridge: CUP.

Grice, P. 1975. Logic and conversation. In *Syntax and Semantics,* 3: *Speech Acts*, P. Cole & J. Morgan (eds.), 43–58. New York NY: Academic Press.

Halliday, M. A. K. & Hasan, R. 1990. *Language, Context, and Text: Aspects of Language in a Social-Semiotic Perspective.* Oxford: OUP.

Johnstone, B. 2002. *Discourse Analysis.* Malden, MA: Blackwell.

Kearns, K. 2000. *Semantics.* Houndmills: Palgrave MacMillan.

Kraut, R. 1980. Humans as lie detectors. *Journal of Communication* 30: 209–216.

Kraut, R. & Poe, D. 1980. Behavioral roots of person perception: The deception judgments of customs inspectors and laymen. *Journal of Personality and Social Psychology* 39: 784–798.

Miller, G. R. & Stiff, J. B. 1993. *Deceptive Communication.* Newbury Park CA: Sage.

Porter, S. & Yuille, J. C. 1996. The language of deceit: An investigation of the verbal cues to deception in the interrogation context. *Law and Human Behavior* 20 (4): 443–457.

Postman, N. & Weingartner, C. 1969. *Teaching as a Subversive Activity.* New York NY: Dell.

Shuy, R. W. 1998. *The Language of Confession, Interrogation and Deception*. Newbury Park CA: Sage.

West's Encyclopedia of American Law. 2007. Chicago IL: Thomson Gale.

Wierzbicka, A. 2006. *English: Meaning and Culture.* Oxford: OUP.

Zuckoff, M. 2006. The perfect mark: How a Massachusetts psychotherapist fell for a Nigerian e-mail scam. *The New Yorker*. May 15, 2006.

Plagiarism

M. Teresa Turell
Institut Universitari de Lingüística Aplicada
Universitat Pompeu Fabra, Barcelona

The negative connotations of plagiarism as an illegal appropriation of ideas are based on the concept of Intellectual Property. Although Intellectual Property Laws in most countries around the world are specific as to the characterisation of plagiarism as an offence, the extent of plagiarism litigation varies enormously and this variation has a lot to do with the way writers, whose texts are plagiarised, and plagiarists themselves, view the act of being plagiarised or the act of plagiarising somebody else's text. In countries which fall within the Common Law tradition such as the United Sates, Australia, Canada, Great Britain, plagiarism litigation is extensive and there is a regular offer of linguistic expertise to solve plagiarism disputes. In countries within the Civil Law tradition, like Spain, for example, linguists are still rarely called upon as expert witnesses in plagiarism cases.

Plagiarism is multidimensional, as is proved in the number of areas of knowledge affected by it (including literature in all its forms: essay, novel, theatre, poetry), the settings and activities in which it occurs (education, translation), and the contexts in which it is produced (for example, the scope of plagiarism on the Internet is twofold since one can plagiarise directly from the web or use the web as a method to detect plagiarism). As expert witnesses, linguists are frequently asked to give evidence in court to help to decide cases of plagiarism of ideas, linguistic plagiarism, or both. In the first case, the distinction between *author's rights* and *copyright* may be useful, because these two concepts and terms are used differently in different judicial systems. In the second case, it may be important for linguists to come up with theoretical and methodological proposals that help them as legal consultants to find linguistic markers and discourse strategies that will be decisive in plagiarism detection, as well as in establishing *prima facie* cases. As in any other forensic linguistics contexts, plagiarism is an area where the need to incorporate internal and external validity to the experts' findings is strongly felt. When giving opinions in court, it has been proven that both qualitative and quantitative approaches to plagiarism detection are valid and complementary, and also that both semantically and statistically expressed opinions may be necessary.

1. Introduction

> Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit, including those obtained through confidential review of others' research proposals and manuscripts.
>
> (*US Office of Science and Technology Policy*, 1999)

The negative connotations of plagiarism as an illegal appropriation of ideas are based on the concept of Intellectual Property. Plagiarism can be defined as "intentional lifting of an idea and/or intentional copying of the text (linguistic, musical, etc…) used to express that idea, to cover up non-originality" (Turell 2004: 4). Thus, both content (the plagiarised idea) and form (the language used) are relevant issues to its definition. Judicial systems belonging to the Common or the Civil Law traditions may characterise the legal base involved in plagiarism quite similarly, although it is generally agreed that plagiarism as an accepted or unaccepted practice, has to do with a community's culture; in other words, that there is a cultural background embedded in the nature of plagiarism that is reflected in dictionary definitions: "some cultures see calquing, matching and borrowing from text and the copying of ideas without attribution to documented references as something positive; in other cultures plagiarism is simply seen as an offence" (Ibid.). Although Intellectual Property Laws in most countries around the world are specific as to the characterisation of plagiarism as an offence, the extent of plagiarism litigation varies enormously and this variation has a lot to do with the way writers, whose texts are plagiarised, and plagiarists themselves, view the act of being plagiarised or the act of plagiarising somebody else's text. In countries which fall within the Common Law tradition such as the United Sates, Australia, Canada, Great Britain and some others, plagiarism litigation is extensive and there is a regular involvement of linguistic expertise to solve plagiarism disputes. However, in countries within the Civil Law tradition, like Spain, for example, linguists are rarely called upon as expert witnesses in plagiarism cases, either because plagiarists are seldom taken to court – plagiarism in Spain is justified by the writers themselves in terms of "intertextuality" – or because there is little tradition in Spanish courts of accepting linguistic evidence.

This article is concerned with the distinction between plagiarism of ideas and linguistic plagiarism, drawing from examples of plagiarism contexts as observed in plagiarism litigation in Spain: plagiarism in literary works (essay and novel), plagiarism in scientific works and plagiarism in translated works.[1] This distinction

1. This article also considers, but it is not exclusively concerned with, plagiarism in education, which has recently raised interest in most universities around the world. For a complete view on

has not only raised theoretical issues that help understand the nature of plagiarism but has also helped to answer some methodological questions which are relevant in the detection[2] and establishment of plagiarism, and in the many ways in which evidence can be used and presented in court. This article is addressed to linguists and non-linguists interested in understanding the nature of plagiarism. However, before I turn to the main focus of this article, it will be useful, on the one hand, to highlight the distinction between *author's rights* and *copyright*, which may operate differently in different judicial systems and, on the other, to specify the linguistic theoretical and methodological principles upon which plagiarism analysis and plagiarism expert witness practice are based.

2. The nature of plagiarism

The nature of plagiarism is multidimensional, as is proved in the number of areas of knowledge affected by plagiarising practices (literature in all its forms: essay, novel, plays, poetry), the settings and activities in which it occurs (education, translation), and the contexts in which it is produced (for example, the scope of plagiarism in Internet is twofold, since you can plagiarise directly from the web or, methodologically speaking, you can use the web as a method to detect plagiarism), affecting people's interest to varying degrees.

Table 1 illustrates the ranking of interest that plagiarism has attained by searching on the web plagiarism sites by different areas of knowledge, settings and contexts involved: literature, the Internet, translation and education.

Table 1. Ranking of interest in plagiarism

	Yahoo.com
Internet	3,560,000
Education	3,320,000
Literature	1,950,000
Translation	922,000

Search data: April 24, 2007

this type of plagiarism, see http://www.keele.ac.uk/depts/aa/landt/lt/docs/plagiarismreview04.htm, Stephen Bostock, also in *Educational Developments* 5.3, 2004.

2. Although it does not consider plagiarism detection, a thorough account of plagiarism detection systems and tools can be consulted at http://www.usyd.edu.au/su/ab/docs/2003/ABAgAug03_attach_13.2.3.pdf. There exist the archives of PLAGIARISM@JISCMAIL.AC.UK storing debates on plagiarism for several years (http://www.jiscmail.ac.uk/lists/plagiarism.html). And there are also several reports on the evaluation of plagiarism detection techniques for example, the CAA report conducted at the University of Luton in 2001.

2.1 Plagiarism in literature

When looking at plagiarism in literary work (novels, plays and poetry), two issues have to be brought into the discussion: the question of *imitatio* and the question of *intertextuality.* In general terms, *imitatio*, which has been a common practice in literary production in all centuries and civilisations, is understood in literary circles as a steering wheel for creativity. It has been observed through time that the elements that are bound to be plagiarised in a piece of literary work vary according to genre: in the novel, *imitatio* occurs by theme and characters, and also in dialect and style; for example, the Spanish picaresque novel travels first to the English novel and later on to the North-American tradition; in theatre and cinema, *imitatio* takes place in the plot and characters; and finally, in poetry, apart from the poem's theme, one can imitate and copy the rhyme, the figures of speech, and other elements.

Intertextuality is a relatively recent term and concept, whose public appearance in the critical discourse of the French intellectual avant-garde of the seventies takes place in collective publications authored by Barthes, Derrida, Foucault and Sollers, among others, but in particular in two key works; one by Kristeva (1969), for whom intertextuality is an indefinite process where it is more a question of traces, frequently unconscious and not easily unavoidable rather than borrowing, affiliation and imitation (see Feuillebois, on line) and, some years later, another by Genette (1982), for whom intertextuality is at the very heart of *transtextuality*, which defines the specificity of literature, intertwined in five types of structural relations: *architextuality, paratextuality, metatextuality, intertextuality, and hypertextuality*. Intertextuality is revealed in citation, plagiarism and allusion. According to Feuillebois (on line), intertextuality can be defined as (…) "a constituent element of literature: no text can be written independently from what has been already written and carries more or less visibly the traces and memories of heritage and tradition. Defined as such, intertextuality is prior to the theoretical context of the sixties and seventies which conceptualises it".[3] Finally, the notion of intertextuality is linked to a text theory which developed during the XX century within the tradition of Russian formalism, but also within Bakhtine's tradition, where a text is always seen as deriving from, as well as fertilised by, other texts. Its more recent usage can be traced back to the 'critique of sources', which postulates

3. For other interpretations of *intertextuality*: as a reading effect, where it is perceived by the readers as the relations between one piece of work and another, see Riffaterre (1980), or as reading subjectivity, see Barthes(1973).

an individual memory different from the anonymous and collective memory defined in Kristeva (Jenny 1976).[4]

In 2001, the accusation that Spanish writer Luis Racionero, at that time the Director of the Spanish National Library, had plagiarised in his work, *Atenas de Pericles* (1993), several dozens of pages from British historians Gilbert Murray and Arnold J. Toynbee, caused an uproar within Spanish cultural and intellectual domains. Racionero rejected criticism by formulating in his defence that "his was not a case of plagiarism, but rather of intertextuality". He admitted using these historians' material in order to produce a completely new piece of work, but did not admit that he used this material as his own, copying literally and not citing. Thus, it was more than obvious that his originality was no longer real and that his supposedly claimed intertextuality became plagiarism. There are other examples of intertextuality in outstanding Spanish-writing authors such as Cervantes or Borges, even if in Spain only two centuries ago plagiarism was not a crime. Recently, well-known Spanish writers (Monzó, Jorge Bucay, Cela, and others) have been tainted by accusations of plagiarism.

