

Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models

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Abstract. *Global legal systems can be divided into those that are essentially adversarial in nature and those that are essentially inquisitorial. In recent decades, many countries that traditionally used inquisitorial processes have adopted more adversarial models of evidence presentation in trials, giving lawyers a more prominent role and judges a less prominent one. As a result, control over the creation of legal narratives in trials has passed from judges to the litigants, through their proxies, the lawyers. Adversarial trial evidence is developed primarily from oral question-and-answer sequences between the lawyers and witnesses, whereas in inquisitorial trials, judges construct legal trial narratives mainly through written witness statements. The linguistic characteristics of adversarial evidence presentation have implications for public perception of procedural justice and the legitimacy of law. Social psychology studies predict that the procedural justice consequences of this change in trial practice will be positive in some aspects, but potentially negative in others.*

Keywords: Adversarial trial, criminal justice, legal narratives, inquisitorial trial, procedural justice.

Resumo. *Os sistemas jurídicos mundiais dividem-se essencialmente entre adversariais e inquisitoriais. Nas últimas décadas, muitos países da tradição inquisitorial adotaram modelos de apresentação em tribunal mais adversariais, conferindo papéis de maior relevo aos advogados e de menor relevo aos juízes. Assim, o controle da criação de narrativas jurídicas passou dos juízes para as partes, através dos seus representantes: os advogados. Nos julgamentos adversariais, a prova decorre predominantemente de sequências de perguntas e respostas orais dos advogados e das testemunhas, enquanto nos julgamentos inquisitoriais os juízes constroem as narrativas jurídicas do julgamento sobretudo através dos depoimentos escritos das testemunhas. As características linguísticas da apresentação de prova adversarial possuem implicações para a percepção pública da justiça processual e para a legitimidade da lei. Estudos em psicologia social estimam que as consequências desta mudança nas práticas de julgamento para a justiça processual serão positivas em determinados aspetos, mas potencialmente negativas noutros.*

Palavras-chave: Julgamento adversarial, direito penal, narrativas jurídicas, julgamento inquisitorial, direito processual.

We are witnessing a quiet revolution in the structure and practices of justice systems in many parts of the world. While it is a revolution without armies or battles, it is a revolution nonetheless, and one that is not merely of technical or professional interest to lawyers and judges. What we are seeing in nation after nation is a move from inquisitorial models of legal adjudication to adversarial models. The change has broad implications that extend far beyond the courtrooms in which trials play out. Because the shift from inquisitorial to adversarial justice models affects how legal narratives are created and deployed in trials, this change has the potential to impact popular perceptions of legal legitimacy, which in turn has implications for the social order and the relationship of citizens to their government and judicial systems.

To understand why this might be, it is helpful to first consider the essential characteristics of inquisitorial and adversarial justice systems. Modern global justice systems have been classified by comparative legal scholars as falling into one model or the other. Adversarial systems trace their heritage to the English common law system, whereas inquisitorial systems originated in Roman law and persisted in the civil law systems derived from Roman legality. While both adversarial and inquisitorial systems share basic characteristics, they are marked by essential contrasting features in the manner of how formal adjudication takes place. (For the details of the distinctions in the operation of these two contrasting models, see generally van Koppen and Penrod, 2003).

In the adversarial system, the trial is thought of as a kind of contest between two equally-situated contestants, each of which is striving to prevail. A common metaphor in adversarial justice systems is that the trial is a sort of game in which the 'playing field' of the courtroom should ideally be a level playing field in which both competing litigants are equivalently poised for the contest which will determine the outcome of the dispute. Just as it would be unfair for a sporting match to give one side an advantage before the game begins, the adversarial trial emphasizes the importance of the parties being treated as equals as the contest begins.

Live oral testimony by witnesses is the preferred means of presenting evidence at trial, but the process of taking that testimony is under the control of the parties, through their proxies, the lawyers. The lawyers for the litigants bring out the testimony of the witnesses by asking each witness a series of questions to which the witness supplies answers. After the lawyer who has called the witness to the stand finishes this question-and-answer sequence, the lawyer representing the opposing party can ask the witness additional questions in a cross-examination, which is designed to surface contradictions, implausibilities, and qualifications in the direct testimony of the witness. During this process, the witness is limited to answering the questions asked by the lawyers. Witnesses are not permitted to give a free narrative of their evidence; nor can they comment on or argue with the questions that the lawyers put to them.

