

EXPLORING COURTROOM DISCOURSE

THE LANGUAGE OF POWER AND CONTROL

Edited by
Anne Wagner and Le Cheng

LAW, LANGUAGE AND COMMUNICATION

Exploring Courtroom Discourse

The Language of Power and Control

Edited by

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ASHGATE

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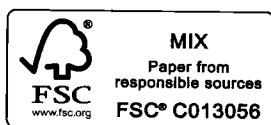
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Foreword

Power of and to Language in Law

Deborah Cao

Whether one admits or not, or whether one knows or not, language entails power. Linguistic power often works in a subtle and invisible way because language is so natural and innate to all of us that it often works its power and influence without us realizing it. This is particularly the case in the courtroom and the legal process, where language sometimes exerts tremendous power as this book and the many chapters in it show us.

Thus, it seems to me that there are two kinds of power at work here: the power of language and the power of the law. The power of the law is much more visible and overt, seen and experienced every day by many and all of us. The power of language or linguistic power, on the other hand, is much more subtle and invisible, and most people are unaware of it even though most use that power every day and exert its power to achieve one's ends in different circumstances and contexts for better or worse. Importantly, language has the power to reveal as well conceal. It has the power to inform and enlighten as well as misinform and mislead.

Increasingly, the importance of language to law and the legal process is being studied and examined by linguists and legal scholars. Law is expressed in language and performs its functions through language. "Law would not exist without language," declares Danet (1980, 448). Similarly, Schauer (1993, xii) writes: "Language plays a central role in the operation of law that is different from, even if not necessarily greater than, the role it plays in facilitating many other forms of human interaction." The discipline of forensic linguistics—that is, the studies of language and law or language used in law and legal process—has now come of age as a discipline (Johnson and Coulthard 2010, 1). Forensic linguists are now involved in many areas related to the legal process, such as the analysis of language for evidentiary purposes in criminal and civil matters, including voice identification, author/speaker identification, legal interpreting/translation, discourse analysis of writing and spoken utterance and linguistic proficiency of the accused as in understanding a Miranda warning or police caution.

Of the many areas of forensic linguistics, it is believed that courtroom language represents the most dramatic of language use. I am pleased to read that this collection of essays specifically examines language in the courtroom in order to understand the law, or rather law's power. As Conley and O'Barr say correctly (1998, 2), for most people, and may I add that this is true for jurisdictions beyond the American borders, "the law's power manifests itself less in the Supreme Court

decisions and legislative pronouncements than in the details of legal practice, in the thousands of mini-dramas re-enacted every day in lawyers' offices, police, stations, and courthouses," and the dominant element in almost every one of these mini-dramas is language. As they further point out: "To the extent that power is realized, exercised, abused, or challenged in such events, the means are primarily linguistic" (Conley and O'Barr 1998, 2). Language plays many crucial roles in the establishment and maintenance of relations of the many legal actors, be they lawyers, judges, jurors, criminals or victims. We often reveal who we are and our relations to others through the subtleties of language such as accent, choice of words, grammar, spelling and style, even the forcefulness of our voices as part of our linguistic capital. As Bourdieu (1991) tells us, language is a mechanism of power, and one's relational position in a social space is indicated by the language one uses, and the existing social structures affect or determine who has the right to be listened to, to interrupt, and to pose questions, and to what extent. Similarly, as Habermas (1998) postulates, language is not only the primary means of understanding and consensus, but also the potential instrument of power and inequality in the public sphere, and conversely, communicative action can be distorted by power and inequality, especially in institutional contexts. For our purpose, in the legal context, we need to understand meaning and power of language in relation to the specific parameters and in the light of the connections between the meaning of utterances and social practices and institutions in which communicative activity is embedded. Courtroom discourse, which represents the most institutionalized legal language use, can tell us much about the power of language and of the law, as well as the power of language in law.

