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JUDGEMENT IN COURT: EVALUATING PARTICIPANTS IN COURTROOM DISCOURSE

Attorney: Thou art the most vile and execrable
Traitor that ever lived.
Raleigh: You speak indiscreetly, barbarously and
uncivilly.
Attorney: I want Words sufficient to express thy
viperous Treasons.
Raleigh: I think you want Words indeed, for you
have spoken one thing half a dozen
times.
Attorney: Thou art an odious Fellow, thy Name is
hateful to all the Realm of England for
thy Pride.

(From the trial of Sir Walter Raleigh. c. 1603)

1. Introduction

In 21st-century common law criminal trials, witness examinations are meant rationally to present the disputed “facts” of the case before the judge or jury. These “fact-finders” then deliberate on that evidence to reach a verdict. Only if and when the defendant is found guilty will the judge pass legal and moral judgement. Until then, explicit expression of ethical judgement is meant to be suspended. Yet the above exchange reminds us both that this was not always the case, and that we are dealing with interested parties who are already likely to hold strong opinions about other participants in the trial. Rules of evidence notwithstanding, there is a strong interest on the part of the advocates to convey their judgement of other participants’ behaviour and character to the judge and/or jury who will decide the case. Trial lawyers thus face a strategic tension between the need to conform to the evidentiary rules which prevent explicit construal of judgement and the desire to persuade a jury who might be influenced by such construals. This is part of a broader tension in legal-lay courtroom interaction between a “paradigmatic” mode of reasoning and discourse construction based on objective logical principles, rules and definitions, and a “narrative” mode based

on the subjective reconstruction of personal experience (Heffer 2005). In the above passage, Raleigh and the Attorney follow their narrative-mode instincts and make no attempt to ground their accusatory judgements in “objective” facts. In contrast, much of the modern jury trial process – from the presentation of “Opening Facts” (in England and Wales) to the focus on “facts in issue” (facts to be determined by the “fact-finder” or “fact-trier”) and “material facts” (facts that are relevant to the legal charges) – is ostensibly designed to do just that.¹

This paper explores the relation between factual evidence and subjective judgement in three interrelated ways. At its core is a corpus-based analytical overview of the linguistic construal of judgement by legal professionals in court. Surrounding that core analysis is a reflection on methodology: I present a limiting case of the use of corpus methodologies and a systematic analytical framework to provide empirical grounding for the apparently ephemeral and elusive field of evaluation. Beyond that reflection on methodology, I shall consider more generally the relationship between evidence and the judgement of participants in research on courtroom discourse.

I shall begin with this more general stocktaking aim by reappraising how some of the key texts in the area of courtroom discourse have explored the nexus between testimonial fact and subjective opinion and have, at the same time, judged the behaviour of participants in courtroom discourse. I next introduce two methodological tools which promise a more rigorously empirical take on the linguistic realisation of evaluation in court: the systemic-functional lexical-semantic appraisal framework of judgement (Martin 2000; Martin and White 2005) and a large, representative corpus of official court transcripts (Heffer 2005). With these tools, I attempt an empirically-grounded analysis of judgement in court, beginning with a quantitative overview of the realisation of judgement in the various trial genres and moving on to a more specific analysis of the judgement of lying in cross-examination. This leads to a putative model of evaluative keys (or positionings) assumed by participants in courtroom discourse. Finally, I return to reflect on the relationship between evidence and evaluation in the observation of courtroom discourse.

2. Fact and opinion in courtroom discourse and its observation

The relationship between testimonial evidence and subjective judgements of the witnesses producing that testimony has always been central to social scientific

¹ As social constructionists (Berger and Luckmann 1967) have pointed out, facts can be made and not found. Having noted that “fact” does not always assume some pre-existing objective state of affairs, I shall desist from the annoying habit of using scare quotes around the word “fact”.

studies of the courtroom. In the thirty or so years since language and law studies began to come to the fore, considerable evidence has been adduced in this area, but the methods used to uncover that evidence and the overt or covert judgements made of the courtroom participants have shifted to some extent. Rather than attempting anything resembling a balanced overview of this now extensive area, I shall take a “sampling” approach based on snapshots of two influential texts published in each of the equidistant years 1979, 1990 and 2001, representing early, middle and relatively recent periods in the history of language and law research. In doing so, I shall try to show what these texts tell us about the types of judgements that are made by, and of, the participants in courtroom discourse.

2.1. Cognitive deficiencies

Two of the key language and law texts of 1979 (Loftus 1979; Lind and O'Barr 1979) both addressed the question of how the evidentiary facts are distorted in the minds of the lay participants processing the incoming data. Loftus (1979) applied the already extensive psychological literature on memory to the specific context of eyewitness accounts and found that numerous cognitive factors could affect the accuracy of those accounts. Through a number of experimental studies, she found weaknesses in eyewitnesses' capacity to acquire and initially store information at the scene, to retain that information in memory over periods of time, and finally to retrieve it when recounting the scene. Often these incapacities were related to linguistic influences. For example, after viewing a film of a car crash, subjects asked how fast the cars were going when they *smashed* into each other gave a higher speed than those asked the same question using the verb *hit*. When asked a week later whether they had seen any broken glass, those who had been given the *smashed* question were more than twice as likely to say “yes”, even though there was in fact no broken glass. The presupposition in *smashed* clearly affected both retention and retrieval of memories. Loftus also showed that the problem caused by the inability of eyewitnesses to recount their experiences accurately is exacerbated by the jury's tendency to give undue weight to those accounts. Jurors judged eyewitnesses as more credible than other types of witness, whereas in fact they were less accurate.

Jurors' evaluations of witness testimony were also the key focus of the highly influential Duke University Law and Language Project, the findings of which were reported in Lind and O'Barr (1979). The Duke research team found not only that mock jurors were heavily influenced by their social psychological judgements of witnesses but also that these judgements were significantly affected by the speech style of these witnesses. In a series of “matched guise” experiments, mock jurors listened to recordings of the same actors reading out versions of testimony which were substantively the same but stylistically different. In each

case, certain linguistic features had been altered to produce “powerful” and “powerless” styles of speaking. The powerless style included such features as hedging, hesitation and deferential terms, while the powerful style lacked these features, was louder and had a greater pitch range. Lind and O’Barr concluded that:

For both the male and female witnesses, the power speech testimony produced perceptions that the witness was more competent, attractive, trustworthy, dynamic, and convincing than did the powerless testimony. (1979: 72)

Thus testimony which was propositionally alike led to markedly different judgements of the witness on stylistic grounds. The study therefore appeared to show a serious incapacity of jurors to assess testimony fairly and accurately.

These two key studies from 1979 were essentially negative judgements of the cognitive capacity of lay participants in the judicial process to fulfil their assigned tasks in a legally acceptable manner. Eyewitnesses appeared incapable of providing accurate accounts of what they had seen and powerless witnesses failed to come across as credible irrespective of the truth value of their evidence. Meanwhile, jurors gave undue credibility to the inaccurate accounts of eyewitnesses and they judged witnesses according to the way they spoke as well as what they said. Both studies were empirically grounded in experimental methods and, in the case of Lind and O’Barr, extensive discourse analysis of 150 hours of recordings of criminal trials in North Carolina. One might infer from the findings, then, that the legal system should not be relying on lay people to judge witnesses. That inference would be wrong since we now have ample evidence to show that “experts” such as judges and investigators fare no better than lay people when it comes to psychological biases (Fitzmaurice and Pease 1986; Wagenaar *et al.* 1993; Wise and Safer 2004; Kassin *et al.* 2005), but Loftus, Lind and O’Barr were writing at a time when the jury system was seriously under attack (Findlay and Duff 1988).

2.2. Representational discrepancies

The sample texts from 1990 (Conley and O’Barr 1990; Berk-Seligson 1990) focus on discrepancies in the representation of the disputed facts and their witnesses. In *Rules versus Relationships*, Conley and O’Barr (1990) studied the way litigants in small claims courts narrated the disputed events that had brought them to court. They found that while some litigants produced narratives which linked real-world events to the legal framework, thus easing the judge’s decision-making task, many others recounted stories of social injustice, soured relationships and the need for personal and social remedies. While judges

preferred the “rule-oriented” accounts to the “relation-oriented” ones, such rule-based accounts are quite alien to normal storytelling practices:

... lay litigants have theories of evidence, proof, causation, blame, and responsibility which differ markedly from the official legal versions. The law’s preference for information that is acquired visually rather than aurally, its insistence that a story be told from a consistent perspective, and its effort to draw a sharp line between fact and opinion all run contrary to the conventions of everyday storytelling. (Conley and O’Barr 1990: 176-77)

In other words, legal professionals make no concessions for the fact that storytelling is usually undertaken in a narrative mode rather than in a paradigmatic mode.

The other key text from 1990 shows how the testimony itself can be represented erroneously by court interpreters. Berk-Seligson (1990 and 2002) details the numerous ways in which court interpreters impose their subjective interpretations on the ongoing testimony. For example, she shows that interpreters tend to render witness testimony in a more “powerless” fashion (in Lind and O’Barr’s terms) than the original and, in general, that “the interpreter has the powerful capability of changing the intent of what a non-English-speaking witness wishes to say in the way that he or she would like to say it” (Berk-Seligson 2002: 196-97). The English-speaking juror in this context is not in a position to distinguish the intent of the witness from the representation of the interpreter, with the result that the juror is judging not the witness herself but an already-interpreted version of that witness.

