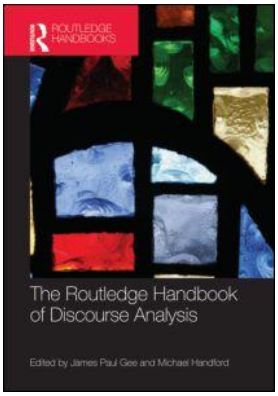

The Routledge Handbook of Discourse Analysis

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Discourses in the language of the law

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Discourses in the language of the law

Edward Finegan

The most dramatic and most often dramatized stage for displaying and observing legal discourse is the courtroom. There judges preside over criminal and civil trials in which the task is to determine the facts and, in light of them and the application of relevant law, to render a verdict or decision. Courtroom trials are witness to opening and closing statements, to direct examination and cross-examination with objections by counsel and rulings by the court, and to jury instructions; they are preceded by examination of prospective jurors under oath, a process known as *voir dire*, and may be peppered by in-chambers discussions between judge and attorneys; and they often draw to a close with jury deliberations. Television shows treating the law emphasize courtroom drama in criminal cases, and some semi-judicial civil law courtroom shows have large followings, for instance the US program "Judge Judy," which has been the focus of professional discourse analysis (van der Houwen, 2005). Some domains of legal discourse exercise their strongest impact on litigants, some on jurors, some on attorneys, some on judges, and so on. Appellate court (i.e. court of appeals) opinions exert extraordinary impact on judges and attorneys and are the most widely influential discourses in common law theory and practice. The role of legislation—the literal "language of the law"—is overshadowed insofar as its interpretation by appellate courts constitutes the precedents of common law. Such appellate opinions also suffuse law school classrooms and teach prospective lawyers what it means to use discourse in a lawyerly fashion, to think like a lawyer—indeed, to be a lawyer (Mertz, 2007).

Although some domains of legal discourse are better researched than others, legal discourse in general is understudied, and no domain is yet well understood. Among the most important but least studied forms of discourse, jury deliberations remain largely immune to analysis because of their secrecy (but see Conley and Conley, 2009); the same holds for face-to-face interaction between attorneys and clients (but see Sarat and Felstiner, 1995). Legislation itself has been examined, but little is known about the negotiations that underlie legislative drafting (see e.g. Bhatia *et al.*, 2003 and about cross-linguistic and cross-cultural perspectives Gotti and Williams, 2010). Still, the importance of the various forms of legal discourse cannot be exaggerated, and the growing interest in them is to be applauded.

What is discourse in the language of the law?

Given the wide scope of the law and its reach beyond courts and attorneys, most kinds of legal discourse cannot be addressed in a chapter. This chapter notably excludes statutory language, the

language of legal consultation and arbitration, jury deliberations, and all non-public discourses. Far more legal work and dispute resolution takes place orally and in private between attorneys and clients, attorneys and attorneys, attorneys and prosecutors, and attorneys and officers of the court than the record of published research might suggest. Conclusions from these interactions may be memorialized in writing, and some forms of interaction, such as police interviews of suspects, are increasingly video-recorded, but we lack sufficient substantive information about the discourse of such consequential interactions (but cf. Berk-Seligson, 2009 and Eades, 2009). Neither can we address certain registers of courtroom interaction such as jury instructions, by which jurors are instructed in the law as it relates to the issue before them. Likewise for the comprehensibility of legal documents and the plain English movement—important matters to which discourse analysts still have much to contribute. Nor can certain complex arenas in legal language even be noted beyond citing bibliographies (Levi, 1994), standard works on legal language (Tiersma, 1999), textbooks and handbooks about forensic linguistics (Coulthard and Johnson, 2010; Eades, 2010), and the *International Journal of Speech, Language and the Law*. In those arenas there are adequate and accurate transcriptions of courtroom trials and other oral proceedings, courtroom interpretation, second and foreign language speakers, non-standard dialect speakers and speakers of dialects unfamiliar to the courts, and an increasing range of forensic matters, including discourse analysis of interrogations, confessions, or accounts of conspiring and defamation (Shuy, 1998, 2010). Indeed, what might be understood even in a narrow interpretation of legal discourse includes so many registers and discourse-related questions that even a superficial analysis would be impossible here.