2.2 Plagiarism in the Internet

The scope of plagiarism in the Internet is twofold since one can plagiarise directly from the web or, methodologically speaking, one can use the web as a method to detect plagiarism or authorship. In the first case, web page authors plagiarise from other web pages motivated by the "cut & paste" procedure widely used at present. The number of search results found is clear evidence for the increasing interest that this type of plagiarism reflects: Yahoo.com = showed a total of 174,000 results in 2003 and 3,560,000 in 2007 (see Table 1). In fact, plagiarism on the Internet becomes an issue mostly when it interacts with education, or when its context of occurrence is within this area. Relevant issues in this case are the impact of plagiarism in the Internet by searching, analysing and evaluating posted up materials; and the consideration of the author's right of protection against plagiarism on the Internet.[5] Plagiarising directly from the Internet involves plagiarism of texts as well as the content, design and message of web pages; in this case, detecting plagiarism can be done through numerous existing programs.[6] In the second case,

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4. For a deeper analysis on the debate on intertextuality, see Torodov (1981), Angenot (1983), Somville (1987) and Piegay-Gros (1996).

5. See http://www.maestrosdelweb.com/editorial/articulo.php?derechos

6. See http://www.turnitin.com/static/home.html; http://www.canexus.com/eve/index.shtml; http://plagiarism.phys.virginia.edu/Wsoftware.html; http://www.plagiarism.com/;

the web has been used as a method to detect plagiarism in order to search, analyse and evaluate real plagiarism cases (for example, Dan Brown, Madonna, and others).[7] The use of the web for plagiarism becomes an issue particularly when it takes place in education.

2.3 Plagiarism in education

Interest in plagiarism in education is also detectable from the increasing number of Internet search results that refer to this phenomenon. Yahoo.com showed a total of 148,000 results in 2003 and a total of 3,320,000 searches in 2007. Plagiarism in education affects, above all, but not exclusively, those universities and programs which offer on-line courses. Mertz (2005) – citing Rimer (2003) on a recent NY Times study (2003) on plagiarism which included twenty-three Higher Education institutions within the United States – reports that "thirty-eight percent of the undergraduate students surveyed said that in the last year they had engaged in one or more instances of "cut-and-paste" plagiarism involving the Internet, paraphrasing or copying anywhere from a few sentences to a full paragraph from the Web without citing the source" and that "almost half of the students said they considered such behaviour trivial or not cheating at all" (Rimer 2003).

The first documented study on exam and paper plagiarism is Johnson's (1997), where the extent of plagiarism was documented through the linguistics analysis of students' papers paper by means of CopyCatch, a concordance program and statistical tool created by David Woolls for CFL Development (2003), which among other things, allows researchers to visualise text similarity. This tool was not specifically designed to detect plagiarism, but that, as Johnson (1997: 220) points out, "knowing the kind of statistical output they could produce, […] might shed light on the plagiarised texts in a way that qualitative and manual text analysis cannot adequately do". This study also shed some light on the question of directionality in plagiarism and helped establish from quantitative evidence which text is the source text (T1) and which is the derived one (T2), stating that, two texts being contemporary, we would need a third text (T3) to see whether T2 and T3 have more in common with T1 than with each other (Johnson 1997: 222).

As reported in Turell (2004, 2005), student plagiarism in papers and exams has recently become an issue in many countries, particularly the United States,

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http://webscapeworldwide.com/; http://www.copyscape.com/;
http://www.ithenticate.com/static/home.html;
http://www.usyd.edu.au/su/ab/docs/2003/ABAgAug03_attach_13.2.3.pdf.

7. See http://www.ucm.es/info/cyberlaw/actual/fir01-12-01.htm

the United Kingdom and Australia, where for example, a study conducted in Australia in 2001 by two groups of universities showed "that up to 33 % of first year computer science students admitted they had plagiarised" but that after applying detection software from Germany, one of the schools involved "had cut plagiarism from 33% at the start of 2001 to less than 10%" (http://www.ebsworth.com.au).[8] Another survey of 1,750 essays across seventeen subjects by a consortium of six Victoria universities "found in 2002 that 8.25% of students had plagiarised".

2.4 Plagiarism in translation

One quite common plagiarism practice involves one type of plagiarism in translation, which occurs "when a language A text written by author A is translated into language B and the translator appears as the author of the original translated text; in other words, it involves the translation of a text from one language into another and then having the translated text published in another country as original work" (Turell 2004: 7). This practice, quite extended in several areas of knowledge, is the best documented example of plagiarism of ideas. The other type of plagiarism in translation occurs between two or more translations of the same original piece of work. This plagiarism context was considered for the first time in Turell (2004), which reports on the linguistic basis and the methodological techniques used by the expert witness in her report to determine whether there was plagiarism or not between Pujante's translation (1987) of Shakespeare's *Julius Caesar* into Spanish – the plagiarised translation – and Vázquez Montalbán's translation (1988) into Spanish of the same literary work – the disputed translation. This case was decided to be a case of plagiarism of literary translation by the Spanish Supreme Court (Judgment 1268) in 1993.

3. Intellectual property, author's rights and copyright

Intellectual property refers to everything related to creativity and creation. In the majority of countries it is dealt with as Industrial Property and Copyright. Spanish legislation distinguishes between *author's rights* and *copyright.* It is worth mentioning that *author's rights* and *copyright* refer to two different conceptions of literary and artistic intellectual property. Author's Rights is a concept deriving from Continental Law (also referred to as Civil Law), particularly from French Law. Copyright usage derives from Anglo-Saxon Law, also known as Common

8. Source: FORENSIC LINGUISTICS DISCUSSION LIST (2003).

Law.[9] Author's rights are based on the author's personal and non-transferable right established in the relationship between the author and his/her creation. It is recognised that a particular piece of work is some person's expression and this is protected accordingly. Copyright protection, on the other hand, is strictly limited to the piece of work. The author is not considered as such, but he/she has specific rights which determine how that piece of work can be used. Author's rights protection only covers the expression of content but not the ideas. It does not require any further formality, nor a registration or deposit of ideas, because the author's rights are born with the creation of a new piece of work. According to the Webster Dictionary (1998), copyright involves "the exclusive legal right to reproduce, publish, and sell the matter and form (as of a literary, musical, or artistic work)".[10] Copyright protection extends to all forms of intellectual property and exists as soon as the work is put into a fixed form. Registration is not a requirement for copyright protection either.

To return to the legal situation in Spain, the new Spanish Civil Code passed in 1995 (http://2ni2.com/juridico/penal/codigopenal.htm) devotes three articles to crimes related to Intellectual Property (articles 270, 271 and 272), by which an offender of an intellectual property crime would be someone who "would, wholly or partially, reproduce, plagiarise, distribute or communicate publicly a literary, artistic or scientific piece of work, or undertakes its transformation, interpretation or artistic execution, without permission from the corresponding holder of the right of intellectual property or from his/her assignees", and thereby profit or damage a third party. Also, in the Spanish Act of Intellectual Property (LPI, articles 138 and 140), the plagiarised author would be eligible for damage compensation, both moral and financial.[11] The concept and term 'copyright' makes concrete the legal protection of intellectual property. And plagiarism is directly related to Copyright.[12]

Other concepts which may be useful in plagiarism contexts are: *public domain knowledge*, *data* and *facts*. Public domain knowledge refers to facts that can be verified from different sources and are known to a considerable number of people. Its consideration involves that, if a fact is not known and has to be

9. See http://www.lib.iastate.edu/commons/resources/copyright/copyright.html, for more details.

10. See http://www.m-w.com, Webster Dictionary, [online]. [1998, June 23].

11. For more details on the Spanish Intellectual Property Act (LPI), see http://civil.udg.es/normacivil/estatal/reals/Lpi.html.

12. For more details on US Copyright legislation, see http://www.copyright.gov, and also http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html.

searched in a source, such source has to be mentioned. Data is a term used for "facts", "principles", and "statistics". Data refer to observable and verifiable results and constitute the basis for an assumption or argumentation.[13] Facts and data as such cannot be legally protected. However this does not mean that the sources from other people's data do not have to be mentioned.

4. Linguistic principles and methodological aims relevant to plagiarism

Two working linguistic principles which are at the heart of sociolinguistic and pragmatic approaches to language are relevant to plagiarism contexts. The first principle has to do with language production, because "whenever a speaker or a writer produces a message, he or she will produce a unique and idiosyncratic text with a number of linguistic 'markers' or 'resources' that will make it unrepeatable" (Turell 2004: 7). The second principle involves both language production and reception, in the sense that "in informal spontaneous contexts, speakers and writers, but also, hearers and readers, pay little attention to the form that either speech or writing take; they are therefore not aware of those specific linguistic 'markers' and 'resources' mentioned above, and consequently if these 'markers' remain unnoticed by the authors themselves they will remain unnoticed by any user who would try to plagiarise, imitate or copy them. However, in more formal and less spontaneous contexts such as interviews, articles, translations, where linguistic activity is planned and more attention is paid to the spoken and written forms used, there seems to be a well-trodden path for imitation, copying and plagiarism of the linguistic forms used in the texts produced" (op.cit.: 7–8).

Forensic linguistics views plagiarism as a complex phenomenon, showing clear overlapping aspects with authorship attribution (Grant and Baker 2001; Grant this volume), and forensic stylistics. Coulthard (2005) refers to plagiarism as "one major authorship detection problem" and defines linguistic plagiarism as "the theft, or unacknowledged use, of text created by another". Thus, the concept of idiolect becomes relevant in plagiarism studies. As Coulthard (2005: 261–262) puts it:

> Indeed, linguists from all persuasions subscribe to some version of the 'uniqueness of utterance' principle, (Chomsky 1965; Halliday 1975) and so would expect that even the same person speaking/writing on the same topic on different occasions would make a different set of lexico-grammatical choices. It follows from this that, in any comparison of two texts, the more similar the set of items, the

13. See http://www.lemoyne.edu/library/plagiarism/detection.htm

> greater the likelihood that one of the texts was derived, at least in part, from the other (or, of course, that both were derived from a third text), rather than composed independently.

Although interest in plagiarism has been increasing during the last decade in many countries, the involvement of expert linguists in plagiarism varies from country to country and research on plagiarism cases is still in the early stages, yet more and more pressure is put on linguists to write reliable reports based on reliable evidence (Coulthard 2007). Therefore, there is a felt need to contribute to the theoretically-grounded internal and methodologically-grounded external validity of the evidence used in plagiarism cases.

This means that one primary theoretical aim in the study of plagiarism is the establishment of the linguistic markers and criteria that can be "determinative" in plagiarism detection and description. These linguistic markers will be described when considering different types of plagiarism, but suffice to say for the time being that one major methodological criterion is the establishment of the threshold level of textual similarity between texts which is going to be decisive to determine if that similarity is suspicious. This approach involves trying to answer a much more general question asked by Roger Shuy (FORENSIC-LINGUISTICS discussion list) in 2003, in relation to the degree of difference that there must be between two texts in order to be able to decide if one has been plagiarised from the other. Shuy's exact question was: "How different/how identical is enough?" One ultimate theoretical and methodological aim involved in plagiarism studies that I will also consider is to decide whether or not the kind of plagiarism evidence available may help to establish a *prima facie* case.

5. Plagiarism of ideas

5.1 The legal base of plagiarism of ideas

Plagiarism of ideas occurs when content expressed in some literary (original or translated), artistic or scientific text, or any other type of text, is used in another piece of work as if original. It is obviously much more difficult for linguists to establish plagiarism of ideas than linguistic plagiarism, but it must be remembered that ideas are expressed through language, and this means that if there is linguistic plagiarism, then there is also plagiarism of ideas, although plagiarism of ideas without linguistic plagiarism is possible.