In this work on discrepancies in representation, the authors are not so much making judgements about the capacity of the participants to undertake their tasks in general, but about the abnormality of the institutional context which requires extra-special abilities beyond those required in “normal” contexts. So, the problem with “relational” litigants is not that they are unable to narrate the disputed events (they can do that in ways which would seem perfectly normal in everyday contexts) but that they are unable to narrate in the “abnormal” legal fashion expected by judges. Similarly, the problem with court interpreters is not their capacity to interpret from the other language and to convey the informational content accurately but their lack of awareness that even subtle changes in style (such as the introduction of, or non-translation of, discourse markers) can have effects on the way a witness is judged by the jury. These institutionally-specific problems are different from the general incapacities revealed in the texts from 1979: eyewitnesses are likely to be inaccurate in whatever context of telling and people are almost always influenced by their social psychological judgements of interlocutors. On the contrary, it is the court specialists who need to develop special skills. Judges in small claims courts need to develop the ability to “read” relational accounts, while court interpreters need special training:

If the research findings presented in this book and others in this field demonstrate that there are routine discrepancies between what speakers say in the courtroom and the way in which interpreters render what is said, this by no means intimates that interpreters should be removed from the judicial process. ... If anything, the research demonstrates that interpreting in its various forms is a highly intellectually demanding task, and those who prove themselves to be skilled interpreters should be held in the highest regard. (Berk-Seligson 2002: 236-37)

2.3. Interactional violence

The two texts I have sampled from 2001 (Matoesian 2001 and Ehrlich 2001) are both monographic studies of individual rape cases which draw heavily on social and feminist theory. Matoesian (2001) is a detailed conversation-analytic study of the 1991 Kennedy-Smith rape trial. In an earlier study of rape trials, Matoesian (1993) had identified a number of strategies used by defence cross-examiners to challenge the credibility of rape complainants. These included the manipulation of question form and the embedding of evaluative comments to turn eliciting dialogue into self-serving judgemental monologue; close management of the topic through repetition, reformulation and elaboration; the strategic use of silence to comment on the witness's response (or lack of it); and direct challenges to the witness's source of knowledge, which act as "epistemological filters" (1993: 184) to her testimony. However, as Conley and O'Barr (1998) point out, these judgement strategies are common to cross-examination of witnesses in any type of criminal case. So Matoesian (1993), along with other work on the language of cross-examination (see for example Drew 1990), revealed a certain deceptiveness on the part of cross-examiners. However, in his later book, Matoesian (2001) goes one judgemental step further and claims that cross-examiners are effectively enacting "rape of the second kind":

... whereas the rape trial indeed employs generic impeachment strategies, like other criminal trials, it also activates, through those same strategies, a covert interaction with the patriarchal logic of sexual rationality in crucial moments to fashion the penetrating thrust of blame attributions against the victim. (Matoesian 2001: 234)

The "patriarchal logic of sexual rationality" is the term Matoesian gives to the mechanism that relates male-dominated expectations of sexuality to the "microculture of language use" (2001: 40) and much of the book is concerned with explicating stylistic devices which create "rhythms of domination" which lead to the "penetrating thrust of blame attributions against the victim". Rather than merely badgering the complainant, as claimed by Drew (1990), the cross-examiner is figuratively raping the "victim".

Ehrlich (2001) is a detailed discourse analysis of the proceedings (in a university tribunal and criminal trial) against a male student accused of sexual assault. Like Matoesian, Ehrlich draws on a pre-existing social theoretical framework (in her case feminist critiques of the law), which she applies to “the nitty-gritty linguistic details of actual verbal interaction” (Ehrlich 2001: 1-2). However, where Matoesian focuses on the power of trial talk to revictimise the victim, Ehrlich is more concerned with the role of talk in “defining and delimiting” the range of meaning options available to the different trial participants. Like Matoesian (1993 and 2001), Ehrlich identifies some of the interactional strategies used by cross-examiners to achieve discursive (and thus evaluative) control, such as strategic questioning, presupposition and selective reformulation. However, she goes on to show how these presuppositions and pseudo-assertions construct an ideological frame which severely constrains the way in which evidence may be evaluated. Accordingly, the complainants are seen to have had “numerous” and “unlimited” options for resisting the sexual aggression, so that their own responses to that aggression come to be construed as “ineffectual and passive”, while the explanation that they were gripped by “paralysing fear” is discounted as a motivation for their inaction (Ehrlich 2001: 91-2). The complainants and their witness are thus not afforded the same “latitude and range of gendered subject positions” as the defendant:

... their identities as “ineffectual agents” are thrust upon them by a dominant discourse that constrained their possibilities for representing their strategic agency. Indeed, the gendered subject positions made available (in the case of Matt) and thwarted (in the case of the complainants and their witness) within these institutional settings all worked in the service of the same goal: protecting a range of sexual prerogatives for Matt at the expense of the complainants’ sexual autonomy. (Ehrlich 2001: 150)

Ehrlich (2001) and Matoesian (2001) are representative of a shift towards focussing on the behaviour of legal professionals in court rather than the capacity of lay participants or the special skills demanded by the institutional context. Cross-examiners use numerous strategies to deceive the witness and thus convey negative judgements of that witness to the jury, but they go beyond that to revictimise the victim. However, in neither book are the legal professionals judged so overtly as that. In both the authors’ conclusions, the “accused” are abstract institutional entities. For Matoesian, it is “the rape trial” which “employs ... strategies” and “activates ... a covert interaction” that fashions “the penetrating thrust of blame attributions”. And for Ehrlich, the ineffectuality of the complainant’s identity and the thwarting of her subject positions are “thrust upon” her not by the cross-examiner but by “a dominant discourse”.

Methodologically, Matoesian and Ehrlich are indicative of a tendency in more recent years to move away from attempts to provide representative samples

of data (a paradigmatic approach) and towards studies with narrative coherence. Both Conley and O’Barr (1990) and Berk-Seligson (1990) took an ethnographic approach involving participant observation of the courtroom over several weeks or months. They also attempted to collect a representative sample of texts. Conley and O’Barr (1990: 32) recorded 466 small claims cases and transcribed and studied 156 of these, while Berk-Seligson (2002: 43) recorded 114 hours of judicial proceedings over a period of seven months, including a wide variety of courtroom genres (e.g. hearings, pleas, trials, sentencings). Matoesian and Ehrlich, on the other hand, both approach courtroom discourse from a social theoretical standpoint. Unlike most social theory, their work is highly empirical since it deals with the “fine-grained” (Matoesian 2001: 38) or “nitty-gritty” (Ehrlich 2001: 1) details of socially situated verbal interaction. Nevertheless, it is difficult to generalise their findings since they study individual cases rather than representative samples and thus base their analyses on the language of very few legal professionals and witnesses in just one specific context.

3. An empirical framework

In the above survey of the literature on the relation between court testimony and the judgement of witnesses, I claimed to have adopted a sampling method. However, the account is clearly a partial one and the “sampling” was primarily a rhetorical ruse. In other words, the account was motivated more by narrative than scientific concerns. In Heffer (2005), I argue for the need to find a middle way (both in the linguistic practice of jury trials and in their study) between narrative and logico-scientific (paradigmatic) approaches. In what follows, though, I present a limiting case of empirical grounding in an area – the discourse analysis of subjective judgement – which would not appear at first sight particularly amenable to a scientific approach. The object is to see to what extent we can separate out the linguistic evidence from our own subjective evaluations of that evidence. I shall firstly define the scope of judgement we shall be working with, and introduce a systematic framework for analysing judgement within the scope of that definition. Then I shall define a data set which is broadly representative of the investigative domain.

3.1. The semantic system of JUDGEMENT

The term “judgement” can be used to refer to someone’s powers of discernment, their considered opinions on any topic, or a judge’s authoritative opinion on rights and obligations. However, I have already *de facto* limited the scope in this paper to the evaluation of human behaviour, and specifically to the

evaluation of witnesses and defendants by trial lawyers and judges. I shall now further restrict the scope to the linguistic construal of judgement through lexis. This is a crucial restriction since evaluation of someone's behaviour, as can be seen in the work of Matoesian and Ehrlich, can be conveyed in many other ways: prosodically (e.g. surprise intonation), paralinguistically (e.g. loudness, silence), pragmatically (e.g. presupposition), interactionally (e.g. turntaking), and non-verbally (e.g. gaze, gesture, facial expression). This limitation is necessary partly due to the nature of the data set (official court transcripts) and partly due to the nature of the linguistic framework I shall be applying (a lexical-semantic one).

This delimitation of judgement is in line with the systemic-functional view of JUDGEMENT² as a semantic resource "construing our attitudes to people and the way they behave – their character (how they measure up)" (Martin and White 2005: 52). Within the appraisal framework (Martin 2000; White 1998; Martin and White 2005), JUDGEMENT is one of three "systems" used to construe a speaker's attitude to things, the others being AFFECT (emotional response) and APPRECIATION (aesthetic response). Attitudinal feelings towards entities tend to be positive (+ve) or negative (–ve), and contrast with opinions about propositions, which tend to be epistemic and involve degrees of certainty.³ JUDGEMENT can be further divided into attitudes that concern someone's social esteem –

- normality** how unusual they are (*lucky, peculiar, predictable*)
- capacity** how capable they are (*mature, stupid, witty*)
- tenacity** how resolute or reliable they are (*brave, reckless, loyal*)

– and those where negative judgement might result in social sanction –

- veracity** how honest they are (*candid, dishonest, devious*)
- propriety** how ethical they are (*good, corrupt, cruel*)

At the most basic level, the framework provides a convenient metalanguage for talking about people's judgements of others in general. For example, we can use the framework in this elementary form to roughly summarise the shifts in the judgement of courtroom participants in the literature surveyed in the previous section. The texts from 1979 (Loftus, and Lind and O'Barr) focussed primarily on the **incapacity** of witnesses and jurors to cope with the specific legal tasks –

² In appraisal theory, small capitals are usually used to indicate the lexical-semantic systems available to the speaker. Thus, the semantic system (JUDGEMENT) is distinguished from the speaker's judgemental faculty or opinions in general (judgement). Martin and White (2005) use bold instead. I shall use the small capitals convention, but only when explicitly referring to the SFL appraisal framework.