Despite the progress in the law's ideals in most democratic countries around the world in the last few decades, there is still unease about the fairness of the law's application, especially today, in the increasingly globalized world where people from different backgrounds and cultures move much more frequently across national boundaries. As we are told, one can sense some of the problems just by listening to how language is used in a courthouse:

Listen to the way that police officers and judges speak to women seeking domestic violence restraining orders. Listen to the way that mediators interact with husbands and wives in divorce cases. Observe the reasons of judges and jurors to the testimony of different kinds of witnesses. Talk to small claims magistrates about what constitutes a persuasive case ... it is hard to escape the feeling that the law's power is more accessible to some people than to others. (Conley and O'Barr 1998, 3)

The courtroom is a stage for the display of linguistic power at work, with various actors performing largely linguistic acts in the discursive choices in (re) presenting and (re)constructing stories or events in real life. As was once described vividly, words can inform our mind, caress our feelings, excite our spirit, and

kindle the flame of our hearts. They can also slap our face, punch us in the stomach, rattle our nerves or destroy our confidence.

Despite the importance of language in the judicial process, and despite the fact that language evidence can be as important as physical evidence, as Shuy (2005) points out, the reality is that linguistic evidence or the roles of language do not enjoy the same degree of scrutiny by investigators, lawyers and the courts. Furthermore, many of the legal professionals are unaware of the existence of forensic linguistics or forensic linguists (Gray 2010). This makes works such as the present book all the more important in bridging the communication gaps between lawyers and forensic linguists.

Before the reader embarks on reading this worthy book, perhaps it is fitting to remind ourselves: the pen or the *word* in deed is mightier than the sword!

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Contents

<i>List of Figures and Tables</i>	vii
<i>Notes on Contributors</i>	ix
<i>Foreword: Power of and to Language in Law</i> <i>Deborah Cao</i>	xv

1	Language, Power and Control in Courtroom Discourse <i>Anne Wagner and Le Cheng</i>	1
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PART I POWER AND CONTROL IN LANGUAGE

2	Understanding Courtroom Communication through Cultural Scripts <i>Kim McCaul</i>	11
3	Witnesses on Trial: Address and Referring Terms in US Cases <i>Sarah Dettenwanger</i>	29
4	(False) Confessions Become Compelling at Trial <i>Gillian Grebler</i>	47
5	The Role of Metadiscourse in Counsels' Questions <i>Silvia Cavalieri</i>	79
6	Constructing Legal Narratives: Client-lawyers' Stories <i>Flora Di Donato</i>	111

PART II POWER AND CONTROL BEHIND LANGUAGE

7	Magical Images in Law <i>Christine A. Corcos</i>	131
8	The Construction of Admissions of Fault through American Rules of Evidence: Speech, Silence and Significance in the Legal Creation of Liability <i>Janet Ainsworth</i>	177

9	The Construction of Truth in Legal Decision-making <i>Petrina Schiavi</i>	193
10	Hidden Penalties Faced by Non-English Speakers in the UK Criminal Justice System: An Interpreting Perspective <i>Roxana Rycroft</i>	209
11	Language Alternation in Kenyan and Malaysian Courts <i>Richard Powell and Maya Khemlani David</i>	227
12	The Place of Arbitration in Online Proceedings as a Simulacrum <i>Joanna Jemielniak</i>	251
	<i>Index</i>	263

List of Figures and Tables

Figures

3.1	Victim references in closing statements	43
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Tables

2.1	Semantic primes adapted from Goddard (2009) and Wierzbicka (2006)	12
3.1	Address options	36
3.2	Rate of address usage	38
5.1	Synthesis of Hyland's 1998 taxonomy of metadiscourse	83
5.2	Synthesis of Hyland's 2005 taxonomy of metadiscourse	84
5.3	Re-elaborated taxonomy of metadiscourse after the preliminary quantitative analysis of the sub-corpora	88
5.4	Code glosses frequency in the sub-corpora	90
5.5	Functions of WHICH IS	90
5.6	Function of THAT IS	90
5.7	Functions of FOR EXAMPLE	91
5.8	Evidentials frequency in the sub-corpora	92
5.9	Functions of STATEMENT	92
5.10	Function of DOCUMENT and LETTER	93
5.11	Functions of PHOTOGRAPH	94
5.12	Examination endophoric markers frequency in the sub-corpora	94
5.13	Functions of QUESTION and ANSWER	95
5.14	Intra-evidential endophoric markers frequency in the sub-corpora	95
5.15	Keyness of self-mentions in the sub-corpora	97
5.16	Self-mention frequency in the sub-corpora	97
5.17	Functions of I	98
5.18	Functions of ME	99
5.19	Five-word clusters of WE	100
5.20	Functions of INQUIRY and TRIBUNAL	101
5.21	Engagement markers frequency in the sub-corpora	102
5.22	Functions of YOU	103
5.23	Functions of YOUR	104