The legal base for plagiarism of ideas is provided in the main Acts which regulate intellectual property in the majority of countries around the world. In Spain,

such Acts are the new Civil Code (1995) and the updated Intellectual Property Act (LPI) of 1996. Rodríguez Tapia (1995: 772–3) cited in Turell (2004: 1) states in summary that "scientific or didactic works are subject to correctness, reliability or obsolescence factors, which are decisive in judicial estimations of degree of originality and subsequent possible plagiarism, and of repentance or regret rights for which Article 14.6 of the LPI provides". He also points out that didactic and scientific works look very much alike because their content is structured around data, generalisations and common ground shared by the scientific community in each area of knowledge. The Spanish LPI does not protect the data, but rather their original selection and grading (Article 12). On the other hand, in the area of intellectual property in translated works, he highlights the fact that a translator's degree of freedom and creativity is higher than in the case of authors of didactic or purely scientific pieces of work and, therefore, it is possible to grant intellectual property to that part of the translation that involves or presupposes an original contribution by the translator. Following Rodríguez Tapia's comment (1995) on the translator's rights established by the Spanish LPI, once the literary translation's originality has been established, this originality falls within the scope of protection established by the LPI. Article 10 of the LPI protects its status as a literary piece of work and article 11 establishes that a translation, which involves a transformation of a prior piece of work, is also subject to intellectual property. Given that the translation is derived from a prior piece of work, its scope of protection is reduced: its title, the original plot, the characters, and proper names (patronymics and toponymics) will not be protected, because these constituents would be liable to the original author's intellectual property rights. The Spanish LPI establishes that "the translator's property will be in the translation, its structure, the syntax, and several common nouns that he/she might have selected as alternative terms to previous translations" (Rodriguez Tapia 1995: 774, cited in Turell 2004: 2).

5.2 Examples of plagiarism of ideas

Plagiarism of ideas would include the following:

a. *The use of structural elements that form the unity of a literary piece of work: plot, characters, place, time, stream of consciousness, and others.*

In Spain, *Formoso v. Cela* is a clear-cut example of plagiarism of ideas. In April 1994, Galician writer Carmen Formoso Lapido registered her novel *Carmen, Carmela, Carmiña* (CCC, from now on) in the Spanish Intellectual Property Registry and submitted it to the Planeta Prize, one of the most prestigious literary prizes in Spain. Nobel Prize laureate Camilo José Cela also submitted his novel *La Cruz*

de San Andrés (LCSA, from now on) for this same prize. At the end of 1998, Formoso's lawyers brought a lawsuit against Cela for misappropriation and plagiarism offence against intellectual property in A Coruña court (Galicia, Spain). In 1999 they presented a new lawsuit in a Barcelona court, but before admitting the procedure the court asked publisher Planeta for the prize requirements and register documentation of both CCC and LCSA. Formoso's certificates were in order but Cela could neither provide a receipt for the submission of LCSA to Editorial Planeta nor his acceptance of the prize requirements, which proved that Cela did not follow the requirements and that he submitted his novel outside the period for submission specified and after Formoso had submitted hers. In the end, the court decided not to admit the procedure, because the defendants (Cela and publisher Planeta), being informed of the development, could conceal evidence, and also because the plaintiff's counsel acted irregularly; however, the judge declared that a similarity existed between the two novels, although he did not allow the investigation to proceed.

The analysis of these similarities facilitates the drawing of the following conclusions which could have helped the court to decide on plagiarism, had the case been sentenced:

i. Both CCC and LCSA narrate the story and relationships between three women from the same family, and since Formoso wrote her novel before Cela, this would imply appropriation of characters on Cela's side.
ii. In CCC the actions takes place between 1931 and 1994, but the central plot occurs between the sixties and seventies, a period which is also chosen by Cela in LCSA.
iii. Both in CCC and LCSA, the location of the story is the Galician city of A Coruña; moreover, there is a coincidence of many places of action, cities, countries and states around the world: *Havana, Buenos Aires, Central Africa, Colorado*; and also specific places and institutions in Galicia: *Torre de Hércules, Instituto Eusebio da Guarda* (where Carmen Formoso attended secondary education), *El Carballo de San Pedro de Nos, Ordés, Betanzos*, and one street in Madrid: *Fuencarral.*
iv. There is coincidence in characters: *Carmen, Carmela* and *Carmiña* in CCC have their correlates in LCSA: *Matilde Verdú* and her daughters *Matty* and *Betty Boop*. It's not only a question of the number and gender of the protagonists, but also their similitude in traits, feelings, occurrence of anecdotes or experiences.
v. There is coincidence of topics: magic, power, sorcery, rituals, solitude, aging, death.

vi. The existence of grammatical errors in LCSA: for example, the use of masculine and feminine pronouns and adjectives, even when the narrator is a female character, or the confusion of the pluperfect – fuera/fuese – due to Formoso's Galician origin, that Cela reproduces.

b. *The use of all or almost all original rhetorical figures from some other literary author, without specific acknowledgement, even if the words used to express those figures are different.*

Another case of plagiarism of ideas involves the use of original rhetorical figures from another author. *Pujante v. Vázquez Montalbán*, a case of plagiarism in literary translation decided by the Spanish Supreme Court in 1993, offers a good example of plagiarism of ideas of this type, since Vázquez Montalbán copies Pujante's brilliant translation into Spanish of the six puns used by Shakespeare in *Julius Caesar*. Example (1) illustrates one of such puns, which appears at the beginning of *Julius Cesar*, during the conversation between Flavius and the cobbler:

(1) A TRADE, SIR, THAT I HOPE I MAY USE WITH A SAFE CONSCIENCE; (I,I,13–14)
P. Señor, un oficio que siempre hace el bien:
VM. Señor, un oficio que siempre hace el bien:
WHICH IS INDEED, SIR, A MENDER OF BAD SOLES
P. a quien mal anda, lo **con-suela.**
VM.[14] a quien mal anda, lo **con-suela.**

In these lines the cobbler plays with the meaning of 'soles' (*suelas*), that is, the under-surface of a shoe, and 'souls' (*almas*), the non-material part of a human body, a wordplay that cannot be achieved in Spanish; however Pujante gives a personal touch to the translation of this pun by playing with the Spanish prepositional phrase *con-suela*, which means "with soles'", and the Spanish verb *consuela* (consolar) which involves to "give comfort". Vazquez Montalbán calques this translation strategy without even changing a comma, as can be observed in (1).

c. *The copying of a translated version, if the translated version itself makes an explicit contribution, by changing this version from prose to verse, or by dehistoricising a classical work, or historicising a contemporary work.*

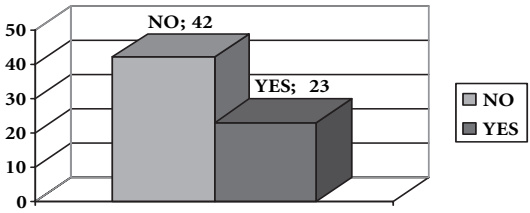
Another instance of plagiarism of ideas in a translation setting is the copy of a translated version. Evidence for this is also found in *Pujante v. Vázquez Montalbán*,

14. Where P. stands for Pujante and VM. for Vázquez Montalbán.

although this circumstance was not the object of litigation at the time the case was taken to court. If Vázquez Montalbán's deromanisation of his translation of *Julius Caesar* were to be copied by a future translator, the resulting translation could constitute an offence of plagiarism of ideas.

d. *In scientific contexts, the use of the same topics in the description of a historical period or in a contribution to a field of specialisation.*

Plagiarism of ideas in the production of scientific works is found in the use of the same topics in the description of a historical period or in a contribution to a field of specialisation. *XXX v. YYY* (conventions used to respect confidentiality requirements) provides an illustration of this type of plagiarism of ideas. An analysis of the thirteen (13) sections into which the disputed article was divided, showed that YYY partially used the same source as XXX's doctoral dissertation, written in 1991. In fact, XXX devoted six (6) of the seven (7) chapters to the central topic, and YYY used this topic in seven (7) out of thirteen (13) sections. It is true that the disputed article also aimed at highlighting the discovery of cinnamon, a topic which is notwithstanding also central to XXX's dissertation; but the bulk of the disputed article's content deals with botany and Spanish commerce in the Philippines. This analysis also showed that there was copying or reproduction[15] of ideas in 23 out of the 65 cases considered (35.5%), as compared to the 42 cases (64.5%) which did not involve copy or reproduction, as is shown in Graphic 1:



Graphic 1. Copy or reproduction of ideas (N). XXX v. YYY

e. *In scientific text books, the reproduction of important structural components of this type of work, such as Activities, Questions and Laboratory Techniques.*

Plagiarism of ideas also occurs, particularly in text books, when there is reproduction of important structural components of such work. *Bruño v. Magister* is

15. Another term that can be used to refer to plagiarism of ideas.

a case, including evidence of plagiarism of ideas, which has already been decided. The final judgment (2006) established that in *Temario Magister* (2005) – the disputed text – publisher Magister copied a number of structural elements such as *Activities*, *Questions*, and *Laboratory Techniques* from the text book, *Física y Química Bruño* (2002) – the plagiarised text. Of the total of 147 Activities included in *Temario Magister* (2005), 98 were also found in *Fisica y Química Bruño* (2002), and with exactly the same words (resulting in a case of linguistic plagiarism to be analysed in the next section) and this amounts to 66% of the units displayed,[16] which proves that the sections related to the methodological aspects of the book *Temario Magister* were not produced independently. Moreover, all the Questions included in the plagiarised text *Física y Química Bruño* (2002), that is, a total of 12, also appear in the disputed text *Temario Magister* (2005), and this amounts to 100% of the units displayed in the original text book.

It could be argued that Physics and Chemistry are disciplines whose content falls within the scope of the common knowledge, but what I am arguing here is that what was indeed copied constitutes an essential part of the structure and derivation of the topics included in such text books.

f. *In scientific text books, the reproduction of a creative methodology devised to teach a particular discipline.*

Finally, one last example of plagiarism of ideas[17] has to do with the reproduction of a creative methodology devised to teach a particular discipline. *ZZZ v. WWW* (conventions used to respect confidentiality requirements) illustrates an example of "supposed" plagiarism of ideas in which the content of what was plagiarised has to do with methodology, in this case, the methodology used in teaching Mathematics to secondary students. In order to contextualise the case it should be mentioned that WWW had been publishing the text books, *Matemàtiques* 1, 2, 3, 4, 5, and 6 from 1992 to 2004 and all these books, which included an Activities volume, had been co-authored by ZZZ and her assistant VVV. In 2005, the same publisher came up with a new text book entitled *Xifra* 1, 2, 3, 4, 5, and 6 (2005), with VVV appearing as unique author. This case raises both theoretical and methodological relevant to plagiarism of ideas.

In this line of thought, it must be mentioned that the most important contribution of forensic linguistics to plagiarism detection involves the establishment of a

16. Although date of publication is a crucial element in deciding the directionalisty of plagiarism – in this case the analysed plagiarised text was published in 2002 and the disputed text, in 2005 –, there are other linguistic strategies which can help in this determination.