³ See Thompson and Hunston (2000) for an introduction to the slippery terminology involved in linguistic discussions of evaluation/stance/attitude/viewpoint.

particularly the separation of testimonial fact from social judgements – assigned to them in the courtroom. Those in 1990 (Conley and O’Barr, Berk-Seligson) were more concerned with the **normality** and **tenacity** of their litigants and interpreters. In both cases, the participants behaved in a “normal” fashion for narrators and interpreters but this lacked the special skills demanded by the specialised context of the trial. Furthermore, the reliability of the interpreters in re-presenting the testimony was held to account. Finally, in the texts from 2001 (Matoesian, Ehrlich) we see at least a covert judgement of the **veracity** and **propriety** of the trial lawyers. The cross-examiners, in particular, use deceptive techniques, but they go beyond dishonesty to the impropriety of revictimising the rape complainants. More importantly, the very institutional structure of the law, and of society at large, is effectively held to be improper.

When we turn, though, to the “nitty-gritty linguistic detail” of analysing discourse using this system, the situation becomes more complex. On the one hand, an outburst from the Lord Chief Justice in the early modern trial of Lady Lisle (from the Helsinki corpus of historical texts) provides, in 1), exceptional support for this framework:

- 1) LCJ: Thou art a strange, prevaricating, shuffling, snivelling, lying rascal.

We might analyse this outburst as 2), where we see that the noun phrase moves from evaluations of social esteem to evaluations of social sanction:

- 2) Thou art a **strange** [-ve normality], **prevaricating** [-ve tenacity], **shuffling** [-ve tenacity], **snivelling** [-ve capacity], **lying** [-ve veracity] **rascal** [-ve propriety].

On the other hand, the semantic categories proposed by Martin and White are far from watertight, as might be expected of such a slippery field as evaluation: capacity slips into tenacity, veracity into propriety, and so on. Often context clarifies, but not always: *reasonable* behaviour in most contexts shows a capacity for reason, but also suggests that the person is reliable, normal and beyond reproach; a *dishonest* witness not only lies, but can also be both unreliable and morally reprehensible (as we shall see).

Martin and White (2005: 61-8) make a crucial distinction between judgement which is effectively written into the text (**inscribed**) and judgement which is called upon from the reader (**invoked**). Judgement is inscribed through the use of attitudinal lexis, particularly adjectival epithets (*normal*, *capable*, *reliable*), but also through attitudinal nouns (*liar*, *thief*, *saint*) and verbs (*lie*, *steal*). Judgement is invoked, on the other hand, by appealing to cultural scripts and background knowledge. For example, in 3), from the data described below,

the cross-examiner is ostensibly eliciting information about the usuality of an event.

3) Does he normally leave his door wide open or unlocked? [CR69]

However, drawing on our cultural scripts, we might see this as an invitation to evaluate the supposed behaviour as stupid. And the jury, drawing on their accumulated knowledge of the defendant by that point in the trial (he is not stupid but lives in a rough area), might construe this as an invitation to evaluate the defendant's testimonial behaviour as deceitful. Similarly, while Matoesian (2001) uses the label "victim" to inscribe innocence (+ve propriety) to the rape complainant (and thus exclude the ethical alternative of false allegation), he invokes, or even provokes, a judgement of negative propriety (linguistic rape) through the metaphorical "*penetrating thrust* of blame attributions". Martin and White describe any such invoked instance as a **token** (t.) of judgement. As we move towards this more reader-oriented invoked judgement, though, objective analysis merges into increasingly subjective interpretation.

3.2. A corpus of legal-professional trial talk

Armed with a systematic analytical framework, we want to be able to apply this to a data set broadly representative of the domain of legal-professional trial talk. A suitable set of corpora of official court transcripts was designed and compiled for Heffer (2005). The texts in the key corpora of witness examinations and judicial summings-up (2005: 221-25) were selected via a quota sampling procedure to ensure representativeness with respect to the variables accounted for in the transcripts: location of court (various Crown Courts in England); type of offence (theft, GBH, rape etc.); party (prosecution, defence); type of witness (lay, expert, police etc.); type of judge (circuit, high court etc.); and sex of barrister, witness and judge. The corpora include speech by 103 barristers and 72 judges, thus avoiding to some extent the skewing caused by idiolect (2005: 58-63). The transcripts are from 150 ordinary trials, thus avoiding the skewing created by celebrity lawyers on celebrity cases. In addition, smaller corpora of opening and closing speeches and the judge's sentencing remarks were compiled on similar principles. Since we are interested here only in legal-professional judgements of lay witnesses, a LEGAL-LAY⁴ corpus was constructed (Table 1) consisting solely in the language addressed by counsel and judges to witnesses, the defendant and the jury. Apart from the monologic genres of counsel's opening and closing

⁴ Sub-corpora are referred to in SMALL CAPITALS to distinguish them from the trial genres themselves.

speeches (OPENING, CLOSING), the judge's summing-up (divided into jury DIRECTIONS and the REVIEW of evidence) and the judge's act of SENTENCING, this included all and only counsel's turns addressing witnesses (c-w turns) during examination-in-chief (CHIEF) and cross-examination (CROSS).⁵

Table 1. The LEGAL-LAY corpus

Component	No. of texts	Size in words
<i>Counsel</i>		
OPENING	16	57,500
CHIEF (c-w turns)	100	223,600
CROSS (c-w turns)	127	407,800
CLOSING	10	37,400
<i>Judge</i>		
DIRECTIONS	100	323,000
REVIEW	100	648,500
SENTENCING	100	66,300
Totals	553	1,764,100

While this corpus is strong in representativeness, it is weak in terms of its representation of the communicational context since it relies on official court transcripts (Heffer 2005: 52-8). Conversation analysts from Atkinson and Drew (1979) to Matoesian (2001) have provided rich transcripts encoding as many as possible of the prosodic, paralinguistic and non-verbal features in the interaction between counsel, witness and judge. Court reporters (official transcribers), on the other hand, mostly ignore these features and have also been known to “tidy up” the grammar of counsel and judges (Walker 1990). However, it is a given in language and law work that data will be defective in some respect: the key is to make the most of the data you manage to obtain. Furthermore, it is a well-known methodological axiom in language research in general that “[b]readth and depth generally operate in inverse proportion to each other” (Milroy and Gordon 2003: 72). Court reporters are legally bound to produce a “verbatim” transcript, which is generally understood as one containing all the “words” of the original, so while rich ethnographic analysis is not possible, there should be no problem studying the frequency and distribution of lexical items, and given the representativeness of the corpus, the findings can be generalised beyond the specific context.

⁵ Annotation of the texts meant that it was very easy to link any one barrister turn with its interactional context in the “mother” corpus. The trial corpora in Heffer (2005) include 54 very short re-examinations, which have been left out of the LEGAL-LAY corpus for practical reasons.

4. An empirical analysis of judgement in court

Given a systematic framework for coding lexical items conveying judgement and a corpus that is as representative as possible of the domain under investigation, what can we learn about the way legal professionals in general explicitly convey their judgement of lay participants in the trial process? Following the general approach adopted in Heffer (2005), I shall begin with a broad-brush quantitative survey of JUDGEMENT items in the data and then move some way towards more fine-grained qualitative analysis.

4.1. A corpus-based methodology

The initial aim was to sketch a quantitative picture of how the various trial genres linguistically construe judgement. This takes us far from the conversation analytic concern with the linguistic minutiae of social interaction and towards the computational linguistic concern with automatic categorisations of enormous corpora of texts. At the computational extreme of attitudinal analysis of texts is the rapidly growing field of sentiment analysis. The primary aim of sentiment analysis is to develop computational systems for automatically classifying target texts as evaluatively positive or negative, which has significant commercial applications in such areas as market research, and data and web mining. Most of the studies work with a testbed of 1000 positive and 1000 negative movie reviews (Pang and Lee 2004) and tend to rely either on a “bag of words” approach, which compares the frequencies of words in the “positive” and “negative” documents, or on a “semantic orientation” approach which identifies each word in the document as “positive” or “negative” and then compares the totals. However, both these methods are semantically and contextually crude and neither approach has managed to achieve 90% accuracy. The appraisal framework has recently been introduced to this area precisely because it enables “more fine-grained analysis of the expressions of sentiment in a document” (Whitelaw *et al.* 2005: 630). Here we see that “fine-grained analysis” is very much a relative notion since we are still dealing with large-scale automatic analysis.

My own study is a little further down the qualitative end of the continuum to the extent that I was interested in the distributions of each of the JUDGEMENT categories in each of the trial genres represented in the LEGAL-LAY corpus, rather than simply the overall orientation of the texts. However, the initial methods were similar to those used by Whitelaw *et al.* (2005). First a lexicon of “candidate” judgement items was constructed for each of the JUDGEMENT categories (normality, capacity, tenacity, veracity, propriety). Then the items were retrieved automatically from each of the subcorpora in the form of concordances. And finally the concordance lines were manually checked for judgemental relevance.