Centrally, the phrases "language of the law" and "legal discourse" refer to (a) language that arises in statutory law; (b) the interpretation of statutory law in judicial opinions; (c) various forms of courtroom language, including opening statements and closing arguments, direct examination and cross-examination of witnesses, and jury instructions; (d) written contracts that create legal obligations, including rental agreements, insurance policies, wills, and liability waivers. Less central perhaps, but crucially important in people's lives and a frequent topic of analysis by forensic linguists, is the wide array of registers representing interaction between institutional operatives and ordinary citizens, including police interviews of persons of interest and criminal suspects; ordinary electronic and other correspondence examined in connection with possibly illegal communication; and face-to-face and telephone conversations (for example, surreptitiously recorded interaction between persons suspected of conspiring to commit a crime).

I focus here on three kinds of legal discourse: the formal talk of lay litigants in small claims courts; the language of attorneys and witnesses in cross-examination, as illustrated in a brief excerpt from a rape trial; and certain aspects of the discourse of appellate court opinions. The first forcefully illustrates how the ordinary discourse of some social groups, when deployed in a courtroom setting, can place members of those groups at a disadvantage before the law, as compared with other social groups. Both the first and the second kinds demonstrate the conflict between views of fairness and justice held by ordinary citizens and the enormous power of institutionalized and structural superiority. The third kind is examined here because appellate court opinions exercise such a powerful effect at so many levels, from law school students, who are in turn the main players in propagating the social structures imposed by and through the law, to attorneys and lower court judges and the litigants and other participants in their courtrooms, and out on to the streets, where such opinions ultimately have their most important effects. In all three arenas—and all those not touched on here—"the details of legal discourse matter because language is the essential mechanism through which the power of the law is realized, exercised, reproduced, and occasionally challenged and subverted" (Conley and O'Barr, 2005: 129). This chapter is written with that observation in mind.

Demographics and lay litigants' talk in court

In small claims or magistrates' courts, litigants aim for dispute resolution over relatively small economic matters (as compared to ordinary civil suits), but the disputes in small claims courts often represent matters of social importance and quotidian views of fairness and justice. In such courts, litigants represent themselves, usually without guidance or assistance from attorneys. Extensive work in the 1980s revealed the extent to which different forms of lay discourse can affect the internal workings of litigation in small claims courts, and in particular whether characteristic discourse practices of speakers from different social groups and genders influence the outcome of their claims. Conley and O'Barr (1990) present a distilled analysis of 466 small claims court cases in six US jurisdictions. Their ethnography is rich in detail and we focus on only one aspect: the rule-oriented accounts and relational accounts identified as the two principal kinds of discourse characteristic of lay litigants.

Rule-oriented accounts are characterized by a tendency to: (1) base claims for relief on violations of specific rules, duties, obligations (as in contracts); (2) follow a sequential order in a straight-line narrative telling; (3) deal with cause and effect and human agency; (4) be highly factual in ways that are relevant to the law; (5) report names, dates, content of conversation in detail and as relevant to a specific alleged violation; (6) describe documents in detail; and (7) assume no prior knowledge. They are, in other words, just what a judge needs to know in order to address the legal matter at issue, just what a judge is pleased to hear. Put otherwise, rule-oriented accounts tend to honor Grice's maxims of relevance, manner, quantity, and quality.

Below is an example of *a rule-oriented account*, as presented in a small claims court case in which an employee (Dan Webb) sued his employer (represented by Lynn Hogan) in connection with a promotional bonus for a spectrometer sale that the employee felt entitled to but did not receive.

JUDGE: Let's turn over to you ma'am. We do need your name, business address, and connection with the uh, Instrument Supply Company.
[…]

HOGAN: Okay, thank you. Um, as uh Dan stated, uh, Instrument Supply is a scientific distributor. Uh, we represent over 1500 manufacturers and we sell over 60,000 products. Um, we are continuously being exposed to gimmicks from our manufacturers to boost the sale of their products. Uh, the only control that management has, um, over these prod-, over these promotions, is to pick and choose the ones that uh, best support our local selling programs, where we want the local emphasis to be. Um, then it is my responsibility, as well as the district manager, to assist the sales reps in focusing on these sanctioned programs. Uh, in order to keep track of what we have sanctioned, we have a calculation sheet that specifically shows the sales representative what we are sanctioning. I have highlighted that that particular promotion for spectrometers was on the first half, from March until August of 1984, giving the particular payouts, and as you'll see there is a $200 payout there for 1001 Spectrometer.