17. I am aware that this list is not exhaustive.

series of parameters, markers, resources and discourse strategies that account for an author's methodological proposal.[18] ZZZ's methodological view of the teaching of Mathematics to primary and secondary pupils is based upon the idea that children of that age think in concrete ways, far from the type of abstract thought required in Mathematics. This methodological approach, first proposed in 1992 (when these text-books were first published), was original, and was and is the result of ZZZ's personal research trajectory and also the trajectory of the research team that ZZZ has supervised as principal investigator at the Barcelona Institut Municipal d'Investigació Aplicada a l'Educació (IMIPAE) – Municipal Institute for Applied Educational Research. This methodology involves the following elements:

1. This approach has to do with abstract thought and language, and also specific rules, which make it different from the rest of natural, symbolic, musical, etc. languages.
2. This abstract language is composed of a set of signs with a specific meaning. These signs represent real actions – to add, subtract, separate, measure, compare – and express quantifiable aspects of reality.
3. Different language systems are combined and related: the material action in itself, its graphic representation through a drawing or graph (symbolic language), its linguistic expression (verbal language) and, finally, the canonical mathematical language.
4. Reflection upon the actions to fix the concepts, reinforcement of the learnt concepts and procedure through practical work, and reinforcement of mental arithmetic, since the teaching of Mathematics implies moving from action to thought to reinforcing abstract thought.

The issue was the extent to which these principles were plagiarised.

6. Linguistic plagiarism

According to Coulthard (2005), when forensic linguists are "called in to help a court" (2005: 249) decide plagiarism or authorship determination cases, the detection of linguistic plagiarism usually implies trying to answer the following question: *Who is the author of a particular text*?[19] Taking the notion of *idiolect*, according to which the phrases and sentences occurring in language production

18. ZZZ first proposed this methodology back in 1992 when she presented her Ph.D. dissertation and later on in different articles published and papers submitted to the international community of her field.

19. The other question usually posed is "*What does a given text 'say'?*" (Coulthard 2005: 249).

and use of an individual are unique, the possibility that two writers or two translators produce the same phrases and sentences by chance is low; thus, when a substantial proportion of these linguistic units in two texts under comparison are the same one should suspect that those texts have been produced by the same author, or that plagiarism has occurred between one text and the other, or that they share a common source.

Following Menasche (1977) and Roig (2006),[20] linguistic plagiarism takes place when the following circumstances occur:

- When exactly the same words and/or sentences are used in order to write about one's own or other people's ideas.
- When there exists paraphrase, that is, when someone uses other people's ideas with his or her own words but makes use of the main bulk of the original words, phrases and sentences.
- When one uses several words and sentences without quotations but changes others.
- When the original syntax is maintained and only words are replaced by synonyms.
- When there is acknowledgment of the original author, but the changes only involve one or two words, word order (WO), voice (active v. passive) and/or the verbal tense and aspect of the sentences or the whole text.[21]

As mentioned above, and due to the intrinsic nature of the linguistic sign, if linguistic plagiarism occurs, plagiarism of ideas also takes place. Thus, the notion of plagiarism is usually extended to a) self-plagiarism, that is, when a writer reuses his/her own material or data used in a previous article, without letting the audience know that this text material has been published in another piece of work, and b) the segmentation or fragmentation of data and research results in one or two publications, with the additional implied problem of distortion.

In recent years, forensic linguists who have analysed linguistic plagiarism and acted as expert witnesses in court have had to face two sets of problems. One problem has to do with the request on the court's part for both methodological validity and reliability in their reports, drawn from rigorous qualitative preliminary observation which can then be validated by quantitative techniques. The second set of problems is related to the choice of the best way for the linguist to

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20. See also http://www.sscnet.ucla.edu/history/bartchy/classes/194a/98F/plagiarism.html and http://facpub.stjohns.edu/~roigm/plagiarism/Index.html, respectively.

21. For a complete overview of plagiarism in education and the directions given to avoid plagiarism, see Roig (2006).

present these findings in court "when s/he is asked to rate the strength of the evidence s/he is giving" and "present their evidence in useful and acceptable ways" (Coulthard 2007).

In the sections that follow I present evidence from real plagiarism cases: a) to illustrate different linguistic markers and criteria that have proved useful in determining the directionality of plagiarism; b) to consider the degree of difference or similarity above or below which it can be established that two or more texts have been plagiarised; c) to establish the extent and nature of plagiarism; and finally d) to conclude whether or not the kind of evidence presented in court could help to establish a *prima facie* case.

6.1 Linguistic markers and directionality

As pointed out above, plagiarism directionality – that is, which text has been plagiarised from which – in most cases is resolved by the consideration of the text's date of publication. However in cases where the texts under consideration are contemporary or very close in time of publication, the linguist must find other criteria and linguistic analytical resources and discourse strategies to try to solve this question. Some of these criteria[22] are the degree of unity, completeness and coherence/cohesion of the texts under comparison, that is, the plagiarised and the disputed texts, and several linguistic parameters and discourse strategies.

6.2 Unity, completeness and coherence/cohesion

Bruño v. Magister is a case which illustrates that the linguistic expression, in a unified, complete and coherent /cohesive (Halliday & Hasan 1976) form, of the Content, Examples, Activities, Problems and Laboratory Techniques in a text book can become a powerful qualitative marker to help a court to decide which text is the original and which one has been plagiarised from the former.

In the text book *Física y Química Bruño* (2002) each unit presents in a unified, complete and coherent/cohesive way the competences and abilities to be acquired by learners, the concepts to be learnt, and all the methodological components such as Activities, Examples, Problems, Exercises, etc. This leads us to conclude that *Física y Química Bruño* (2002) is a text book which was produced independently. On the other hand, the presentation that *Temario Magister* (2005) makes of each unit

22. Research conducted by means of further empirical evidence will have to come up with other relevant criteria.

and in particular of many of the Activities included is produced in a fragmentary way, and thus on many occasions one concept does not lead to another concept in a natural and progressive manner according to degree of conceptual difficulty.

On other occasions *Temario Magister* (2005) includes Activities which are meaningless because of the 'cut & paste' technique used. Many times *Temario Magister* (2005) uses the heading of a particular Activity in *Física y Química Bruño* (2002) but the Questions that follow such heading are part of another Activity located somewhere else in the original text. Table 2 illustrates this observation, since *Temario Magister* (2005) combines in Activity 2 the directions of Activity 23 and the Questions of Activity 24 in *Física y Química Bruño* (2002),[23] the plagiarised text. Exact textual similarity in the texts under analysis is indicated in italics.

Table 2.[24] Comparison of Activities in Física y Química Bruño (2002) and Temario Magister (2005)

Física y Química Bruño (2002)	**Temario Magister (2005)**
ACTIVITY 23 (Unit 2, page 40)	**ACTIVITY 2 (Unit 2, page 11)**
23. *Desde la azotea de un rascacielos de 120 m de altura se lanza hacia abajo una pequeña bola con velocidad inicial de 20 m/s. Calcula:* **a) El tiempo que tarda en llegar al suelo.** **b) La velocidad que tiene en ese momento.** **Toma *g* = 9,8 m/s2.**	*2. Desde la azotea de un rascacielos de 120 m de altura se lanza hacia abajo una pequeña bola con velocidad inicial de 20 m/s. Calcula:*
ACTIVITY 24 (Unit 2, page 49)	
24. Se lanza verticalmente hacia arriba un proyectil con velocidad de 200 m/s; al cabo de 4 segundos, se lanza otro proyectil con el mismo objeto. Calcula: a) *La altura a la que se encuentran.* *b) El tiempo que tardan en encontrarse.* **c) La velocidad de cada proyectil en ese momento. Toma *g* = 10 m/s2.**	*a) La altura a la que se encuentran.* *b) El tiempo que tardan en encontrarse.*

23. The actual display reported in the tables that follow was obtained through the execution of CopyCatch.

24. From now on, the fragments in *Física y Química Bruño* (2002), the plagiarised text, and *Temario Magister* (2005), the disputed text, which show exact textual similarity are indicated in italics.

English translation

Física y Química Bruño (2002)	**Temario Magister (2005)**
ACTIVITY 23 (Unit 2, page 40)	**ACTIVITY 2 (Unit 2, page 11)**
23. *From the roof of a 120 metre high skyscraper a small ball is launched downwards with an initial velocity of 20 m/s. Calculate:* **a) How long it takes to reach the ground.** **b) Its speed at that moment.** **Take *g* = 9.8 m/s2.**	*2. From the roof of a 120 metre high skyscraper a small ball is launched downwards with an initial velocity of 20 m/s. Calculate:*
ACTIVITY 24 (Unit 2, page 49)	
24. A projectile is launched vertically upwards as a velocity of 200 m/s; after 4 seconds, another projectile is launched in the same way. Calculate: a) *The altitude at which they meet.* *b) How long they take to meet.* **c) The velocity of each projectile at this moment.** **Take *g* = 10 m/s2.**	a) *The altitude at which they meet.* *b) How long they take to meet.*

6.3 Linguistic parameters and discourse strategies

In the texts under analysis in *Bruño v. Magister,* there are a series of linguistic parameters and discourse strategies (inconsistency in referential style, decontextualisation, inversion in the grading of structural elements, and others), typical of plagiarists, which have been observed in *Temario Magister* (2005), the disputed text, but which do not appear in the plagiarised text, *Física y Química Bruño* (2002) and that lead us to conclude that the former was not produced independently.

a. Inconsistency in referential style

In plagiarised text book *Física y Química Bruño* (2002) direct speech is used by means of the second person imperative to address students in the formulation of Activities, Exercises, Techniques, etc. and this discourse strategy is kept throughout the whole text book. In the disputed text, *Temario Magister* (2005), sometimes there is a change in the address form used to the readership, in that the infinitive is used rather than the imperative. However, this referential change is inconsistent; sometimes the imperative is used but at other times it is the infinitive that is present, which is an indication that *Temario Magister* is copying the original text book by means of the 'cut & paste' technique.

Table 3 illustrates such an inconsistency. Activities 6, 7, 10 and 11 (Unit 11, page 204) in *Física y Química Bruño* (2002), which use the second person imperative, are literally reproduced as Activities 1 and 2 (page 8), and 1 and 2 (page 9) in Unit 11 of *Temario Magister* (2005), using the infinitive on page 8, and the imperative on page 9. This is marked in boldface.