Clearly, invoked judgement is impossible to retrieve in a corpus without first qualitatively analysing all the texts (a task well beyond the scope of this study). On the other hand, restricting the selection of items to adjectival epithets would be too restrictive for an institutional site where explicit construal of judgement is for the most part proscribed. The selection was thus restricted to judgement inscribed through attitudinal lexis, but extended from adjectives to other lexical word classes (nouns, verbs, adverbs) and from single words to phrases. For example, *fraud*, *exaggerate* and *economical with the truth* were all selected for Veracity, and *on the ball* was selected for Capacity. The conceptual organisation of *Roget's Thesaurus* (Kirkpatrick 2000) provided a rich source of lexical items and these were amply supplemented by entries in the *New Oxford Thesaurus* (Hanks 2000). The resulting lexicons consisted of between 500 and 800 forms for each JUDGEMENT category.⁶

The next stage involved retrieving the items from the trial corpora. Concordances of items in each lexicon were retrieved using WordSmith Tools (Scott 1996). The lines were then manually analysed to weed out items such as the “position” sense of *lie* and other non-judgemental senses.⁷ On the other hand, judgements which were mediated through attribution to another source (*He said she was dishonest*), or were conditional (*That would be dishonest*) were retained. Similarly, items such as *innocent* and *indecent* which were used meta-judgementally in contexts such as the judge’s directions on the law and review of evidence (*He does not have to prove he is innocent*) were retained in the analysis.

A sample of judgement lexis retrieved from the data can be seen in Table 2, with frequently occurring items indicated in italics.

Table 2. Inscribed JUDGEMENT in court (adapted from Martin 2000: 156)

Social Esteem	Positive (admire)	Negative (criticise)
normality (fate)	<i>normal</i> , regular, usual...	<i>unusual</i> , rare, odd...
“Is he or she special?”	ordinary, <i>reasonable</i> ... special, fortunate, lucky...	strange, curious, funny... unfortunate, tragic, pitiful...
capacity	<i>able</i> , capable, competent...	unable, incapable,
“Is he or she capable?”	<i>aware</i> , sensitive... <i>careful</i> , prudent...	stupid... silly, depressed... careless, hysterical...

⁶ The use of wildcards in the search phase to cover morphological variation means it was not possible to know precisely how many word forms were in each lexicon.

⁷ Given that over 12,000 lines were retrieved, this phase was extremely labour-intensive and so could not involve close and careful contextual analysis; alternative readings were largely ignored and preference went to the category most closely associated with the particular lexical item.

tenacity “Is he or she dependable?”	<i>responsible, sensible... reliable, trustworthy... determined, conscientious...</i>	<i>confused, reckless, foolish... unreliable, forgetful, unsure... worried, nervous, troubled...</i>
Social Sanction	Positive (praise)	Negative (condemn)
veracity (truth) “Is he or she honest?”	<i>tell the truth... honest, truthful... frank...</i>	<i>lie, mislead, trick, cheat... dishonest, liar, deceitful... fraudulent, corrupt, sham...</i>
propriety (ethics) “Is he or she beyond reproach?”	<i>innocent, lawful, remorse... good, right-minded, moral... decent, caring, kindly...</i>	<i>guilty, criminal, unlawful... bad, terrible, appalling... indecent, abuse, offensive...</i>

4.2. JUDGEMENT and the trial stages

The method outlined in the previous section enables us to provide a quantitative overview of judgement in the LEGAL-LAY corpus (Tables 3 and 4). It is important to note that the figures in the tables represent the accumulated frequencies (per 100,000 words) of 500-800 terms in each case, so the figures on the whole are comparatively low, as would be expected of genres where explicit construal of judgement is proscribed.

Table 3 indicates the results for the categories concerned with social esteem. Both one- and multi-word items counted as single occurrences of JUDGEMENT.

While Normality showed no significant variation across the genres, there was a notable difference in the inscription of Capacity and Tenacity between counsel’s turns in examination-in-chief and cross-examination. Cross-examiners judged Capacity and Tenacity over twice as frequently as examiners. The Capacity category was dominated by just two words – *able* and *aware* – which accounted for 75% of Capacity in CHIEF and 56% in CROSS. However, the words are used very differently in the two types of examination. Over half of the occurrences in CHIEF are questions of the form *Are/were you able...?*. Apart from the knotty question of whether *able* is a lexical item (and thus part of appraisal) or a grammatical item (and thus part of modality), these uses were evaluatively neutral.

**Table 3. Lexical inscription of social esteem
in LEGAL-LAY corpus (items per 100,000 words)**

SPEAKER and Trial Stage	SOCIAL ESTEEM			TOTAL
	Normality	Capacity	Tenacity	
COUNSEL				
OPENING	57	110	26	193
CHIEF (c-w)	65	<u>85</u>	<u>17</u>	<u>167</u>
CROSS (c-w)	74	<u>191</u>	<u>38</u>	<u>303</u>
CLOSING	61	241	59	361
JUDGE				
DIRECTIONS	54	185	82	321
REVIEW	60	154	63	277
SENTENCING	54	222	66	342

In contrast, only 9% of the occurrences of *able* and *aware* in CROSS are in this interrogative form, while the others can be found in pseudo-declaratives, such as tag questions, in which the barrister is clearly evaluating the witness, as in 4):

4) Q. Yes, but you were **able** to do it, were you not? [CR33]⁸

The differences between the JUDGEMENT categories were far more marked with regard to Veracity and Propriety (Table 4). The table includes both the figure for lexical judgements of Propriety and for the metalinguistic mention of Propriety (indicated as “Propriety”), while the *Total* figure excludes the metalinguistic citations.

⁸ Cross-examination no. 33. CH = CHIEF, CR = CROSS, SU = SUMMING-UP, SE = SENTENCING.

**Table 4. Lexical inscription of social sanction
in LEGAL-LAY corpus (items per 100,000 words)**

SPEAKER and Trial Stage	SOCIAL SANCTION			Total (V+P)
	Veracity	Propriety	“Propriety”	
COUNSEL				
OPENING	92	27	“118”	<u>119</u>
CHIEF (c-w)	<u>30</u>	<u>25</u>	“13”	55
CROSS (c-w)	<u>142</u>	<u>97</u>	“1”	239
CLOSING	251	190	“24”	<u>441</u>
JUDGE				
DIRECTIONS	65	98	“ <u>713</u> ”	163
REVIEW	95	98	“26”	193
SENTENCING	<u>86</u>	<u>759</u>	“30”	845

The table tends to confirm suggestions made in Heffer (2005) about the structure and function of the various trial stages. Firstly, though based on a relatively small sample, there appears to be a net distinction between the inscription of Veracity and Propriety in the opening speeches (119 per 100,000 words) and the closing speeches (441). Unlike in most US jurisdictions, in England and Wales the defence do not usually reply to the prosecution’s opening speech, which is often referred to as their “Opening Facts”, so it is meant to be a “neutral” statement of their case. Indeed, we see a relatively high frequency of metalinguistic references to Propriety, as in the judge’s legal directions, since the Prosecutor explains the indictment to the jury. These openings are in reality quite evaluative (Heffer 2005: 75-7), but the evaluation tends to be invoked rather than inscribed. On the other hand, the closing “Arguments” of prosecution and defence are intended to be adversarial and are flagged up to the jury by the judge as “opinion” and are thus more overtly evaluative.

Secondly, we see an even more marked distinction between the two main types of examination. With respect to examination-in-chief, the cross-examiner inscribes Veracity roughly 5 times more frequently (30 v 142 per 100,000), and Propriety roughly 4 times more frequently (25 v 97 per 100,000). These figures lend support to the view that counsel is essentially concerned with eliciting the story in examination-in-chief but discrediting its narrators in cross-examination. Examination in general appears to have grown less evaluative with regard to Propriety as the law of evidence has grown tighter. The Propriety figure for

examination in my small Early Modern corpus of trials (extracted from the Helsinki historical corpus) is 324 per 100,000 words, over three times as frequent as modern cross-examination and almost nine times as frequent as examination-in-chief.

Finally, we see a very strong focus on Propriety in the adjudicatory phase of the trial. Firstly there is a high density of metalinguistic “Propriety” items (713 per 100,000) in the legal directions section of the summing-up. The function of directions is, to a great extent, to provide the jury with the law’s own classification system for judgement and the key task required of the jury consists in choosing from the binary Propriety options of *guilty* (the predominant key term in the directions) or *not guilty*. Secondly, Propriety is construed lexically in sentencing (759 per 100,000 words) almost eight times more frequently than in cross-examination (97) and over thirty times more frequently than in examination-in-chief (25). It is also inscribed almost nine times more frequently than Veracity is in sentencing. The reason for this preponderance of Propriety items is that sentencing is no longer concerned with testimonial truth but with punishing the convicted defendant, and it is the “relative moral wickedness” of a crime which partly determines the severity of punishment (Hart 1962: 37).

4.3. Judgemental intensity and sentencing

The above analysis focussed on the distribution of JUDGEMENT categories across the trial genres and the lexical density of judgement items in any one genre. This does not say anything, though, about the intensity of the judgements being conveyed. In selecting candidate items, I took a fairly liberal approach to lexical inscription. This is because, outside sentencing, there was very little use of clear attitudinal epithets. For example, the most frequent adjectival epithet construing negative Veracity in cross-examination is *dishonest*, but this occurs only 5 times per 100,000 words, in comparison to 71 per 100,000 words for the lemma *LIE*, which construes the negative Veracity more indirectly. Table 5 indicates the most distinctive or “key” lexical items realising judgement in each of the genres. The “keyness” of each word was calculated, using the KeyWords tool of Wordsmith Tools (Scott 1996), by comparing its frequency in the wordlist for the trial-genres sub-corpus (e.g. CLOSING, SENTENCING) with the frequency of the same word in a reference wordlist for the entire LEGAL-LAY corpus. A word which is positively “key” here occurs more often than would be expected by chance in comparison with the LEGAL-LAY corpus as a whole. The words indicated in the table are those items realising JUDGEMENT which ranked highest in the keyword lists. The figures indicate the statistical strength of the “keyness” (a log-likelihood test), while gaps in cells indicate that there were no statistically significant keywords for that combination.