[there follows additional testimony by Hogan, a question from the judge, and a further lengthy reply from Hogan; then…]

JUDGE: Go right ahead.

HOGAN: For the second half, and this goes with that one other thing that I gave you, this is the second half PIP calculation sheet, and you will see on there is no Diller and Macy payout for the second half.

(Conley and O'Barr, 1990: 64–66)

In her testimony, witness Hogan makes no reference to any personal relationship with Mr. Webb or to irrelevant past history but focuses on whether Instrument Supply Company had a contractual obligation to pay certain monies to employee Webb, as he claimed. In other words, her testimony addresses the particular issue in dispute and does so with appropriate details of dates, monetary amounts, and agency. In that sense, her testimony honors the Gricean cooperative principle as they apply to this legal proceeding.

In contrast to rule-oriented accounts, relational accounts tend to identify claims for legal relief (1) based on general rules of social conduct; (2) focused on personal status and social position; (3) displaying a view that decent folks who meet their social obligations are entitled to fair treatment; (4) relying on details about the personal life of the speaker and other matters that are irrelevant to the law's concerns; and (5) displaying idiosyncratic treatment of time and of cause and effect. Relational litigants focus on "status and social relationships," believing "that the law is empowered to assign rewards and punishments according to broad notions of social need and entitlement"; they "strive to introduce into the trial the details of their social lives [and] emphasize the social networks in which they are situated, often to the exclusion of the contractual, financial, and property issues that are typically of greater interest to the court"; as Conley and O'Barr (1990: 58) note, "the courts tend to treat such accounts as filled with irrelevancies and inappropriate information, and relational litigants are frequently evaluated as imprecise, rambling, and straying from the central issues."

The account below exemplifies the characteristics of *relational discourse*. Conley and O'Barr characterize the testimony as that of "an unsuccessful plaintiff (Rawls) who has sued her next-door neighbor (Bennett) for removing a hedge on her side of the property line, failing to control the growth of his shrubbery onto her property, and generally harassing her."

JUDGE: You're alleging that these trees and, and the shrubs and apparently the hedge included were removed. When did this happen?

RAWLS: Oh, well now that happened this year. At, uh—

JUDGE: And how did it happen?

RAWLS: Well I can, well, well I have to jump back because, uh, for three years when Mr. Bennett moved back—because he was there once before and then he moved and then he come back into that house—and all the time before—I have to say this though Judge—because all the time before everybody took care of that hedge and they wouldn't let me take care of it. They trimmed it and I even went to Mr. Bennett when he was there before—

JUDGE: Wait a moment. Now the question that I asked you—and I would like to have you answer it—and that is how did the hedge get removed?

RAWLS: Well, um, Mr. Bennett said he told me when he moved back in, uh, because I was taking care of my trees coming up through the hedge, I was cutting them off and he told me not to do that. He said, "Don't do it," he said, […] And that's when I told him, and he said he would do it, "I and the church would take them out," and I, that's when I told him, "If you need, uh, money for a tool or something to help you. I'll pay for the tool or whatever." And he told, didn't do it, and so then I just had a, the Milehigh, uh, Tree Service come uh, uh, and um, a, and Mr., I had his name here—Mr., uh, Cook come and he come in the house and sat down with me and he looked at that and he said well he surely should help in the shrubbery in the back because there's shrubbery in the back that was over on my line that I've got to take out and I've got pictures of that too, sir. And he said he didn't know what the man or what the man was because the tree was dead why didn't he take it out? Well all he wants to do is harass me so he leaves it there so I

> have to keep taking the stuff out and bending over and using my trashcan, you know. This is something else. I only got one can. Why don't he pick up his own trash? And so I went ahead and paid it. He told me he would come if I need. He says, "I'll cut it when you need me." Yet I could never get this man. I tried to have him subpoenaed, yet I could never get him because I think Bennett got to him first. But, anyway I got the Milehigh Tree Service here for 275, and I got his mess in the backyard—if you want the pictures here—that's what I took them for.
>
> *(Conley and O'Barr 1990: 61–63)*