Table 3. Comparison of referential style in Física y Química Bruño (2002) and Temario Magister (2005)

Física y Química Bruño (2002) (page 204)	**Temario Magister (2005) (Unit 11)**
ACTIVITIES 6, 7 & 10, 11	**ACTIVITIES 1, 2 & 1, 2**
6. ***Describe*** *la experiencia de Geiger y Marsden que justifica el modelo atómico de Rutherford.* 7. ***Explica*** *brevemente en qué consiste el modelo de Rutherford.*	(page 8) 1. ***Describir*** *la experiencia de Geiger y Marsden que justifica el modelo atómico de Rutherford.* 2. ***Explicar*** brevemente en qué consiste el modelo de Rutherford.
10. *El kriptón tiene seis isótopos cuyos números másicos son: 78, 80, 82, 83, 84 y 86.* ***Consulta*** *la Tabla Periódica* y ***escribe*** *la notación de esos isótopos indicando el número de protones, neutrones y electrones de cada uno.* 11. *¿Cómo hallarías la masa atómica de un elemento conociendo las masas de sus isótopos y su abundancia relativa en tanto por ciento?*	(page 9) 1. *El kriptón tiene seis isótopos cuyos números másicos son: 78, 80, 82, 83, 84 y 86.* ***Consulta*** *la Tabla Periódica y* ***escribe*** *la notación de esos isótopos indicando el número de protones, neutrones y electrones de cada uno.* 2. *¿Cómo hallarías la masa atómica de un elemento conociendo las masas de sus isótopos y su abundancia relativa en tanto por ciento?*

English translation

Física y Química Bruño (2002) (page 204)	**Temario Magister (2005) (Unit 11)**
ACTIVITIES 6, 7 & 10, 11	**ACTIVITIES 1, 2 & 1, 2**
6. ***Describe*** *the experiment of Geiger y Marsden that justifies Rutherford's atomic model.* 7. ***Explain*** *briefly what Rutherford's model consists of.*	(page 8) 1. ***Describe*** *the experiment of Geiger y Marsden that justifies Rutherford's atomic model.* 2. ***Explain*** *briefly what Rutherford's model consists of.*

10. *Krypton has six isotopes with atomic numbers 78, 80, 82, 83, 84 and 86.* ***Consult*** *the Periodic Table and* ***write down*** *the annotation of those istopes, indicating the number of protons, neutrons and electrons of each one.* 11. *How would you find the atomic weight of an element, if you know the weight of its isotopes and their relative abundance in percentages?*	(page 9) 1. *Krypton has six isotopes with atomic numbers 78, 80, 82, 83, 84 and 86.* ***Consult*** *the Periodic Table and* ***write down*** *the annotation of those istopes, indicating the number of protons, neutrons and electrons of each one.* 2. *How would you find the atomic weight of an element, if you know the weight of its isotopes and their relative abundance in percentages?*

b. Decontextualisation

Temario Magister (2005) presents some examples of decontextualisation in the sense that some Activities included in *Física y Química Bruño* (2002) are reproduced in *Temario Magister* (2005) but part of their description has been omitted so that the Activity is decontextualised. This plagiarism strategy is shown in Table 4, where one part, – namely, "consultando la Tabla Periódica" – of Activity 2 (page 194) in *Física y Química Bruño* (2002) has been deleted in Activity 2 (Unit 11, page 8) in *Temario Magister* (2005).

Table 4. Decontextualisation in Temario Magister (2005)

Física y Química Bruño (2002) (page 194)	**Temario Magister (2005) (Unit 11, pages 8 & 9)**
ACTIVITY 2	ACTIVITY 1
2. *Completa en* tu cuaderno *la siguiente Tabla* 11.2 consultando la Tabla Periódica.	1. *Completa la siguiente Tabla*:

English translation

Física y Química Bruño (2002) (page 194)	**Temario Magister (2005) (Unit 11, pages 8 & 9)**
ACTIVITY 2	**ACTIVITY 1**
2. *Complete* in your exercise book *the following Table* 11.2 consulting the Periodic Table.	1. *Complete the following Table*:

c. Inversion in the grading of structural elements

Another discourse strategy used in plagiarism is the inversion of the grading of the structural elements of a text, in this case, a text book (Activities, Questions, Examples, etc.) resulting in conceptual incoherence. Table 5 illustrates the fact that while in the plagiarised text, *Física y Química Bruño* (2002), Questions 3 and 4 on page 253 are included in this order – since Question 3 requires from

the pupil the integration of the notion of "entalpía" [enthalpy] in the chemical equation of an "exothermic reaction", and Question 4 asks the pupil to think of 2 examples of "exothermic" and "endothermic" reactions, going from particular and applied to a generalisation – in the disputed text, *Temario Magister* (2005), these two Questions are presented inversely and in the context of Questions of a different nature, resulting in conceptual incongruence.

Table 5. Inversion in Temario Magister (2005

Física y Química Bruño (2002) (page 253)	**Temario Magister (2005 (Unit 13, page 10)**
QUESTIONS 3 and 4	**QUESTIONS 1 and 4**
3. *A veces se pone en uno de los miembros de la ecuación química de una reacción la entalpía de reacción. ¿En qué miembro pondrías la entalpía si la reacción fuera exotérmica?* 4. *Escribe dos ejemplos de reacciones exotérmicas y otros dos de reacciones endotérmicas, indicando cómo se escribe la entalpía.*	1. *Escribe dos ejemplos de reacciones exotérmicas y otros dos de reacciones endotérmicas, indicando cómo se escribe la entalpía.* … 4. *A veces se pone en uno de los miembros de la ecuación química de una reacción la entalpía de reacción. ¿En qué miembro pondrías la entalpía si la reacción fuera exotérmica?*

English translation

Física y Química Bruño (2002) (page 253)	**Temario Magister (2005 (Unit 13, page 10)**
QUESTIONS 3 and 4	**QUESTIONS 1 and 4**
3. *Sometimes the enthalpy of reaction is included in one of the parts of the chemical equation for a reaction. In which part would you include enthalpy if it was an exothermic reaction?* 4. *Write down two examples of exothermic reactions, and two more example of endothermic reactions, indicating how enthalpy is included.*	1. *Write down two examples of exothermic reactions, and two more example of endothermic reactions, indicating how enthalpy is included.* … 4. *Sometimes the enthalpy of reaction is included in one of the parts of the chemical equation for a reaction. In which part would you include enthalpy if it was an exothermic reaction?*

6.4 Threshold level of similarity and other measures

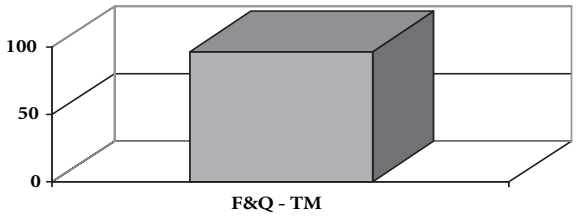
One effective way to start the analysis of possible plagiarism that will form the basis for the final expert witness report to be presented in court is the calculation of the degree of textual similarity between the texts considered. Copycatch, one of the programs currently used to detect plagiarism, allows researchers to come up with the base-line or threshold level of similarity, which will establish the point at which this similarity becomes suspicious. This program incorporates several

measures (*base-line degree of similarity in overlapping vocabulary, shared once-only words, unique vocabulary* and *shared once-only phrase),* which have proved useful in different types of plagiarism detection. In order to determine the *degree of similarity in overlapping vocabulary*, empirical evidence suggests that in any percentage "up to 35% similarity is normal and up to 50% is not unusual, although the further above 50% the more likely it is to indicate" (Turell 2004: 8) that the texts under consideration have not been produced independently and that there exists a borrowing relationship between the texts under consideration. *Shared once-only words* accounts for words that occur only once in each file (of the pairs compared) but occur in both members of the pair; the higher the number of words, the greater the similarity between the two texts. As the terms indicates *Unique vocabulary* looks at the number of words which do not appear in the other text, that is, words which are unique to each text; the assumption is that if two texts have been produced independently, they will include a higher proportion of unique lexical items, than those which have not been produced independently. Finally, the measurement of s*hared once-only phrases* involves that the higher the number of phrases, the lower the probability that the two texts in the file comparison have been independently produced. Taken in isolation, it is possible that all these measurements do not discriminate sufficiently; and then the analyst will have to consider all of those which are more decisive in order to raise 'reasonable doubt'.

The measurements mentioned above were used to test textual similarity in the real case *Bruño v. Magister* by looking at three of the most important structural elements (Activities, Questions and Laboratory Techniques) in *Física y Química Bruño* (2002), the plagiarised text, and *Temario Magister* (2005), the disputed text. Graphics 2, 3 and 4 (pp. 288–290) illustrate the degree of textual similarity by structural element.

a. Activities

Graphic 2 shows that the threshold level of *overlapping vocabulary* (96%) between the Activities that appear in *Física y Química Bruño* (2002) and *Temario Magister*



Graphic 2. Overlapping vocabulary (F&Q – TM) Activities

Table 6. Literal reproduction

Física y Química Bruño (2002)	**Temario Magister (2005)**
[P1 S2] *Entre las magnitudes siguientes indica cuáles son fundamentales y cuáles derivadas: fuerza, aceleración, longitud, tiempo, velocidad, volumen, superficie, temperatura, cantidad de sustancia, masa, carga eléctrica y energía.* {P1 S2}	{P1 S2} *Entre las magnitudes siguientes indica cuáles son fundamentales y cuáles derivadas: fuerza, aceleración, longitud, tiempo, velocidad, volumen, superficie, temperatura, cantidad de sustancia, masa, carga eléctrica y energía.* [P1 S2]

English Translation

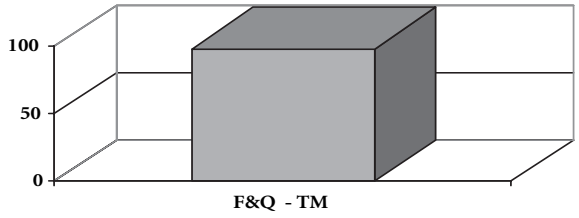
Física y Química Bruño (2002)	**Temario Magister (2005)**
[P1 S2] *Among the following magnitudes, indicate which ones are fundamental, and which ones are derived: force, acceleration, length, time, velocity, volume, surface, temperatura, quantity of matter, mass, electrical charge and energy* {P1 S2}	{P1 S2} *Among the following magnitudes, indicate which ones are fundamental, and which ones are derived: force, acceleration, length, time, velocity, volume, surface, temperatura, quantity of matter, mass, electrical charge and energy.* [P1S2]

(2005) is very high and this means that the Activities included in the plagiarised text have been textually reproduced in the disputed text.

As to the phrases used, CopyCatch generates a comparison by indicating which phrases in one text coincide in the other text under comparison. Although this is not the actual display generated by CopyCatch, where overlapping phrases appear in red and non-overlapping phrases appear in black, a mere look at Table 6 (where similarity is shown in italics), shows that that this particular Activity in *Física y Química Bruño* (2002) is literally reproduced in *Temario Magister* (2005), the disputed text.

b. Questions

Graphic 3 accounts for overlapping vocabulary of all the Questions included in *Física y Química Bruño* (2002) and then reproduced in *Temario Magister* (2005).

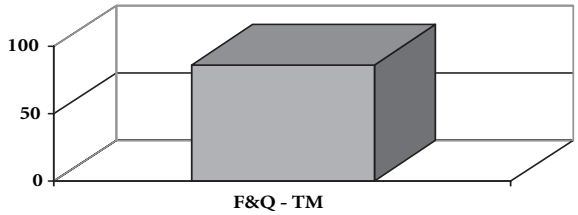


Graphic 3. Overlapping vocabulary (F&Q – TM) Questions

The threshold level in this case is even higher (98%), which indicates almost total textual similarity.

c. Laboratory techniques

Finally, Graphic 4 illustrates the threshold level for overlapping vocabulary in the case of Laboratory Techniques (86%) when comparing the plagiarised text, *Física y Química Bruño* (2002) and the disputed text, *Temario Magister* (2005), which again proves the lack of independent production and confirms suspicious textual similarity.



Graphic 4. Overlapping vocabulary (F&Q – TM) Laboratory Techniques

6.5 A prima facie case

Linguistic analysis of plagiarised literary translation for forensic purposes provides the kind of evidence which may help to raise two theoretical and methodological issues that may be useful for expert witness performance in court. First, it may help to address a *prima facie* case, that is, a case in which the evidence produced is sufficient to enable a decision or verdict to be reached, unless the evidence is refuted. Second, it may help to establish what base-line one needs to have for degree of similarity between translations of the same text, as opposed to the similarity threshold set in the comparison of original texts on the same topic, and the point at which this similarity becomes suspicious. The latter point is important, because what makes plagiarism in translation different from other types of plagiarism, and thus more difficult to detect, has to do with the nature of translation itself. As Turell (2004) points out, on the one hand, all translations will tend to reflect the author's original form and content, and in so doing resemble the original work, and on the other, the more faithful they are to the original piece of work, the more difficult it is to be sure of their originality.