Table 5. Evaluative distinctiveness in the LEGAL-LAY corpus (k=keyness)

SPEAKER and Trial Stage	SOCIAL ESTEEM			SOCIAL SANCTION	
	Normality	Capacity	Tenacity	Veracity	Propriety
COUNSEL					
OPENING					<i>abuse</i> k=45
CHIEF (c-w)			<i>confirm</i> k=28		
CROSS (c-w)		<i>understand</i> k=65		<i>truth</i> k=52	
CLOSING			<i>in doubt</i> k=28	<i>fraudulent</i> k=52	

JUDGE					
DIRECTIONS	<i>reasonable</i> k=245		<i>reliable</i> k=95	<i>lies</i> k=155	<i>guilty</i> k=867
REVIEW				<i>denied</i> k=48	
SENTENCING				<i>trust</i> k=49	<i>appalling</i> k=93

Statistically, the strongest keywords (apart from *lies*) are all adjectival epithets (*guilty*, *reasonable*, *reliable*, *appalling*), but the first three of these are being used meta-judgementally in the legal directions. Indeed, the only two adjectival epithets in the grid which actually judge the behaviour of the witness or defendant are *fraudulent* used in closing speeches and *appalling* used in sentencing. Beyond these top keywords, though, SENTENCING reveals a range of other keywords which, though not all adjectival epithets, convey a particularly strong sense of negative propriety: *convicted*, *aggravating*, *gravity*, *no remorse*, *wicked*, *suffered* (victim), *evil*, *unprovoked*, *dreadful*, *frightening*, *cruelty* and *caused misery*.

The intensity of the inscription of judgement in sentencing does appear (apparently following Hart) to be calibrated with the severity of the crime. Thus, a man convicted of unlawful use of a metal detector, receiving a fine of £100, is told by the Assistant Recorder (a part-time judge):

- 5) It is **not appropriate** for people to go around those lands, passing on other people's land searching for potentially valuable items that there may be buried beneath the surface of the ground and removing them **without any say so** from the owner. [SE16]

A man convicted of stealing over £1000 from an elderly resident in his care, is told by the Circuit Judge:

- 6) I accept Mr S. made out the appropriate authorities and cheques in your favour, but that having been done, for you then to use the monies for your own purposes was *downright* **dishonest** and was **taking advantage of an elderly man**, and of course it was an **abuse of trust**, a *serious* **abuse of trust** having regard to your respective positions. [SE23]

Finally, a serial sex offender is handed down the following judgement:

- 7) Your record as far as sexual offences are concerned is *quite appalling*. Indeed, in this case on the last occasion when you appeared in front of me I said, and I still think and believe, that your conduct was verging on the **satanic**. In relation to counts 8, 9 and 10, the rape, buggery and false imprisonment, you behaved *quite atrociously*. You are an **evil** man and you are a **wicked** man. [SE30]

Perhaps only the sentencing of the notorious serial-killer doctor Harold Shipman could have produced more intense judgement:

- 8) The time has now come for me to pass sentence upon you for these **wicked, wicked crimes**. Each of **your victims** was your patient. You **murdered** *each and every one of your victims* by a *calculated* and **cold blooded perversion** of your medical skills. For your own **evil** and **wicked** purposes you **took advantage of** and *grossly* **abused the trust** that each of **your victims** reposed in you. ... The *sheer* **wickedness** of what you have done *defies description* and is *shocking beyond belief*.
(<http://www.the-shipman-inquiry.org.uk/trialday.asp?Day=58>)

A couple of observations are of note here. Firstly, in Bakhtinian terms, the texts are mostly monoglossic; that is, they consist primarily in categorical assertions which do not overtly recognise other voices. In truth, the judge generally does take into account the mitigating circumstances of the defendant, as in "I accept Mr S." in (7), but the main thrust of sentencing is an authoritative proclamation of guilt. Discourse during the trial itself is ostensibly heteroglossic, as the parties fight out their cause, while sentencing is seen as the moment for a unitary voice of

condemnation. The second observation is that the intensity or force of the judgement is heightened through intensification (*downright, serious, quite, grossly, sheer, shocking beyond belief*) and quantification (*each and every one of*). These two factors – the positioning of the appraiser and the amplification of the judgement – are likely to have a considerable effect on the uptake of the judgement by the jury during the trial stages.

5. Judgement and lying in cross-examination

While we have seen that the lexical inscription of Propriety is more or less *prescribed* in judicial sentencing as a public justification for the sincerity of the sentence, such inscription is *proscribed* in cross-examination. Cross-examination is fundamentally concerned with judging the witness, and thus invites lexical inscription, but during a “fact-finding” stage of the trial process in which opinions are not meant to be explicitly expressed. As we saw above, despite the clear focus on the veracity of the witness, the explicit epithet *dishonest* is comparatively rare. Cross-examination is thus a useful site for investigating more subtle construals of judgement. In particular I shall consider how the ascription of lying to the witness becomes transformed into a judgement of Propriety. First, I shall outline the general context of lying in cross-examination. Then I shall analyse the cotexts of the most frequent item realising JUDGEMENT in cross-examination – the lemma *LIE* {*lie, lies, lied, lying*} – and shall show how they work to position the appraiser and amplify the judgement. Finally, I shall briefly analyse the opening of a single cross-examination.

5.1. Lying and cross-examination

According to the law of evidence, there are several legal means of cross-examining to discredit the witness (Keane 1996; Tapper 1999). These come together to build up a picture of the witness as a narrator who is unreliable, since she is deficient in:

- Capacity** – she is incapable of telling the truth owing to the quality of her memory or powers of perception, her incomplete knowledge of the facts, or a general mental incapacity;
- Veracity** – she is dishonest, as indicated by her inconsistent statements, mistakes and omissions in evidence, and any other matters showing a general reputation for untruthfulness;
- Propriety** – she is reprehensible, as shown by previous misconduct and convictions.

(Heffer 2005: 133)

The predominance of the lemma *LIE* is indicative of a preoccupation in cross-examination with the technique of “impeachment”, or “[t]he act of discrediting a witness, as by catching the witness in a lie” (Garner 1999: 756). This is most commonly achieved by showing inconsistencies between the witness’s testimony in court and her previous statements in police interview and under examination. However, showing inconsistency is not sufficient for demonstrating that the witness has been lying. Coleman and Kay (1981: 28) point out that a prototypical lie consists in three key elements:

- 1) The proposition is false;
- 2) The speaker believes the proposition to be false;
- 3) In uttering the proposition, the speaker intends to deceive the addressee.

A lie must have at its core a false statement, but there can be very good reasons (memory lapse, performance slips, police coercion) why an account narrated on two very different occasions, often months apart, can appear inconsistent (Coulthard 2000), even if the speaker believes they are telling the truth. And we now know that genuine eyewitness accounts are very often inaccurate (Loftus 1979). Even if knowledge of these psychological realities is not common among lay people, mere inconsistency is generally not sufficient to make people believe someone is lying. Such inconsistencies in themselves affect judgements of the Capacity of the witness, but not necessarily their Veracity. The witness, then, must believe the statement to be false. But even here we allow for speakers to tell falsehoods without considering them liars. Coleman and Kay note metaphors (*He’s a pig*), sarcasm (*That’s clever!*) and hyperbole (*I’m dying of hunger*) as such examples where the speaker is telling a falsehood with no intention of deception. Thirdly, then, a speaker must intend to deceive the addressee. At this point we become concerned with the Veracity of the witness, but there are various degrees of lying associated with different levels of moral approbation. So-called “white lies” are generally shrugged off as morally insignificant and, in court, jurors are directed by judges that not all lies are relevant in deciding guilt. For example, lies told out of shame, or to cover disgraceful behaviour, or to bolster a just cause are not considered legally relevant. So the law of evidence effectively adds another element for a lie to be considered relevant to the decision-making process:

- 4) The speaker has a guilty motivation in uttering the lie.

At this point, judgement of lying arguably moves from a question of Veracity to a question of Propriety, and this explains the cross-examiner’s concern with establishing the impropriety of a witness’s lying.

5.2. The ENGAGEMENT and GRADUATION of *LIE*

The cross-examiner thus faces two tasks in suggesting to the jury that the witness is dishonest. Firstly, she must claim that the witness is, in fact, lying. Secondly, she must indicate that the witness has a guilty motivation in uttering the lie or lies. Two attendant resources in the construal of appraisal – ENGAGEMENT and GRADUATION – assist in achieving these two tasks (Martin and White 2005: 92-160). ENGAGEMENT (described above as subject positioning) is concerned with:

... the ways in which resources such as projection, modality, polarity, concession and various comment adverbials position the speaker/writer with respect to the value position being advanced and with respect to potential responses to that value position – by quoting or reporting, acknowledging a possibility, denying, countering, affirming and so on. (2005: 36)

GRADUATION (described above as amplification but also including diminution) is concerned with gradability and, since attitude resources like JUDGEMENT are inherently gradable, “graduation has to do with adjusting the degree of an evaluation – how strong or weak the feeling is” (2005: 37). We can see the importance of these resources in the analysis of judgement in cross-examination by considering more closely the cotexts of the 283 concordances of *LIE* retrieved from the CROSS corpus.

The resources of ENGAGEMENT are particularly useful in helping establish the claim that the witness is lying. In 19 (6.7%) of the concordance lines, the proposition on credibility is explicitly pronounced through the subjective projectors *I SUGGEST* and *I PUT to you*.