I have underscored the judge's question and what seem the relevant facts in response to it. All the rest—and it is a good deal more than here included, as represented by the bracketed ellipsis points—seems non-responsive or extraneous to the judge's question. In particular, there are details completely irrelevant to the issues in the case (*I only got one can. Why don't he pick up his own trash?*). There are direct quotes of earlier exchanges between Rawls and Bennett (Bennett: *"I and the church would take them out."* Rawls: *"If you need, uh, money for a tool or something to help you. I'll pay for the tool or whatever."*). Supporting statements from third parties are offered and details about the circumstances surrounding those statements (he sat down with me and he said well he surely should help in the shrubbery because…). From first-hand reports by judges who regarded "relational litigants as hard to follow, irrational, and even crazy," Conley and O'Barr (2005: 73) conclude that such litigants "have a harder time gaining access to justice than do their rule-oriented counterparts."

Rule-oriented and relational litigants fall along a continuum, the kinds of discourse exemplified above representing discourse at either end of the spectrum. In an important observation that cannot be pursued here, Conley and O'Barr take the position that relational litigants are more typically women than men and conclude that, if rule-oriented discourse, "powerful discourse," is patriarchal, then

> the law's preferences for it both reflects and reinforces the essential patriarchy of legal discourse.
>
> When the law, as personified by judges, reacts more favorably to rule-oriented accounts, it is granting privileged status to linguistic practices that historically have been more associated with men than with women … the law is preferring the abstract, rule-driven logic typical of men to the more contextual reasoning that characterizes women. … In this way, the law's linguistic practice reveals its fundamental patriarchy. The details of the interactions between judges and rule-oriented litigants comprise the mechanics of translating patriarchy into social action.
>
> *(Conley and O'Barr 2005: 74)*

Whether the intervening decades since this research was carried out have made a significant difference in the realization of relational and rule-oriented discourse between men and women is an important question. A broader point useful to underscore is that a system of justice that privileges one style of discourse over another, whether the discourse is based in gender or any other social category, is fundamentally unjust to the extent that members of some groups have greater access to the privileged discourse style than members of other groups. "Over and over," Conley and O'Barr (2005: 74) report, sociolegal analyses "have shown the gap between the claims of law-in-theory and the realities of law-in-action."

Patriarchy in cross-examination of rape victims

Next, in order to exemplify other challenges laypersons face in their efforts to tell a story in their own words and on their own terms, I rehearse a couple of aspects of the character of cross-examination in a rape trial. Instead of the simple, informal procedures of a small claims court, a

formal courtroom trial with judge, jury, prosecutor, and defense attorney are in play in an adversarial system, in which cross-examination is inherently hostile. In the original analysis by Matoesian (1993), several aspects of cross-examination are explored in which the plaintiff, the rape victim, is being cross-examined by the defendant's attorney. Matoesian explores the examining attorney's use of topic management and commentary, as well as other phenomena. Here we focus on questions and the forms of the answers they constrain a witness to give. The aim is to illustrate and highlight the following contention: "Cross-examination is an adversarial war of words, sequences, and ideas, a war in which the capability to finesse reality through talk represents the ultimate weapon of domination" (Matoesian, 1993: 1).

In his compelling analysis, Matoesian contrasts the locally managed turn-taking of ordinary conversation with the institutionally structured turn-taking of cross-examination. He notes that, in trial talk,

> the scope of opportunity to talk is both differentially and asymmetrically distributed across social structure [and] nonconversational speech exchange systems preallocate… the opportunities for action. Differential access to the procedures of talk is prestructured or built into the social organization of particular speech exchange systems, constituting a major resource of power and constraining the form of the interaction.
>
> *(Matoesian, 1993: 98–99)*

Like Conley and O'Barr, Matoesian emphasizes the patriarchy of legal discourse, arguing that in a rape trial the accuser is subjected to a discursive rape. In the slightly adapted excerpt below, DA stands for defense attorney; V for victim (the accuser); J for judge; and PA for prosecuting attorney. Underlining indicates stress or emphasis; capital letters indicate raised volume; a degree symbol ° represents speech delivered in a "considerably lowered volume compared with surrounding talk"; (.) represents a gap of a tenth of a second or less; punctuation represents intonation rather than grammatical features. I have normalized spellings (e.g. replacing *did'ju* with *did you*) and omitted most marked time lapses and the attorney's false starts.