As mentioned above, 50% threshold level of overlapping vocabulary in the comparison of original texts on the same topic is already unusual and a sign that

the texts have not been independently produced However, in cases of plagiarism between translations it seems reasonable to establish the similarity threshold at a significantly higher point, above which it could be considered that the translations under analysis would not have been produced independently. Therefore, the working similarity threshold of *overlapping vocabulary* to establish strong text relationships is set at 70 %, although more empirical evidence is needed to confirm this figure.

Pujante v. Vázquez Montalbán is a case of plagiarism in literary translation which allows us to test the two theoretical and methodological issues mentioned. The data for analysis include four translations into Spanish of Shakespeare's *Julius Caesar*: those of Astrana Marín 1961, Valverde 1968, Pujante 1987 (the plagiarised translation), and Vázquez Montalbán 1988 (the disputed translation).

In order to distinguish between plagiarism of any original text and plagiarism in translation it may be useful to consider the nature of the latter in more detail. From a legal point of view, the translation of a literary work is considered to be another literary work; even if it is the case that the product derived from literary translation also shares several traits with a scientific work. In fact, under the Spanish Acts of Intellectual Property and Comparative Law, a literary work and a scientific work are considered under the same legal and judicial framework. However, as Rodríguez Tapia (1995: 772–773) points out didactic and scientific works look much alike because their content is structured around data, generalisations and common ground shared by the scientific community in each area of knowledge. The Spanish LPI does not protect the data, but rather their original selection and grading (article 12).

In the case of literary translation, the translator's degree of freedom and creativity is higher than in the case of a didactic or a purely scientific piece of work; therefore, it is possible to grant intellectual property to that part of the translation that involves or presupposes an original contribution by the translator. Following Rodríguez Tapia's comment (1995) (cited in Turell 2004: 2) on the translator's rights established by the Spanish LPI, once the literary translation's originality has been presupposed, this originality falls within the scope of protection established by the LPI. Article 10 of the LPI protects its status as a literary piece of work and article 11 establishes that a translation, which involves a transformation of a prior piece of work, is also subject to intellectual property. The scope of protection is reduced however: neither its title, nor the original plot, characters, and proper names (patronymics and toponymics) will be protected. These elements would be part of the original author's intellectual property rights. The Spanish LPI establishes that "the translator's property will be on the translation, its structure, the syntax, and several common nouns that he/she might have selected as alternative terms to previous translations" (Rodriguez Tapia 1995: 774).

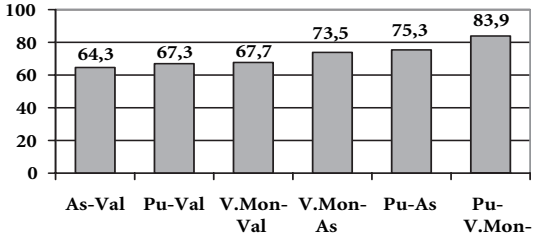
The case under consideration was decided in 1993. Vázquez Montalbán, a quite well-known Catalan writer who regularly wrote in Spanish, was found guilty (Judgment 1268 of the Spanish Supreme Court) of having plagiarised Pujante's translation of Julius Caesar (Espasa Calpe 1987) and having incorporated into his own translation almost the whole of Pujante's translation without his permission.

Following the line of thought set forth by the Spanish LPI on the translator's rights, the Supreme Court judgment considered that in long translations, such as a five-act dramatic work like *Julius Caesar*, the space for originality is much higher than in the case of short translations. The judgment established that the similarities between the disputed translation by Vázquez Montalbán (published by the Centro Dramático Nacional in 1988) and the original translation by Pujante (published by Espasa Calpe in 1987) are qualitatively and quantitatively significant and the court concluded that the defendant had substantially reproduced the original translator's translation. The similarity is not complete but if the original translation is compared to two previous existing translations of Julius Caesar (Astrana Marín 1961; Valverde 1968), it can be concluded that Pujante's translation is original enough to claim intellectual property and protection.

The linguistic measurements that were used to confirm that Vázquez Montalbán had plagiarised the bulk of Pujante's translation were *overlapping vocabulary, shared once-only words, unique vocabulary, shared-once only phrases,* and *qualitative comparison of phrase sharing.*[25]

a. Overlapping vocabulary

Graphic 5 shows *overlapping vocabulary* in every pair of translations that have been selected for comparison in this study.



Source: Turell 2004: 9

Graphic 5. Intertranslation overlapping vocabulary (%)

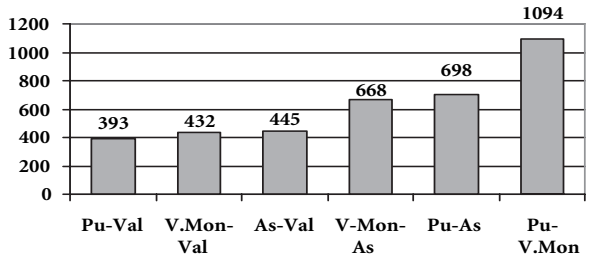
25. For space restrictions, I will only present and discusss evidence related to *overlapping vocabulary, shared once-only words* and *unique vocabulary.*

This graphic indicates that the comparison scores between Vázquez Montalbán's text (the disputed text) and the other three texts are among the highest. However, the highest of all is the comparison pair between Pujante's (the plagiarised text) and Vázquez Montalbán's (the disputed text) which amounts to 83.9%.[26] In view of this evidence, the Court and the other side might have argued that all text comparisons show a high percentage of *overlapping vocabulary*, something which in any case was expected because of the nature of translation itself. This means that the analyst will have to look elsewhere else to find other pieces of evidence that might be more decisive in order to raise "reasonable doubt".

b. Shared once-only words

Another measure that can be used to show strong similarity between two translated texts of the same original is the number of *shared once-only words*, that is, words that occur only once in each file (of the pairs compared) but occur in both members of the pair. The higher the number, both as a raw score and as a proportion of the shared vocabulary, the greater the similarity between the two texts.

Graphic 6 shows the scores for *shared once-only words* in the six comparisons of the translated pairs under analysis. Once more, the highest result (1094 *shared once only words*) is for the file comparison between the plagiarised text (Pujante) and the disputed text (Vázquez Montalbán), which is an indication of a stronger relationship between these two texts.



Source: Turell 2004: 10

Graphic 6. Shared once-only words (N)

26. The high score in the Pujante-Astrana pair (75.3%) was also expected, since Astrana's, the first published translation (1961) of all four, displays a more rhetorical and flowery style, nearer to an Elizabethan one, on which Pujante, a scholar specialising in Elisabethan theatre and therefore knowledgeable about such style, would have drawn to match the original.

c. Unique vocabulary

Table 7 presents comparisons of the all the translations pairings under analysis for unique vocabulary. It is assumed that if two translations have been produced independently, they will include a higher proportion of unique lexical items, than those which have not been produced independently. In Table 7 we can see that, for all comparisons of the other pairings, there is a significantly higher number of unique lexical items than in the Montalbán and Pujante comparisons (17.7 / 20.3)[27] given to the right.

Table 7. Distribution of Unique to each file words by comparison pairs (%)

As-Val		**Pu-Val**		**V.Mon-Val**		**V.Mon-As**		**Pu-As**		**V.Mon-Pu**	
As	45.5	Pu	41.2	V.Mon	40.9	V.Mon	28.5	Pu	32.6	V.Mon-	17.7
Val	25.4	Val	27.5	Val	24.8	As	33.0	As	25.6	Pu	20.3

7. The use of corpora in plagiarism detection

Another approach to plagiarism detection is the use of existing corpora to indicate the rarity or otherwise of the choices made by authors, and thus establish the uniqueness or commonality of the texts produced. In the *Pujante v. Vázquez Montalbán* case I have used the corpus of the Real Academia Española de la Lengua (RAE), and more specifically, two subcorpora, the *CREA* (*Corpus de referencia del español actual*), with 140 million words, and the *CORDE* (*Corpus diacrónico del español*), with 180 million words. The CREA subcorpus was used to account for the uniqueness of Pujante's choices vis-à-vis present-day Spanish. The CORDE diachronic database was used to narrow the searches down to all works written by Cervantes, who was a contemporary of Shakespeare's.[28]

Table 8, reproduced from Turell (2004: 23) shows the results of these searches. The units chosen to do the searches include examples found in the CopyCatch evidence and qualitative analysis of the compared translations. The first figure in each cell indicates the ratio number of cases/ number of texts, and the second figure between brackets is the calculated density for this ratio.

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27. At a more qualitative level, CopyCatch allows the analyst to examine identical and very similar lexical strings by using the *Marked Up-Sentences Only* option. For space restrictions, it will not be possible to illustrate this option with real data.

28. I could have included more extensive CORDE searches, but it would not have changed the results, since the uniqueness of the terms and phrases used was calculated within each database in terms of density, that is, number of cases found per number of texts.

Table 8. Corpora searches in the CORDE and CREA databases of the Real Academia Española

	CORDE	**CREA**
	WORDS	
Carpintero	2/2 (1)	244/128 (1,9)
Mandil	**5/3 (1,6)**	90/52 (1,7)
Escuadra	**20/10 (2)**	319/220 (1,4)
Artesano	0 cases	315/185 (1,7)
Chapucero	0 cases	45/40 (1,1)
Oficio	231/28 (8,2)	3122/1401 (2,2)
Toga	**2/2 (1)**	**129/85 (1,5)**
	PHRASES	
Zapatero remendón	0 cases	11/9 (1,2)
medias suelas	**0 cases**	**9/7 (1,2)**
el yugo de los tiempos	0 cases	0 cases
un aspecto famélico	**0 cases**	**0 cases**
	GREETINGS	
Buenas noches	**0 cases**	**1052/389 (2,7)**
	WHOLE SENTENCES	
Jamás podré apurar la amistad de	**0 cases**	**0 cases**
y quisieran que no fuese tan ciego	**0 cases**	**0 cases**
	IDIOMS	
Vivimos unos tiempos singulares	0 cases	0 cases
(Sin) aguijón	**0 cases**	**175/112 (1,5)**
no volveríais a mirarme a la cara	**40/40 (1)**	**0 cases**
Así es como los dioses censuran al cobarde	**0 cases**	**0 cases**
	PUNS	
A quien mal anda, lo consuela	**0 cases**	**0 cases**

In this table it can be observed that the majority of forms do not show any occurrence in either the diachronic (CORDE) or the contemporary (CREA) corpus and in those cases where occurrences are found, the density of the ratio between number of cases and number of texts is very low. These results would account for the rarity of the choices made by Pujante and thus "confirm that if any of these same choices appear in Vázquez Montalbán's translation, it is very unlikely that he would have produced them independently, that is, without having "kidnapped" them from Pujante" (Turell 2004: 22).

8. Conclusions

In this article I have attempted to demonstrate that the use of quantitative linguistic evidence can assist the analyst in cases of plagiarism and add both internal and external validity to the investigation. At the same time, I have also attempted to answer the question as to whether or not this kind of evidence may help to establish a *prima facie* case.