- 9) You see, **I suggest to you** that you are lying when you say that... [CR76]
- 10) That **I put to you** officer is a blatant lie. [CR34]
- 11) What **I am suggesting to you** was that that was a lie... [CR15]

Martin and White (2005: 129) note that such formulations:

... involve authorial interpolations and emphases which are directed against some assumed or directly referenced counter position. Such formulations are dialogistic in that they acknowledge the presence of this counter view in the current communicative setting and are contractive in that they challenge, confront or resist this particular dialogistic alternative.

In other words, the cross-examiner does not hide the fact that the witness will maintain that they are telling the truth but will try to contract the possibilities for

advancing this alternative reality. One way of severely contracting the dialogic potential is by coercing concurrence from the witness, and one of the most coercive forms of elicitation is the negative question tag, which occurs in 18 cases (6.4%) immediately after *LIE*:

- 12) So that is a lie, **is it not?** [CR41]
- 13) It is you that is lying, **is it not?** [CR81]
- 14) That was a lie, **was it not?** [CR53]

In trying to meet the other challenge – that of suggesting a guilty motivation – cross-examiners make ample use of the resources of GRADUATION. Simple quantifiers (*another, many, more, all*) are used in 16 cases (5.7%) to help suggest that the lies are habitual, which in turn suggests that the witness is a “liar” rather than simply someone who has told one or two lies.

- 15) Is that **another** lie? [CR05]
- 16) So, **all** lies and **more** lies to the police. Correct? [CR54]
- 17) Or is it that there are **so many** lies and inconsistencies in what you have said... [CR33]

Then there are 18 cases (6.4%) of quantification through figurative collective nouns, which add metaphorical force to the graduation:

- 18) You told **a pack of** lies did you not? [CR58]
- 19) This interview is **a litany of** lies, is it not? [CR65]
- 20) ...your evidence...has been **a catalogue of** lies from start to finish... [CR80]

Repetition (9 cases; 3.2%) is an important intensifying device:

- 21) Well, you told **lie after lie after lie**, did you not? [CR54]
- 22) ...what you have done is to **tell a lie, get caught out, tell another lie, get caught out**. [CR21]

Adverbs such as *again* (8) also contribute to the effect of the lying being persistent:

- 23) ...even at that stage you were lying **again**, setting up **again** a self-defence lie? [CR65]

In 25 cases (8.8%), the force of the lie or lying itself is raised:

- 24) That is a **complete and utter lie** by yourself. [CR35]
- 25) You were **lying through your teeth** to them, were you not? [CR32]

Often the graduation realises other JUDGEMENT categories at the same time as intensifying negative veracity. Most frequently (16 cases; 5.7%), modifiers both intensify the lying itself and inscribe negative propriety to the act of lying.

- 26) I suggest that it is a **wicked lie** to say that... [CR39]
- 27) Were you telling the officer a **filthy lie** there? [CR05]
- 28) Why did you tell us that a month ago if it was a **wretched lie**? [CR06]

In some cases barristers focus on the witness's capacity for lying:

- 29) You do **not have any difficulty in lying** when you are under oath, do you? [CR66]
- 30) You are **prepared to lie to anybody** about what was happening... [CR96]
- 31) ...those lies in interview demonstrate your **capability of lying** very easily. [CR60]

In other examples, they stress the normality of the witness's lying:

- 32) Did you **use to tell lies** to other people at school? [CR91]
- 33) You just tell **lies as and when it suits you to do so**? [CR54]
- 34) **One of your little lying times**, is it not, this? [CR65]

This brief analysis of the cotext of *LIE* in cross-examination shows how ENGAGEMENT and GRADUATION are used by counsel effectively to narrativise the act of lying, to flesh out the bare bones fact of an untruth into the normal, conscious and criminally-motivated behaviour of a person of bad character.

5.3. From lying to fraudulent intent

In a final move towards the qualitative end of the methodological continuum, I would like to focus in on the opening of a very ordinary cross-examination to consider further complicating factors in our analysis of judgement. The defendant is accused of benefit fraud but in the preceding examination-in-chief the defence have attempted to portray him as a rather inadequate individual who has been duped by his wife, who filled in the Department of Social Security (DSS) benefit forms for him. The cross-examination begins abruptly with the

prosecutor immediately putting his case to the defendant. (In the following passages, inscribed judgement is indicated in **bold**, engagement and graduation in *italics*, and invoked judgement underlined.)

- 1 Q. Let us understand each other from the outset, *my general suggestion to you is that* [pronounce] between 27th August of 1993 and 26th August 1997 you, assisted by your wife, were **running a thoroughly dishonest racket** [-ve propriety] to obtain money that you were not entitled to from the DSS. What do you say to that?
- 2 A. No, we were not.
- 3 Q. Whether you filled in the forms yourself or not *I suggest to you that* [pronounce] you knew exactly what was going on [t, -ve veracity], and that you were living very well on the proceeds [t, -ve propriety] of that **dishonesty** [-ve veracity]. What do you say to that?
- 4 A. I did not know what was going on. [CR80]

From the start, the prosecutor is categorising the defendant's putative activity not simply as "dishonestly filling in forms" (a matter of veracity) but as "running a thoroughly dishonest racket" (a matter of propriety). While lying is often construed as a venial sin (particularly post-Clinton), a *racket* is "an illegal enterprise carried on for profit, such as extortion, fraud, prostitution, drug peddling etc." (CED 1991: 1227), all clearly "mortal" sins. The judgement is explicitly inscribed in both turns (**dishonest; running a racket; dishonestly**), intensified (*thoroughly* dishonest), and projected through explicit subjective pronouncements (*my general suggestion to you is that; I suggest to you that*). But there are also attempts to invoke the judgement:

you knew exactly what was going on [t, -ve veracity]
you were living very well on the proceeds [t, -ve propriety]

The legal requirement in England and Wales for the cross-examiner to put his case to the witness is an institutional recognition of the dialogic nature of the trial, and the repeated questions "What do you say to that?" are an extremely formal acceptance of that dialogic nature. But the pronouncements themselves are designed to restrict that heteroglossic space as far as possible.

The prosecutor then begins attacking the acknowledged weakness in the defence case, the fact that the defendant lied in interview. In five of his following six turns, he repeats *you lied* and the defendant agrees twice. So the question of veracity is almost beyond dispute. The real question is the motivation behind the lying. The prosecutor thus investigates some possible "innocent" motivations for lying (which might be claimed by the defence or entertained by the jury). Firstly he considers the possibility of compulsion, or negative normality:

- 19 Q. My point is you do not have a medical problem whereby you lie without realising it [t, +ve normality]. You **lie** [-ve veracity] for a reason, do you not?

Here the prosecutor is focussing on construing positive normality: the defendant is a normal person without a medical problem who lies in the way a normal person lies, i.e. for a reason. This is important because judicial condemnation is legitimated by the physical and mental normality of the accused. Then the prosecutor considers the possibility of impulsiveness, or negative capacity.

- 23 Q. You are **not stupid** [neg -ve capacity], *are you*, when it comes to answering questions?
- 24 A. Not really, no.
- 25 Q. You **can** [+capacity] think through the way the questions are going and decide whether you are going to tell the truth or decide whether you are going to lie [t, -ve veracity]. You are **able** [+ve capacity] to do that, *are you not?*
- 26 A. Yes.
- 27 Q. The fact that you are **illiterate** [-ve capacity] and *perhaps ill-educated* [-ve capacity] does not create a problem [t, +ve capacity], *does it?* It does not create a problem when it comes to deciding whether to tell the truth or not [t, -ve veracity].
- 28 A. No, not really.

Arguably, the main thrust of the judgement here is conveyed not by the lexical inscriptions of capacity but by the subtle tokens of negative veracity. Some jurors might already construe turn 23 as ironic understatement (not stupid = cunning), but this line becomes more clearly invoked in turn 25: “think through the way the questions are going” imputes strategic acumen to the defendant, while “decide whether you are going to tell the truth or decide whether you are going to lie” suggests that the defendant considers the possibility of lying each time he answers a question, which in turn suggests that he is a habitual (though not compulsive or impulsive) liar. Ironically, by answering “yes” to the prosecutor’s question “You are **able** to do that, *are you not?*”, the defendant appears both to be admitting to such strategising and yet be incapable of actually carrying out such strategic thinking.

By this stage the prosecutor has ruled out two possible excuses for the defendant’s lying – that it is compulsive (-ve normality) or that it is impulsive (-ve capacity) – and has managed to suggest that the lying is calculated, and that therefore the defendant is a calculating liar (-ve propriety). Two more excuses for the lying are ruled out in turn 27: that it is due to illiteracy or ill-education. At the

same time, these two negative judgements of the defendant's capacity are nevertheless presupposed by being projected from *the fact that*. Within 27 turns, then, the prosecutor appears to have established that the defendant is at once illiterate, ill-educated and a calculating liar – a picture which might fit some jurors' stereotype of the lower-class criminal.

6. Evaluative key

The short qualitative analysis above reveals both the strength and weakness of the appraisal framework for analysing judgement. The great weakness is that, as the analysis becomes more situated, the framework begins to look clumsy and the analysis becomes increasingly subjective. In the rich communicative context of courtroom interaction (which, as noted above, is only partly represented through the official court transcript), applying *a priori* semantic categories to units of text of varying length is not optimal for producing truly fine-grained and contextually aware qualitative analysis. And while raters might agree to a considerable extent on assigning categories to attitudinal lexis (Whitelaw *et al.* 2005), the identification of tokens of judgement is much more subjective. One of the major problems in analysing evaluation is that it tends to be prosodic rather than particulate in nature. Evaluated things are sensed, as Pike (1982: 13) puts it, "as somehow flowing together as ripples on the tide, merging into one another in the form of a hierarchy of little waves of experience on still bigger waves". It is exceptionally difficult to convey those prosodies or waves through the analysis of particulate words.