DA: Did you know Brian's last <u>name</u>? when you left the parking lot that night?
V: °No
DA: Did you know where Brian was <u>from</u>? when you left the parking lot- that night?
V: °From Illinois.
[two similar exchanges between DA and V are omitted here]
DA: Did you know where Brian <u>worked?</u> when you left the parking lot that night?
V: °No
DA: Did he force you to get in- to his automo<u>bile</u> in the parking lot?
V: °No
DA: How did you wind up in his automobile?
V: I got in.
DA: <u>WHY::::.</u>
V: Because he said we were going to a party at a friend of his house.
DA: But you didn't kno::w (.) <u>his last name</u> (.) <u>where he worked</u> (.) or <u>where he was from</u> correct?
V: °Yes.
DA: You didn't know a <u>thing about him</u> did you?
V: °No.

(Matoesian, 1993: 131–132)

Several contrasts between ordinary conversational interaction and the asymmetrical rules of turn-taking that govern cross-examination are painfully apparent even in so brief an excerpt. For example, while in face-to-face conversation the speaker holds the floor and can designate the next speaker, in a cross-examination the floor belongs to the examining attorney once the judge so assigns it. In the course of the examination, once an answer is given, the floor automatically returns to the attorney, who thus generally controls topics, timing, and the form of questions. The cross-examining attorney asks questions of the witness, who answers and is constrained to yield back the floor. Other than for a request to clarify, in which the tables are briefly turned as the witness asks a question of the attorney, control of the speech exchanges belongs to the attorney. As a consequence, the institutional norms of turn-taking in courtroom testimony create a greatly imbalanced interaction as compared with ordinary conversation, and only attorneys are practiced in this kind of highly structured exchange. Even a glance at a transcript of an ordinary conversation will reveal how differently structured a cross-examination is. A scarcity of overlapped turns, lengthy pauses between turns (omitted in the transcript above), rhythmic patterns of question and answer, and the brevity and volume of the attorney's questions, and especially the witness's answers, are among other notable characteristics of cross-examination. Five of the witness's eight answers in the excerpt are monosyllabic, and six of eight are marked as of distinctly lowered volume, risking a suggestion of shame to jurors. In addition, the attorney invokes rhetorically persuasive moves such as the three-part list (*last name, where he worked, where he was from*), the "puzzle sequence" (*How did you wind up in his automobile?/I got in./WHY::::.*), and the attempted knock-out punch (*You didn't know a thing about him did you?*). With all the patriarchal assumptions built into such a question, Matoesian argues, a jury could readily believe that the victim is at fault. Whereas, in ordinary conversation, floor and topic selection are locally managed, in cross-examination the defense attorney manages the floor throughout and lends the floor to the witness solely to answer the questions asked. Those questions, as we will see, are generally of the most constraining kind. Judges, of course, may take the floor at any time for any reason, and opposing counsel may object when an objection is warranted; in case of an objection, the interaction between defense attorney and witness is put on hold until the judge rules on the objection.

In the excerpt above, which has equally apportioned turns, the defense attorney speaks about four times as many words as the witness. This imbalance results directly from the structure of the questions, nearly all of which are closed questions that constrain the witness to minimal "yes" or "no" answers in five of her eight turns. Tag questions in particular—"correct?" and "did you?"—are even more powerful: they compel an answer and constrain its form while enabling the defense attorney to enter statements into the record (and jurors' ears) in the attorney's words, not those of the witness, as in the two below:

(1) But you didn't kno::w (.) his last name (.) where he worked (.) or where he was from
(2) You didn't know a thing about him

Such questions differ importantly from open questions, which permit a witness to choose her own words, as in *Because he said we were going to a party at a friend of his house*. But open questions in cross-examination are scarce, the only one in this excerpt (*WHY::::*) being highly accusatory in volume (upper case letters), stress (underscore), and length (four colons). Closed questions and tag questions exert powerful constraints on a witness who is attempting to relate her story. By contrast, open questions leave a witness some latitude in answering. In cross-examination, however, such "open" questions are highly constrained and strategically directed to arenas where an open question is difficult to respond to.