Textual analysis and statistical significance of *overlapping vocabulary*, *shared once-only words, words unique to each file, shared once-only phrases,* and *identical or similar phrasing* in the texts under comparison allow us to claim that the higher proportion of these counts can be an indication of plagiarism between texts. The question of deciding on the directionality of the plagiarism process can be solved in the majority of cases by mere chronological factors and publication dates.

I hope that this article has raised the theoretical and methodological issues involved in plagiarism detection when analysing cases of plagiarism of ideas and linguistic plagiarism. I also hope that it has helped to deal with one important empirical question, which has been raised but not fully answered; that is, the kind of base-line one needs to have for degree of similarity between translations of the same text, as opposed to the similarity threshold set in the comparison of original texts on the same topic, before we can say that this similarity becomes suspicious. It seems reasonable, due to the nature of translation itself, to have established this base-line threshold at a much higher point than in the comparison of original texts, but we need more empirical evidence before we can safely determine the relevance and significance of this base-line.

Quantitative approaches to the analysis of plagiarism have shown that they can be useful for establishing statistical significance, something which is becoming more and more necessary when presenting evidence in Court and that the use of corpora can be useful for establishing the rarity or expectancy of the choices made by authors. Qualitative approaches to literary plagiarism seem to be useful in cases where semantic and pragmatic information is needed: puns, calquing of semantico-structural features, which have to do with informational packaging (Vallduví 1992), such as end-focus, left-dislocation, right dislocation, and others, figures of speech, dialect and rhyme. So far, this information has not been detected via automatic procedures. At this point, I would like to argue that these two approaches may complement each other.

This article has also uncovered the long-felt need to back the "semantically encoded" opinions with findings that derive from data treated through statistical tools, although again statistically expressed opinions should complement "semantically encoded" ones. As Coulthard (2007: 44) states:

> The majority of forensic linguists and phoneticians have traditionally felt that they were unable to express their findings statistically in terms of mathematical probability and so expressed them as a semantically encoded opinion. Indeed some experts simply expressed their opinion without giving any indication to the court of how to evaluate its strength, or of how that opinion fitted with the two legally significant categories of 'on the balance of probabilities' and 'beyond reasonable doubt': However, a growing number of experts now use a fixed semantic scale and attach that scale as an Appendix to their report to enable the reader to assess the expert's confidence in the opinion s/he has reached. All members of the International Association of Forensic Phonetics also attach a note warning that their evidence should only be used corroboratively in criminal cases, because it is their collective opinion that it is not possible to establish the identity of a speaker with absolute certainty.

Another important issue that this article has raised has to do with the nature of language production itself in the sense that a large percentage of words and sentences occurring in language production and use are unique, and thus that the possibility of two writers producing the same phrases and sentences by chance is very low; thus, when a substantial proportion of words and sentences in the whole text are the same, one should suspect that plagiarism has occurred. I hope to have shown that linguistic knowledge and expertise – at morphological, syntactic, semantic, pragmatic, and discourse levels, and also in contexts of language variation in general (and sociolinguistic language variation in particular) – are indeed essential to addressing and establishing cases of plagiarism.

This chapter is only a starting point for linguists who want to become experts in plagiarism detection and a point of interest to those scholars in other fields interested in Intellectual Property in general. Plagiarism litigation in Spain is still rare and involvement of Spanish linguists in plagiarism cases is low. It is hoped that this article will provide guidance for those engaged in plagiarism litigation in Spanish courts, and will be of interest to those linguists who act as legal consultants in plagiarism cases in courts around the world.

References

Angenot, M. 1983. L' 'intertextualité': Enquête sur l'émergence et la diffusion d'un champ notionnel. *Revue des Sciences Humaines* (LX) 189: 122–135.

Astrana Marín, L. 1961. *William Shakespeare. Obras Completas*. Madrid: Ed. Aguilar.

Barthes, R. 1973. *Le plaisir du texte.* Paris: Seuil.

Cela, C. J. 1994. *La Cruz de San Andrés.* Barcelona: Ed. Planeta.

Coulthard, M. 2005. Algunas aplicaciones forenses de la lingüística descriptiva. In *Lingüística forense, lengua y derecho. Conceptos, métodos y aplicaciones,* M. T. Turell (ed.), 249–273. Barcelona: Publicacions de l'IULA.

Coulthard, M. 2007. In my opinion. In *Proceedings of the Second European IAFL conference on Forensic Linguistics/Language and the Law,* M. T. Turell, J. Cicres & M. Spassova (eds.), 43–56. Barcelona: Publicacions de l'IULA.

Feuillebois, E. *L'intertextualité comme méthode de critique littéraire: définitions et postulats.* (http://www.ivry.cnrs.fr/iran/Archives/archiveRecherche/atelierintertext1.htm).

Formoso, C. 2000. *Carmen, Carmela, Carmiña.* A Coruña: Ed. Punto Crítico.

Fraile, J. 2005. *Xifra 3 Matemàtiques*. Barcelona: Ed. Vicens Vives.

Fraile, J. 2005. *Xifra 3 Matemàtiques*. *Activitats.* Barcelona: Ed. Vicens Vives.

Genette, G. 1982. *Palimpsestes*. Paris: Seuil.

Gómez Granell, C. & Fraile, J. 2004. *Matemàtiques* 3. Barcelona: Ed. Vicens Vives.

Gómez Granell, C. & Fraile, J. 2004. *Matemàtiques* 3. *Activitats.* Barcelona: Ed. Vicens Vives.

Grant, T. & Baker, K. 2001. Identifying reliable, valid markers of authorship: A response to Chaski. *Forensic Linguistics. The International Journal of Speech, Language and the Law* 8 (1): 66–79.

Halliday, M. & Hasan, R. 1976. *Cohesion in English.* Harlow: Longman.

Jenny, L. 1976. La stratégie de la forme. *Poétique* 27: 257–281.

Johnson, A. 1997. Textual kidnapping – a case of plagiarism among three students texts? *Forensic Linguistics* 4 (2): 210–225.

Kristeva, J. 1969. *Séméiotikè. Recherches pour une Sémanalyse.* Paris: Seuil.

Menasche, L. 1977. *Writing a Research Paper.* Ann Arbor MI: The University of Michigan Press.

Mertz, M. L. 2005. Is plagiarism on the rise or just being disregarded at online universities? Contributing Writer to *World Wide Learn*. (http://www.worldwidelearn.com/education-articles/plagiarism.htm).

New York Times (2003) May 11, Times reporter who resigned leaves long trail of deception. Retrieved on 6 June 04 from: (http://www.nytimes.com/2003/05/11/national/11PAPE.html?ex=1088308800&en=a2220c0aa1ded476&ei=5070&th).

Ontañón Palomero, G. et al. 2002. *Física y Química. Bachillerato* 1. Madrid: Ed. Bruño.

Ontañón Palomero, G. et al. 2002. *Física y Química. Bachillerato* 1. *Propuesta Didáctica.* Madrid: Ed. Bruño.

Piegay-Gos, N. 1996. *Introduction à l'intertextualité*. Paris: Dunod.

Pujante, A. L. 1987. *William Shakespeare: Julio César. Traduccón, Introducción y Notas*. Murcia: Universidad de Murcia. (Also published by Espassa Calpe (1987)).

Racionero, L. 1993. *Atenas de Pericles*. Barcelona: Ed. Planeta.

Riffaterre, M. 1980. L'intertextualité est la perception par le lecteur de rapports entre une œuvre et d'autres, qui l'ont précédée ou suivie. *La Pensée* 215.

Rimer, S. 2003. A campus fad that's being copied: Internet plagiarism seems on the rise. *New York Times Late Edition.*

Rodriguez Tapia, J. M. 1995. Traduttore, traditore: Plagio y originalidad de una traducción. Comentario a la sentencia del Tribunal Supremo (Sala 1ª) de 29 de diciembre de 1993. *Revista General de Derecho* 604–605: 771–779.

Roig, M. 2006. Avoiding plagiarism, self-plagiarism, and other questionable writing practices: A guide to ethical writing. First on-line version published in September, 2003**.** Revised online version published in August, 2006

Several authors. 2005. *Temario. Oposiciones al Profesorado de Secundaria. Teoría y práctica programación. Física y Química, Tomo* 2. Madrid: Ed. Magister.
Somville, L. 1987. Intertextualité. In *Méthodes du texte. Introduction aux études littéraires,* M. Delcroix & F. Hallyn (eds.), 113–131. Louvain-la-Neuve: Duculot.
Todorov, T. 1981. *Mikhaïl Bakhtine, le principe dialogique*. Paris: Seuil.
Turell, M. T. 2004. Textual kidnapping revisited: The case of plagiarism in literary translation. *The International Journal of Speech, Language and the Law* 11 (1): 1–26.
Turell, M. T. 2005. El plagio en la traducción literaria. In *Lingüística forense, lengua y derecho. Conceptos, métodos y aplicaciones*, M. T. Turell (ed.), 275–298. Barcelona: Publicacions de l'IULA.
Valverde, J. M. 1968. *William Shakespeare Teatro Completo*. Barcelona: Ed. Planeta.
Vallduví, E. 1992. *The Informational Component*, New York NY: Garland.
Vázquez Montalbán, M. 1988. *Julio César de W. Shakespeare*. Madrid: Centro Dramático Nacional.
Webster Dictionary, (online). 1998, June 23. (http://www.m-w.com).
Woolls, D. 2003. CopyCatchGold. CFL Development.

Cases cited

XXX v. YYY. 2007.
ZZZ v. WWW. 2008
Bruño v. Magister. 2006.
Formoso v. Cela. 1999.
Pujante v. Vázquez Montalbán. 1993

Contributors

Dr. Enrique Alcaraz was Professor of English Language at Universidad de Alicante (Spain), where he was a founding member of the Department of English Philology in the decade of the 70s. He was also the founder of IULMA (Interuniversity Institute for Applied Modern Languages), an institution created to promote the applied study of specialized languages. Alcaraz devoted his academic life to the study of English and Spanish, translation and applied linguistics, introduced numerous students to stylistics, pedagogy, English for specific purposes, legal translation and technical lexicography, and inspired many new ideas for future research in applied linguistics and translation. He was the author of *Tres paradigmas de la investigación lingüística* (Alcoy: Marfil, 1990), *El inglés profesional y académico* (Madrid: Alianza Editorial, 2000), *El inglés jurídico* (Barcelona: Ariel, 2002) and co-author, with Brian Hughes, of *Legal Translation Explained* (Manchester: St. Jerome Publishing, 2002), *Diccionario de términos económicos, financieros y comerciales* (Barcelona: Editorial Ariel, 2004 [1996]) and *Diccionario de términos jurídicos* (Barcelona: Ariel, 2005 [1993]).

Ronald R. Butters retired in September 2007 as Professor of English and Cultural Anthropology and chair of the Linguistics Program at Duke University, where he began teaching in 1967. He received his doctorate in English with concentration in English Linguistics from the University of Iowa in 1967. He is president of the International Association of Forensic Linguists (2008–2009) and is one of the co-editors of *The International Journal of Speech, Language, and the Law*. His interests in language and the law include (1) statutes and contracts, (2) felony appeals based on discourse analysis, (3) copyrights, and (4) semiotic and linguistic issues in trademark litigation. Website: http://trademarklinguistics.com/

Diana Eades (University of New England, Australia) has been doing sociolinguistic research on language and the law for nearly 20 years. In addition to a number of journal articles and book chapters, her publications include the 2008 book *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter), the 1995 edited book *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (University of New South Wales Press), and the 1992 handbook for lawyers *Aboriginal English and the Law* (Queensland Law Society). She has also been

actively involved in legal applications of sociolinguistic research as consultant, expert witness and advisor to several inquiries. From 1995–1999 she was President of the International Association of Forensic Linguists.