At the same time, the great strength of this framework is precisely that it enables finer-grained *quantitative* analysis than simply word counts or collocational analysis. This makes it ideal for helping to characterise types of discourse. One of the most promising outcomes of previous work using the JUDGEMENT framework has been the identification of evaluative "keys" that operate in specific types of discourse. Hymes' notion of "key" as the "tone, manner or spirit of the speech act" (Hymes 1974: 57) is extended to encompass different patternings of appraisal features across texts. Martin and White (2005: 164) define "key" as:

[S]ituational variants or sub-selections of the global evaluative meaning making potential – typically reconfiguration of the probabilities for the occurrence of particular evaluative meaning-making options or for the co-occurrence of options.

More simply, we can define an evaluative key (in a somewhat shorter noun phrase) as a set of normative constraints on the appraisal options available to the speaker. With regard to JUDGEMENT, the key variables appear to be whether:

- 1) The judgement is inscribed or invoked;
- 2) The judgement is of social esteem (normality, capacity, tenacity) or social sanction (veracity and propriety);
- 3) The judgement is sourced in the speaker/author (unmediated) or is mediated through attribution to another participant.

White (1998) distinguished between the keys of **reporter voice**, in which the news is presented as a series of neutral facts and in which no authorially-sourced inscribed judgement could be found, and **writer voice**, in which such unmediated inscribed judgement could be found. Writer voice is then subdivided into **correspondent voice**, in which unmediated inscribed social esteem is common but unmediated inscribed social sanction is rare, and **commentator voice**, in which there are no obvious constraints on judgement options and inscribed social sanction is common. Coffin (2003) reveals similar distinctions in school history textbooks and student history essays. **Recorder** key presents history as an unproblematic factual account and, while it invokes judgement, it does not inscribe it in an unmediated way. In contrast to this are two **appraiser** keys correlating with White's writer's voice: **interpreter** key, in which inscribed social esteem is likely but inscribed social sanction unlikely, and **adjudicator** key in which there are no constraints on the judgement options available.⁹

Although a systematic analysis of evaluative keys in the LEGAL-LAY corpus would require very careful manual coding well beyond the scope of the present study, the evidence adduced here and in Heffer (2005) does suggest that we might find a similar set of keys to those found by White (1998) and Coffin (2003). I have set out a putative set of keys and the JUDGEMENT options they might entail in Figure 1. As with White and Coffin, I begin with the basic distinction between adopting an overtly neutral or overtly evaluative stance with respect to the evidence adduced. My rough equivalent to the **reporter** or **recorder** keys is the **fact-finder** key. This label reflects the ostensible role of the legal professional in helping the jury to "find", and thus also evaluate, the "facts" for themselves. Since the facts are meant to be brought before the jury without prior evaluation, in this key there should be no, or minimal, unmediated inscribed judgement. Within this fact-finder key, though, I distinguish between an **examiner** key and an **arbitrator** key. The examiner is a figure who is authorised to "take testimony" (Garner 1999) and thus facilitates the presentation of evidence by the witness rather than presenting her own evidence or evaluating that of the witness. Examination-in-chief is prototypically delivered in **examiner** key, which explains the low levels of inscription of social esteem in CHIEF (Table 3) and the very low levels of inscription of social sanction (Table 4). The arbitrator, on the other hand, is '[a]

⁹ Coffin also draws a little on the appraisal system of APPRECIATION in her classification.

neutral person who resolves disputes between parties' (Garner 1999). The meaning we are interested in here is not the resolving of the dispute but the neutral handling of the two cases. Thus, while the examiner neutrally elicits the case of one party, the arbitrator neutrally presents the cases of both parties. English judges work in an **arbitrator** key when reviewing the evidence of both sides in the summing-up. Here they report the 'he said, she said' details of the trial testimony; indeed, *he*, *said* and *she* are the top three keywords in the REVIEW sub-corpus (Heffer 2005: 196). Consequently, although judges should not directly inscribe their judgement of the participants, in reporting the testimony of the two sides they often present invoked judgement (and sometimes inscribed judgement) mediated through attributions to the various participants.

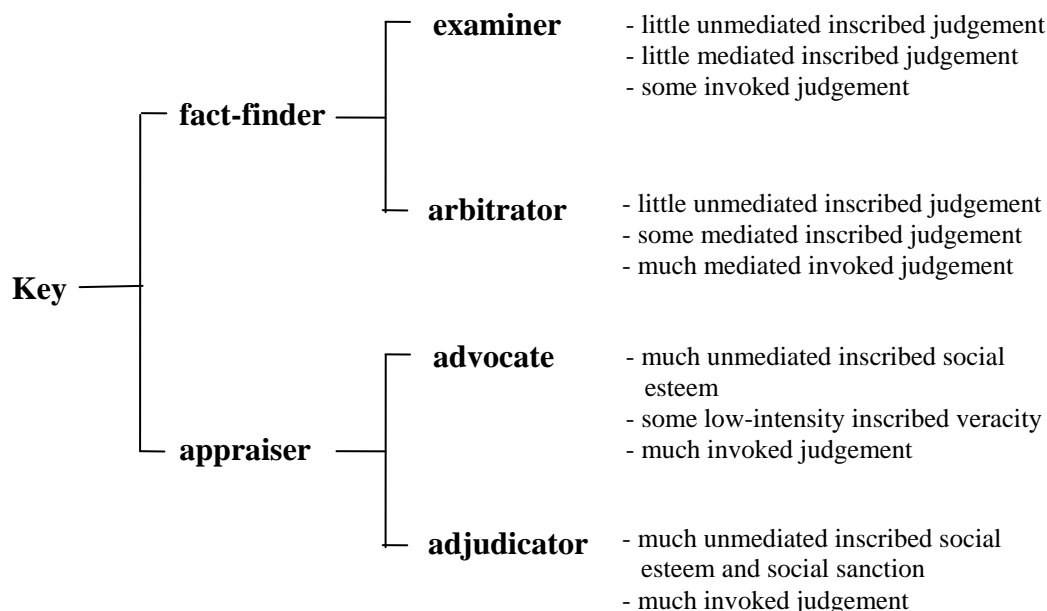


Figure 1. Possible keys of legal-lay discourse (options for construing judgement)

The adoption of a “neutral” **fact-finder** key does not mean the barrister or judge is not appraising the witness, but simply that he or she is doing so more covertly. Examiners will carefully construct both their individual questions and their line of questioning to present their witness in the best possible light: as competent, reliable, truthful, upstanding citizens. They will simply not inscribe those judgements overtly. Similarly, judges in summing-up frequently convey their view of a witness, but they will make sure that it is heavily mediated and modalized so that it accords with an arbitrator key (Heffer 2005: 188-205). For example, in a case which hinges almost entirely on the reliability of a police

officer in identifying the defendant in an adjacent car, the judge's crucial evaluation of the Tenacity of that witness (*reliable*) is both heavily modalized and mediated through attribution and disclamation:

35) ... one should take into account the fact that this was not a chance meeting between people who did not expect to meet each other. He was wholly interested in that car. That is, as I say, the only reason why he was there. So, it is a matter for you, but you may think that that is something that may cause his identification to be the more reliable. However, as I say, that is entirely a matter for you to assess. [SU62]

The **appraiser** keys, on the other hand, are more overtly evaluative. The **advocate** key, prototypically followed in cross-examination, falls somewhere between the examiner and the adjudicator. The advocate does not simply take testimony but pleads a case and so has a strong interest in conveying her evaluation of participants to the jury. At the same time, in witness examination, the advocate is also always an examiner. Consequently, in **advocate** key we find a considerable amount of unmediated inscribed social esteem (CROSS in Table 3) and a fair amount of low intensity inscribed social sanction, but primarily in relation to veracity (CROSS in Table 4).¹⁰ We saw how cross-examiners have to draw extensively on the resources of ENGAGEMENT and GRADUATION to transform permissible judgements of veracity into circumscribed but invoked judgements of propriety. Finally, the **adjudicator** key, prototypically realised in the judge's sentencing remarks, makes no constraints on the appraisal options available and frequently inscribes negative propriety.

7. Conclusion

This paper set out to explore the relation between factual evidence and subjective judgement in courtroom discourse. By applying a systematic semantic framework to a large, representative corpus of legal-professional discourse, I was able to provide a broad overview of the linguistic construal of judgement by legal professionals in court. This quantitative picture for the most part confirms findings in Heffer (2005) regarding the nature of legal-lay discourse: that it involves a tension between rational, legally-framed fact-finding and subjectively evaluative narrative construction. Additionally, though, I have suggested here that a number of different evaluative keys might be available during the various phases of the trial. This can account for variation in evaluation both across the trial

¹⁰ This is an approximation – I have not systematically coded mediated and unmediated occurrences.

genres and through history: the examiner-in-chief speaks in **examiner** key, the cross-examiner principally in **advocate** key and the Attorney in the opening quote is speaking in **adjudicator** key.

This research can be taken in a number of directions. The analysis of evaluative keys could be made much more robust through manual coding of part, or all, of the corpus. Direct analysis of court recordings, or even videotaped recordings,¹¹ might reveal to what extent an appraisal analysis can be integrated with analysis of pragmatic phenomena. It would also be extremely useful to carry out the type of experimental work conducted by Lind, O'Barr et al. in the 1970s to attempt to find answers to such questions as: whether inscribing or invoking judgement in cross-examination has a differential effect on mock jurors; to what extent judgement mediated through attribution (as in the English judge's review of the evidence) is interpreted as the speaker's own judgement; and to what extent invoked judgement meets a consensual response in the jury. These are not easy questions, but they would take the research beyond description to possible application.