In rehearsing some of Matoesian's findings, Conley and O'Barr view revictimization as having little to do with rules about introducing evidence about a victim's prior sexual history, as is

commonly believed. Instead, they urge us to look at "the linguistic details of common cross-examination strategies that are taken for granted in the adversary system," and they argue persuasively as follows:

> Rape victims are … revictimized … not by any legal rules or practices peculiar to rape [but by] the ordinary mechanics of cross-examination that, in this extraordinary context, simultaneously reflect and reaffirm men's power over women. The basic linguistic strategies of cross-examination are methods of domination and control.
>
> *(Conley and O'Barr, 2005: 37)*

Appellate court opinions, appellate court briefs, adverbs and intensifiers

Solan (1993: 1) has observed that serious judges struggle with the balance between making what is often a very tough decision and the presentation of an opinion that depicts the decision as logical, even inevitable. In this section I focus on appellate court opinions, including those of the United States Supreme Court. I also report some findings about the discourse of legal briefs submitted by attorneys in appellate cases.

Appellate courts, including state and federal supreme courts in the US, establish jurisprudential precedent. They are thus the most important courts in terms of jurisprudence, but, because they are not trial courts, citizens whose understanding of the legal system derives from film and television dramatizations of courtroom trials in criminal cases may infer a fundamentally skewed view of the justice system. Limiting their scope to the trial record of a court below, augmented by written pleadings and very brief oral presentations from each side, interrupted freely by questions from appellate judges, it is appellate court opinions—majority, minority, concurring, and dissenting—that enshrine jurisprudence. From appellate courts come decisions and opinions that, as much as statutory law, constitute the theoretical and practical jurisprudence of a common law judicial system.

Partly as a consequence of researchers' recognizing the importance of such opinions in supporting a law-abiding society, appellate court decisions have been attracting increasing attention from analysts. Partly, too, scholars have taken an interest in the discourse of appellate cases because technology and the Internet have enabled faster and more complete access to briefs submitted on appeal, to oral arguments offered in appellate court hearings, and to the ensuing decisions and opinions. While discourse analysts have until recently paid little attention to appellate court opinions and less to the briefs submitted in appellate cases, social psychologists and other social scientists are examining them from perspectives likely to disappoint discourse analysts.

In one recent study, specialists in government and political science assessed complexity of thought and language in US Supreme Court opinions solely on the basis of lexical items used in the opinions. What, to a discourse analyst, may seem a mechanical (even naïve) tool for gauging complexity of thought and language is nevertheless a tool whose validity is supported by impressive published credentials in the scholarly literature of social psychology. While this is not the appropriate venue in which to critique such methods, it is useful to highlight selected findings so as to illustrate the kinds of questions social scientists are asking about legal discourse.

Using a content analysis program called Linguistic Inquiry and Word Count (LIWC), which is "designed to parse the complexity of words and cognitive thought" in various kinds of discourse, Owens and Wedeking (2010) explored such complexity in US Supreme Court opinions, aiming to measure the clarity of opinions by examining their "cognitive complexity." Fundamental to their enterprise is the assumption that objective linguistic measurements of (ostensibly) greater cognitive complexity in an opinion reflect less clarity. Relying on