Dr. William G. Eggington is a Professor of linguistics and chair of the Linguistics and English Language Department, Brigham Young University, Provo, Utah. Originally from Australia, he received his MA and PhD in Linguistics from the University of Southern California in Los Angeles with specializations in sociolinguistics and language planning and policy development. He has taught linguistics and conducted research while based in universities in Australia, Australian aboriginal contexts, Hawaii and the South Pacific. His research interests include language policy and planning, contrastive rhetoric, discourse analysis and forensic linguistics. He has published four co-edited volumes and numerous articles dealing with these subjects. He has served as a member of the board of directors for TESOL (Teachers of English to Speakers of Other Languages Inc.). He has contributed to the development and/or the evaluation of language services for four Olympic Games; namely the Atlanta, Nagano, Sydney and Salt Lake City games. His forensic linguistics interests and experience cover criminal and civil U.S. federal and state cases involving defendant comprehension of the English language with respect to the Miranda Warnings and other communicative issues. He has also focused on discourse analysis of disputed contracts and wills, trade name to generic name issues, author identification and deception and fraud detection.

Chris Heffer is based at the Centre for Language and Communication Research at Cardiff University, Wales, where he directs the MA programme in Forensic Linguistics. He has a BA in English and Philosophy from Victoria University, New Zealand, and an MA in Applied Linguistics and a PhD in Forensic Linguistics from Birmingham University. He lived and worked in Venice for many years, working both at the University and as a professional translator and editor. After moving back to the UK, he worked at the universities of Birmingham and Nottingham Trent before coming to Cardiff in 2005. He is the author of *The Language of Jury Trial* (Palgrave 2005), the first detailed analysis of the language of legal professionals in English trial by jury, in which he develops a model of legal-lay communication based on strategic tension between narrative and scientific modes of reasoning. He is currently co-editing (with John Conley and Frances Rock) a collection on legal-lay communication after co-hosting a Round Table on this theme. He has also been writing a book on Forensic Discourse. Heffer has a special interest in the language of jury instruction and has published a number of articles in this area in both linguistics and legal journals. He is particularly interested in the way the criminal standard of proof is conceived, debated and delivered across different legal jurisdictions and the effect this might have on due process.

John Gibbons is an Adjunct Professor at the University of Western Sydney. His work is mainly in two areas – language and the law, and bilingualism. He has studied Cantonese-English bilingualism in Hong Kong, Italian-English bilingualism in Sydney, and his most recent research is on Spanish-English bilingualism in Sydney. Publications include *Code Mixing and Code Choice* (Multilingual Matters, 1987), Halliday, Gibbons & Nicholas (eds), *Learning Keeping and Using Language* (Benjamins, 1990), and Gibbons & Ramirez *Maintaining a Minority Language. A Case Study of Hispanic Teenagers* (Multilingual Matters, 2004). He is on the Editorial Board of the *Journal of Multilingual and Multicultural Development*.

Dr. Tim Grant is Deputy Director of the Centre for Forensic Linguistics (www.forensiclinguistics.net) at Aston University. He has a PhD in forensic authorship analysis and also holds postgraduate qualifications in psychology. Previously he taught on postgraduate courses in forensic psychology and at Aston University is involved in establishing postgraduate programmes in forensic linguistics. Within the UK he is an Expert Advisor to the National Police Improvement Agency's Special Operations Executive, a Speciality Assessor for the Council for the Registration of Forensic Practitioners and also sits on the scientific committee of the International Investigative Interviewing Research Group. In 2008 he was awarded the Joseph Lister Award by the British Association for the Advancement of Science for his work in the forensic authorship analysis of text messages and science communication. In the criminal field he has provided expert evidence in cases including terrorist conspiracy, murder fraud and stalking, working for both police and defence. He has also assisted in civil cases of literary and student plagiarism and intellectual property theft. He publishes in both forensic psychology and forensic linguistics and research in authorship analysis includes Grant (2007) Quantifying evidence in forensic authorship analysis (*The International Journal of Speech Language and the Law*). In addition to authorship analysis work he carries out research with the UK police examining the language occurring between offender and victims in serious sexual assaults and rape.

Phil Hall has worked for Appen Speech and Language Technology since 2001, and is currently the Business Development Manager. He has contributed to speech and language related projects for commercial, law enforcement and intelligence applications in a wide range of languages. The projects include US Government funded projects for the development of Forensic Linguistic tools for Data Stream Profiling (a security and on-line child protection tool using linguistic and keystroke analysis to profile and/or identify computer users), and for Authorship Attribution/Author Profiling. Hall's research interests are in the areas of police interrogation, and the grammar and semantics of information exchange.

Dennis Kurzon is Professor of linguistics in the English Department at the University of Haifa, Israel. He is a member of the editorial boards of the *Journal of Pragmatics* and the *International Journal for the Semiotics of Law*. He co-edited with John Gibbons the Law and Language section of the *Elsevier Encyclopedia of Language and Linguistics* (2005). Kurzon deals with legal language, especially legal pragmatics and also with the pragmatic analysis of silence, both in the legal field as the right of silence and also in other contexts. His book *Discourse of Silence* was published in 1998. He has recently published other articles on silence. Other research interests are Indian sociolinguistics (e.g. *Where East Looks West: Success in English in Goa and on the Konkan Coast*, 2003), linguistic landscape, especially in the Indian context, and adpositions; Kurzon has edited two books on prepositions and postpositions (2002 and 2008).

Ester Leung has worked as a free-lance interpreter for the legal institutions in the UK while pursuing her doctoral study at Lancaster University. She returned to Hong Kong in 1997 to teach legal English for her first full-time job and later joined the Translation Programme of Hong Kong Baptist University to teach subjects of her own interests such as legal translation, interpreting, gender and translation. She enjoys experimenting and utilizing different methods in exploring different issues in translation study and its relation with discourse analysis. One of her research products includes a corpus which consists of the bilingual legislation of the sexual offence ordinances and proceedings of rape trials; it is made available to the public at the website: http://cpdb-arts.hkbu.edu.hk

Jill Northcott is Head of English for Business and Law at the University of Edinburgh's Institute for Applied Language Studies (IALS). She designs and teaches courses for professionals, students and teachers of English for Specific Purposes. In addition to her work with an international body of learners in Edinburgh, consultancy work has provided insights into the varied contexts where English for Legal Purposes is learnt and taught. Examples include working with court interpreters in Zimbabwe, judges in training in Lebanon, and Legal English textbook writers in Romania. Research interests focus mainly on ethnographically-oriented investigation of academic and professional contexts. She has published in the journal *English for Specific Purposes* and is a member of the editorial board of the *Journal of English for Academic Purposes* (JEAP).

Richard Powell studied history at Cambridge, political science at London and linguistics at Macquarie Universities, and trained to be a solicitor at the College of Law in London. He has worked in Japan for more than 15 years, where he is Professor of English at Nihon University in Tokyo. His main areas of research are bilingualism in legal systems, language disadvantage before the law and postcolonial

language planning. His publications include books on courtroom code-switching (*Motivations for Language Choice in Malaysian Courtrooms*, University of Malaya, 2008) and Asian Englishes (*English in Asia, Asia in English,* Prounsoup, in press 2008) and textbooks for teaching law in ESP contexts (*Viewpoints in Law*, Macmillan Language House, 1996; *Law Today*, Longman, 1993) and has also written several articles on language planning (e.g. for *Current Issues in Language Planning*). He is also an active presenter at international conferences, including *World Englishes*, *Englishes of Southeast Asia*, the *International Association of Forensic Linguistics* and the *Law and Society Association.* While focusing on East and Southeast Asia, he has also done research in South Asia and East and West Africa, and is currently involved in an international project on the discourse of arbitration in which he is examining differences between arbitral and adversarial conflict resolution in Japanese and Malaysian contexts.

Peter Tiersma is Professor of Law and Joseph Scott Fellow at Loyola Law School in Los Angeles. He was born in the Netherlands, immigrated with his parents to the United States at five years of age, and grew up on a dairy farm in California's Central Valley. Following graduation from Stanford University, he received a PhD in linguistics from the University of California, San Diego. Subsequently, he obtained a J.D. from Boalt Hall School of Law at the University of California in Berkeley. He clerked for Justice Stanley Mosk of the California Supreme Court, worked in private practice for three years, and has been teaching at Loyola Law School since 1990. Tiersma is the author of the books *Frisian Reference Grammar* (Foris Publications, 1985), *Legal Language* (University of Chicago Press, 1999), and *Speaking of Crime: The Language of Criminal Justice* (with Lawrence Solan, University of Chicago Press, 2005), as well as several articles dealing with language and law. He is a member of the California Judicial Council Advisory Committees on Jury Instructions (both civil and criminal). Further information is available at www.languageandlaw.org

M. Teresa Turell is Professor of English Linguistics at Universitat Pompeu Fabra (Barcelona, Spain). She is director of ForensicLab (www.iula.upf.edu/forensiclab) at Institut Universitari de Lingüística Aplicada (Universitat Pompeu Fabra, Barcelona) and Academic Director of the Master's programme in Forensic Linguistics (IDEC-IULA) in this same university. She holds a BA Honours in English Literature and Language (1973) and has a Master's degree in Linguistics and ELT (1975), a PhD in Catalan Philology (1981) and a Master's degree in Forensic Linguistics (2008). Professor Turell has conducted extensive research on Catalan and English sociolinguistic variation, qualitative and quantitative studies of language contact and, more recently, analysis of forensic authorship attribution

and plagiarism. Results of this research have appeared in *Language Variation and Change, Language in Society, Treballs de Sociolingüística Catalana* and *The International Journal of Speech, Language and the Law.* She is the author of *No One-to-One in Grammar* (Barcelona: Publicacions de la UB, 1983) and *Elements per a la Recerca Sociolingüística a Catalunya* (Barcelona: Edicions 62, 1984) and the editor of collected works such as *Nuevas Corrientes Lingüísticas* (RESLA, 1990), *La Sociolingüística de la Variació* (Barcelona: PPU, 1995), Multilingualism *in Spain* (Clevedon: Multilingual Matters, 2001), *Lingüística Forense, Lengua y Derecho. Conceptos, Métodos y Aplicaciones* (Barcelona: Publicacions de l'IULA, 2005) and *Plurilingüismo en España* (Barcelona: Publicacions de l'IULA, 2007).

In Memoriam

Enrique Alcaraz, one of the contributors to this volume, passed away as this book entered its production stage. He was a respected scholar in the many areas of applied linguistics that he developed, but we would like to remember him also as a passionate linguist who helped in the launching and development of forensic linguistics, or legal linguistics, as he liked to refer to the discipline, in Spain, and also at an international scale. Enrique Alcaraz published outstanding volumes on applied linguistics and translation studies, lectured on legal English in several European and US universities, and gave talks to Spanish High Court judges. He will be greatly missed and remembered for his intellectual capabilities and his academic and personal generosity.

M. Teresa Turell and John Gibbons
The editors

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