5.24	Strategic booster frequency in the sub-corpora	105
5.25	Examples of OATH and TRUTH	105
5.26	Hedges frequency in the sub-corpora	106
5.27	Functions of MODAL AUXILIARIES	107
5.28	Functions of PERIPHRAISIS OF POSSIBILITY/PROBABILITY	107
5.29	Summary of the frequency of metadiscourse in the corpus	108
11.1	Kenyan languages with over 100,000 reported speakers	230
11.2	Malaysian languages with over 50,000 reported speakers	234
11.3	Transcription key	236

Chapter 1

Language, Power and Control in Courtroom Discourse

Anne Wagner and Le Cheng

Language is a powerful tool for social manipulation and seduction. Linguistic utterances are widely used or abused in court for the benefit of the defense or accusation. Throughout the volume, Goffman's "face-work" (for example, 1959) is the invisible link. In Goffman's (1967) terms, face is a mask that changes depending on the audience and the variety of social interaction and is the image of the self that is presented. Ordinarily, maintenance of face is a condition of interaction, not its objective (Goffman, 1967, 12). Emphasizing the conventionality on the one hand, and the diversification on the other hand, "face-work," according to Goffman (1967, 12), is to:

designate the actions taken by a person to make whatever he is doing consistent with face. Face-work serves to counteract 'incidents'—that is, events whose effective symbolic implications threaten face. ... Whether or not the full consequences of face-saving actions are known to the person who employs them, they often become habitual and standardized practices Each person, subculture, and society seems to have its own characteristic repertoire of face-saving practices.

He stresses the analysis and understanding of role-playing in the social world and focuses his attention to the micro-sociology of daily life with an attempt to trace the meanings behind various ways of acting in different social situations. According to Goffman (1959, 1961), the mundane daily interaction can be approached from a broad social framework:

The self ... is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature and die; it is a dramatic effect arising diffusely from a scene that is presented (1959, 252–3).

The self ... can be seen as something that resides in the arrangements prevailing in a social system for its members. The self in this sense is not a property of the persons to whom it is attributed, but dwells rather in the pattern of social control that is exerted in connection with the person by himself and those around him.

This special kind of institutional arrangement does not so much support the self as constituted it. (1961, 168).

Besides the social reflection of the self, there are some face saving techniques that establish distance between a degrading situation and the self. His face theory helps us to shape and control the impression we make on others (audience) in order to influence their reactions and offers an alternative conception of the self as an aspect of social and cultural arrangements. In other words, we shall pay attention to the invisible links between front stage and back stage (Goffman 1959). The inter-semiotic interaction between the two stages enables us to step back from a subjective reality and symbolize instances, and therefore helps us to understand the inter-semiotic operation between the daily and individual activities to larger institutional social structures and processes of power and control in a given discourse community. These issues will be widely discussed in this volume.

Part I: Power and Control in Language

Mapping the contours of power and control in the courtroom equals an interpretation of linguistic utterances and their uses and abuses. This interpretation of law is apt to contribute to the changing needs of institutionally anchored functions, like those of judges, lawyers, legislators or citizens. In Part I, the contributors will highlight that communication (verbal or nonverbal) is a prerequisite of interaction of law and power in the courtroom.

Balkin suggests (1990/91):

When people speak of the relationship between law and “politics,” they mean law’s relationship to the many different forms of power—economic, social, cultural, political, military and technological—that law constrains, enables or propagates. They also mean the ideals, ideologies and arguments that people use to justify these forms of power. “Politics” refers to people’s contrasting visions and to the values that they want to realize or recognize in public life. But it also refers to the power to realize or recognize those values and visions. So when one considers the relationship between “law and politics” one is also interested in the question of law and power—how people justify and legitimate power directly or indirectly through law. And one must also account for law’s own methods of proliferating its own power, whether it be through legal concepts, legal institutions, legal culture, legal education, legal officers, or the legal profession as such. In any case, law is not simply politics; rather it is a surprisingly plastic medium of discourse about power and for the exercise of power.

In Chapter 2, “Understanding Courtroom Communication through Cultural Scripts,” Kim McCaul emphasizes the way in which the linguistic power imbalance of the courtroom perpetuates the colonial experience of Indigenous