a train of work by social psychologists (see e.g. Tausczik and Pennebaker, 2010), they claim: "Less cognitive complexity may highlight an 'ability to penetrate to the essence of key issues' while, conversely, increasing levels of cognitive complexity may represent 'muddled, confused, and vacillating thought' " (Owens and Wedeking, 2010: 14). From more than 2,700 cases decided over a 25-year period ending in 2007, they examined nearly 5,800 opinions (majority, concurring, dissenting, and mixed), each one treated as an independent observation. Focusing solely on lexicon, LIWC tabulates "indicators" of causation (e.g. *because*, *effect*, *hence*), insight (*think*, *know*, *consider*), tentativeness (*maybe*, *fairly*, *perhaps*), certainty (*always*, *absolutely*, *clearly*), negation (*no*, *never*), and others, along with the percentage of words containing six or more letters. Such indicators are assumed to represent a range of psychological and intellectual content, matters that discourse analysts might investigate principally using textual micro-analyses. An exploratory factor analysis gave the researchers the "confidence that all ten [of their] indicators are part of the same underlying dimension that [they] theorize to be cognitive complexity" (p. 28). From their provocative findings, they conclude that ideology and clarity are not correlated (liberal and conservative Supreme Court justices are equally clear or unclear), but that dissenting opinions are clearer than majority opinions, and those in criminal procedure cases are clearer than those in civil procedure cases. Furthermore, the greater the number of justices joining an opinion, the less clear it is likely to be. This finding is ascribed to the necessity of accommodating the increasingly diverse views of a larger number of joiners to the opinion. The researchers also identified justices who systematically crafted clearer and less clear opinions than those of others.[1]

In a study of nearly 900 briefs submitted in appellate cases, Long and Christensen (2011: 1) found that readability as measured by popular formulas relying solely on word length and sentence length (Flesch Reading Ease scale and Flesch-Kincaid Grade-Level scale) could not be correlated with successful outcomes on appeal. This finding, they concede, affords little encouragement to "legal writing professionals who may want to believe that the likelihood of success on appeal can be increased by writing a more 'readable' brief and that a computerized readability formula can provide a basis for determining readability."

Another study of appellate court briefs examined intensifying adverbs, which are commonly lambasted in legal writing guides and have been accused of conveying meanings exactly the opposite of the intended ones. In a study of more than 400 federal and state appellate court cases concluded between 2001 and 2003, Long and Christensen (2008) examined adverbs such as *very*, *clearly*, *obviously*, *patently*, and *plainly* and found that in certain situations excessive intensifier use is associated with a statistically significant increase in *adverse* outcomes for the "offending" party, as one might expect, but in other situations it is associated with a significant increase in *favorable* outcomes. Perhaps not surprisingly, "the odds of reversal [i.e., success] can actually be higher for appellants who have high intensifier usage rates … when the judge writing the opinion is also a prodigious user of intensifiers" (p. 185).

Adverbial expressions in appellate cases have received notable attention from linguists. In legal contexts, potential ambiguities of adverbial scope carry a certain notoriety because adverbial scope in English can be ambiguous and, consequently, interpretation of such ambiguity has figured prominently in litigation. Solan (1993) discusses a case in which the scope of the expression *knowingly and willfully* in a section of the US Criminal Code was at issue. The defendant's conviction was overturned when the appellate court disagreed with the trial court's interpretation, but upon further appeal the US Supreme Court reversed the appellate court on the matter of scope. Schane (2006) discusses wide and narrow adverbial scope in another US Supreme Court case.

Finegan (2010), comparing adverbial use in a 900,000-word corpus of state and federal supreme court opinions with similar use in standard reference corpora of written English, found that supreme court opinions deploy much higher rates of certain adverbs and adverbial types than other registers of written English. Especially in expressing emphasis, appellate court judges exploit the semantic polysemy and word-order flexibility of adverbs to accomplish multiple goals simultaneously—as in this example (internal citations silently omitted), in which a California Supreme Court justice wrote:

> By doing so, a defendant alerts the trial court to a possible error and provides the opportunity for correction. This defendant clearly did.
>
> *(People v. Carasi, 44 Cal. 4th 1263)*

In the sentence above, *clearly* serves simultaneously as a manner adverb ("This defendant did that clearly") and as an emphatic ("It is clear that this defendant did that"). Whether a distinct advantage is afforded to judges tasked with drafting appellate opinions by the word-order flexibility, polysemic character, and ambiguous scope of many adverbials remains to be thoroughly investigated.