This paper has also been a methodological exploration of the relation between factual evidence and subjective judgement in the analysis of discourse. Evaluation remains an ephemeral and elusive field but I believe there is a place for both "thin" and "thick" description (Geertz 1973), for superficial analyses of large representative corpora to help map out the discourse territory and for fine-grained qualitative analyses of partial data which can provide invaluable theoretical insights. One criticism that can easily be made of the research reported here is that it works with "already interpreted" data. The complex courtroom interaction has already been interpreted by the court reporter, but also the semantic universe comes "already interpreted" by the appraisal theorists who produced the JUDGEMENT categories. In Heffer (2005) I deliberately avoided applying a unitary framework to avoid the dangers of "narrative smoothing" in data analysis, or only "hearing" what fits your preconceived narrative (Spence 1986: 223). There is a distinct danger of selective hearing in the systemic-functional framework as a whole since it tries to provide a complete and coherent "narrative" of language. In particular, SFL practitioners often appear deaf both to the pragmatic real-time complexities of situated discourse and the entire cognitive dimension of communication. The appraisal framework does provide a rich metalanguage for describing evaluative phenomena at a textual level and seems particularly useful in illuminating macrolinguistic patterns of evaluation across text. The problems come when it ceases to be a useful heuristic and starts to become an uncomfortable straitjacket, when the focus goes on the labelling rather

¹¹ Unfortunately, research recordings are currently not permitted in English and Welsh courts, but this option is available in some US jurisdictions.

than on the explication. In Martin and White's own terms, the discourse then moves from dialogic engagement to monologic contraction.

Finally, I set out in this paper to consider more generally the relationship between evidence and the judgement of participants in research on courtroom discourse. In the initial survey we saw how research into language and law has moved to some extent from an attempt to conform to a Popperian value-neutral social science, with an emphasis on data sampling and experimental methods (Loftus 1979, and Lind and O'Barr 1979), to one in which commitment to just causes is considered more legitimate (Matoesian 2001 and Ehrlich 2001). As we move towards greater social commitment, though, we need to be extremely careful once again not to listen too selectively. Matoesian and Ehrlich provide extremely insightful and illuminating accounts of discourse in the rape trial, but they entirely suppress the voice of the defendant. With conviction rates for reported rape falling to around 5% in the UK (Berlins 2007), there is understandably great concern that not enough rapists are being convicted but, at the same time, 26% of appealed rape cases which are referred to the FBI lead to exoneration on the basis of DNA evidence (Connors et al. 1996). We should always remain open to such counter-evidence and the implications it might have for our analysis of discourse. At the same time, though, we would do well to remember that the activities of academics are in many ways similar to those of lawyers in court: we couch our investigations in the language of factual description, yet while we would not go so far as to judge another as "the most vile and execrable Traitor that ever lived", we are often ultimately advocating a particular judgement of individuals and institutions.

References

- Atkinson, J. and P. Drew (1979). *Order in Court: The Organisation of Verbal Interaction in Judicial Settings*. London: MacMillan.
- Berger, P.L. and T. Luckmann (1967). *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. New York: Anchor.
- Berk-Seligson, S. (1990). *The Bilingual Courtroom*. Chicago: Chicago University Press.
- Berk-Seligson, S. (2002). *The Bilingual Courtroom*. 2nd ed. Chicago: Chicago University Press.
- Berlins, M. (2007). "Conviction rates for rape have plummeted since the 1970s. Is there anything we can do to change that?". *The Guardian*, 24 January 2007.
- CED (1991) *Collins English Dictionary*. Glasgow: HarperCollins.
- Coffin, C. (2003). "Reconstructions of the past - settlement or invasion? The role of JUDGEMENT analysis". In: J. R. Martin and R. Wodak (eds.), *Re/reading the*

- Past: Critical and Functional Perspectives on Discourses of History*. Amsterdam: John Benjamins, 219-46.
- Coleman, L. and P. Kay (1981). "Prototype semantics". *Language* 57, 26-44.
- Conley, J. M. and W. M. O'Barr (1990). *Rules versus Relationships: The Ethnography of Legal Discourse*. Chicago: University of Chicago Press.
- Conley, J. M. and W. M. O'Barr (1998). *Just Words: Law, Language and Power*. Chicago: Chicago University Press.
- Connors, E., Lundregan, T., Miller, N. and T. McEwen (1996). *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*. Department of Justice, Office of Justice Programs: National Institute of Justice, US.
- Coulthard, M. (2000). "Whose text is it? On the linguistic investigation of authorship". In: S. Sarangi and M. Coulthard (eds.), *Discourse and Social Life*. London: Pearson, 271-87.
- Drew, P. (1990). "Strategies in the contest between lawyer and witness in cross-examination". In: J. N. Levi and A. G. Walker (eds.), *Language in the Judicial Process*. New York: Plenum Press, 39-64.
- Ehrlich, S. (2001). *Representing Rape: Language and Sexual Consent*. London: Routledge.
- Findlay, M. and P. Duff (1988). *The Jury Under Attack*. London: Butterworths.
- Fitzmaurice, C. and K. Pease (1986). *The Psychology of Judicial Sentencing*. Manchester: Manchester University Press.
- Garner, B. (ed.) (1999) *Black's Law Dictionary*. St. Paul, Minn.: West Publishing Co.
- Geertz, C. (1973) *Interpretation of Cultures*. New York: Basic Books.
- Hanks, P. (ed.) (2000). *The New Oxford Thesaurus of English*. Oxford: Oxford University Press.
- Hart, H. L. A. (1962). *Law, Liberty and Morality*. Oxford: Oxford University Press.
- Heffer, C. (2005). *The Language of Jury Trial: A Corpus-aided Analysis of Legal-Lay Discourse*. Basingstoke: Palgrave Macmillan.
- Hymes, D. (1974). *Foundations in Sociolinguistics: An Ethnographic Approach*. Philadelphia: University of Pennsylvania Press.
- Kassin, S. M., Meissner, C. A. and R.J. Norwick (2005) "'I'd know a false confession if I saw one': A comparative study of college students and police investigators". *Law and Human Behavior* 29, 211-27.
- Keane, A. (1996). *The Modern Law of Evidence*. 4th ed. London: Butterworths.
- Kirkpatrick, B. (ed.) (2000). *Roget's Thesaurus of English Words and Phrases*. London: Penguin.
- Lind, E. A. and W. M. O'Barr (1979). "The social significance of speech in the courtroom". In: H. Giles and R. N. St. Clair (eds.), Oxford: Blackwell, 66-87.
- Loftus, E. (1979). *Eyewitness Testimony*. London: Harvard University Press.

- Martin, J. R. (2000). "Beyond exchange: Appraisal systems in English". In: S. Hunston and G. Thompson (eds.), *Evaluation in Text: Authorial Stance and the Construction of Discourse*. Oxford: Oxford University Press, 142-75.
- Martin, J. R. and P. R. R. White (2005). *The Language of Evaluation*. Basingstoke and New York: Palgrave.
- Matoesian, G. (1993). *Reproducing Rape: Domination through Talk in the Courtroom*. Cambridge: Polity Press.
- Matoesian, G. (2001). *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*. Oxford: Oxford University Press.
- Milroy, L. and M. Gordon (2003). *Sociolinguistics: Method and Interpretation*. Oxford: Blackwell.
- Pang, B. and L. Lee (2004). "A sentimental education: Sentiment analysis using subjectivity summarization based on minimum cuts". *Proceedings of the 42nd Annual Meeting of the Association for Computational Linguistics*. Barcelona: ACL.
- Pike, K. L. (1982). *Linguistic Concepts: An Introduction to Tagmemics*. Lincoln, NE: University of Nebraska Press.
- Scott, M. (1996). *WordSmith Tools*. Oxford University Press.
- Spence, D. (1986). "Narrative smoothing and clinical wisdom". In: T. R. Sarbin (ed.), *Narrative Psychology: The Storied Nature of Human Conduct*. Westport, CT: Praeger, 211-32.
- Tapper, C. (1999). *Cross and Tapper on Evidence*. 9th ed. London: Butterworths.
- Thompson, G. and S. Hunston (2000). "Evaluation: An introduction". In: S. Hunston and G. Thompson (eds.), *Evaluation in Text: Authorial Stance and the Construction of Discourse*. Oxford: Oxford University Press, 1-27.
- Wagenaar, W. A., van Koppen, P. J. and H. F. M. Crombag (1993). *Anchored Narratives: The Psychology of Criminal Evidence*. Hemel Hempstead: Harvester Wheatsheaf.
- Walker, A. G. (1990). "Language at work in the law: The customs, conventions, and appellate consequences of court reporting". In: J. N. Levi and A. G. Walker (eds.), *Language in the Judicial Process*. New York: Plenum Press, 203-44.
- White, P. (1998). *Telling Media Tales: The News Story as Rhetoric*. Doctoral thesis. Sydney: University of Sydney.
- Whitelaw, C., Garg, N. and S. Argomon (2005). "Using appraisal groups for sentiment analysis". *Proceedings of the 14th ACM International Conference on Information and Knowledge Management*. New York: ACM Press, 625-31.
- Wise, R.A. and M. A. Safer (2004). "What U.S. judges know and believe about eyewitness testimony". *Applied Cognitive Psychology* 18, 427-43.