As in the example above, adverbs serve commonly as one vehicle for jurists to express stance, though they are by no means the only such vehicle available to them. Especially in dissent, appellate court justices rely heavily on adverbial expression not only to intensify and emphasize but also to express disdain. As an example, consider this excerpt from a 2008 dissenting opinion (*Boumediene v. Bush*) issued by Justice Antonin Scalia of the US Supreme Court, in which the underscoring of adverbial and other markers of stance has been added for present purposes:

> Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well). It blatantly misdescribes important precedents, most conspicuously Justice Jackson's opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

Thus, in choice of verbs (*warps*, *misdescribes*, *breaks*, perhaps *devises*), adjectivals (*brainstormed*, *manipulable*, *impossible*, *each and every*), adverbials (*judicially*, *no doubt*, *as well*, *blatantly*, *most conspicuously*, and *most tragically*), and perhaps quotation marks, stance finds expression. Little in the excerpt is free of disdain, and no one reading it could wonder how its author *feels* about the majority's decision. Still, while Scalia's writing is more dramatic in its expression of stance than that of his fellow justices, he is not alone in marking opinions with unmistakable stance.

It may be useful briefly to point out that this excerpt does not exhibit many of the characteristics widely associated with the language of the law, broadly conceived. Its sentences, while not short, are not overly long (they average 34 words each); the passage contains no passive voice verbs and little repetition of nouns where pronouns might occur—the pronoun *it* appears three times, referring to the Court. The characteristic of the language of the law that is most apparent in the excerpt is its comparatively long words and the Latin expression *habeas corpus*.[2] Other than excessive internal citation and quotation from earlier opinions, the discourse of appellate court opinions characteristically reflects the struggle for balance between decision making and a clear presentation referred to at the head of this section.

Conclusion

We have examined three of the many arenas in which legal discourse and its institutional instantiation have a significant impact on the lives of ordinary people: the discourse of lay litigants in small claims courts; the discourse of cross-examination by a defense attorney of a witness who has accused someone of rape; and the discourse of appellate court opinions. Much of what is discussed in this chapter has application in other domains of law and, of course, in jurisdictions other than those in the United States. While more discourse analysts are taking an interest in the various registers within the language of the law, much of their work arises in forensic contexts and, perhaps inevitably, does not find its way into the ordinary vehicles of scholarly dissemination other than the journal of the International Association of Forensic Linguists. Much of the work of forensic linguists (e.g. Shuy, 1993, 1998, 2010; Gibbons, 2003; Olsson, 2004; Coulthard and Johnson, 2007) and other linguists (Solan and Tiersma, 2005) provides useful insight into cases before the law, but additional work displaying more fundamental or systematic discourse analysis of spoken and written texts in law's many registers is still needed, not purely for scholarly reasons but in the interest of fairness and social justice.

Further reading

Conley, J. M. and O'Barr, W. M. (2005) *Just Words: Law, Language, and Power*, Second Edition. Chicago, IL: University of Chicago Press.

This second edition of a classic rehearses work by its authors in small claims courts and by Matoesian and others; in separate chapters it also treats mediation, patriarchy, a natural history of disputing, cross-cultural and historical perspectives, ideology, and forensics.

Coulthard, M. and Johnson, A. (eds.) (2010) *The Routledge Handbook of Forensic Linguistics*. Abingdon: Routledge.

Nearly forty chapters, authored by respected scholars, organized into sections on legal language in the legal process, the linguist as expert, and new debates and directions (multimodality and terrorism, among others).

Eades, D. (2010) *Sociolinguistics and the Legal Process*. Bristol: Multilingual Matters.

A rich and thoughtful treatment of many sociolinguistic aspects of discourse in the legal process by a scholar deeply involved in these issues in Australia.

Mertz, E. (2007) *The Language of Law School: Learning to "Think Like a Lawyer."* New York: Oxford University Press.

Awarded the Herbert Jacob Book Prize by the Law & Society Association, Mertz explores the role of discourse in law school in shaping how students learn to think and talk as lawyers.

Tiersma, P. M. (2010) *Parchment, Paper, Pixels: Law and the Technologies of Communication*. Chicago, IL: University of Chicago Press.

An exploration of the relationship between speech and writing in the law and the effects of modern technologies on the law's textualization.

Notes

1 By these indicators, Antonin Scalia and Stephen Breyer, coincidentally representing the conservative and liberal wings of the Court, wrote the clearest opinions, Ruth Bader Ginsburg the least clear opinions.

2 Other Latin and Anglo-Norman/French phrases such as *post*, *ante*, *per se*, *voir dire*, and *stare decisis* also appear regularly in recent Supreme Court opinions.

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