In this adversarial trial model, the judge plays an even more limited role in developing the evidence than the witnesses. Judges are not involved at all in pre-trial investigation or assessment of the facts of the case, but only come into contact with the case as the matter is ready to be tried. During the trial, judges make rulings about whether particular questions or answers are legally proper, but they do not decide what witnesses will be called or what evidence they will provide – that is the sole province of the lawyers. In fact, judges seldom interact directly with witnesses at all. They do not determine

what issues are significant at trial or what evidence will be brought forth to prove or disprove them. If the adversarial trial is often metaphorically likened to a game, the lawyers are seen as serving in the role of the athletic competitors, controlling the action of the match, and judges are limited to the passive role of the referee, simply deciding if the contestants are adhering to the rules of the game.

In contrast, the inquisitorial trial is imagined as a neutral inquiry conducted and controlled by a state official aimed at investigating and establishing the facts of a contested occurrence. Court officials, rather than the litigants and their lawyers, determine what information should be presented in the trial, in what order, and for what purpose. Although live oral testimony can be taken within the inquisitorial model, there is a much greater reliance on written statements in comparison with the limited role that written evidence takes in the adversarial trial. Even when live witness testimony is taken in the inquisitorial courtroom, the questioning is conducted mainly by the judge, and is far less directed and controlling than in the adversarial witness examination format. The role of the inquisitorial judge is far more active in all phases of the dispute resolution process than in an adversarial process—the judge is permitted to take a central role in the garnering and assessment of evidence before the trial begins, can decide how much weight to assign to evidence based on his/her assessment of its reliability and credibility, and in the final analysis, is the ultimate fact-finder in the case. This active role in the final decision-making contrasts with the much more limited role of the adversarial trial judge, who rules on whether evidence is legally proper to the admitted but not on whether it should be believed or not, which is the sole province of the lay factfinders, the members of the jury. In the inquisitorial system, lawyers play a relatively marginal role in comparison to the dominant role they have in the adversarial system.

The adversarial justice model has historically been the established system in both the United Kingdom, its birthplace, and in its colonies and former colonial possessions, including the United States and Canada in North America; India, Pakistan, Singapore, Malaysia, and Hong Kong in Asia; Australia and New Zealand in the South Pacific; and nations such as Nigeria, Uganda, Kenya, and Tanzania in Africa. The inquisitorial model, derived from the law of the Roman Empire, has historically held sway throughout continental Europe, as well as in countries that borrowed substantially in their modern legal systems directly or indirectly from those continental European systems, including the former Soviet Union and the Soviet bloc socialist countries, and Japan, Korea, and China.

Those historical dividing lines have begun to break down in the past several decades. More and more countries that traditionally maintained inquisitorial systems have come to adopt in whole or in part many of the characteristics of adversarial systems. In Latin America, for example, which inherited the inquisitorial system from its Iberian colonial legacy, most countries today have adopted some version of an adversarial system to replace their former inquisitorial model, including the federal system of Argentina and a number of its provinces, Bolivia, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Guatemala, many states in Mexico, Nicaragua, Paraguay, Peru, and Venezuela (Pulecio-Boek, 2014: 87–89). Panama began the phased process of transition to an adversarial model in 2011 (Watts and Ruff, 2012), and a Mexican constitutional ruling requires all Mexican state and federal criminal justice systems to be converted fully to adversarial models by mid-2016 (Del Duca, 2011: 131).

The Latin American example bears a closer look as to how this transition from inquisitorial to adversarial justice models came about (see Langer, 2007; Pulecio-Boek, 2014: 86–91). Beginning in the 1970's, a number of Latin American law professors, led by Argentinians Alberto Binder and Julio Maier, began to push for adoption of an adversarial criminal justice model to replace the traditional inquisitorial system, which they saw as corruptible and anti-democratic. These scholar-activists, through the auspices of the Ibero-American Institute of Procedural Law, commenced a two-decade process of drafting what became the Model Criminal Code for Ibero-America, a code that once issued in 1988 proved highly influential in the wave of legal reform that followed in Latin America. This draft code coincided with efforts by the U.S. Agency for International Development to promote 'rule of law' projects throughout the world, including in Latin America (Langer, 2007; Pulecio-Boek, 2014: 86). As a result of all of these reform efforts, most of the nations of Latin America adopted statutory models that replaced their historically traditional inquisitorial criminal justice systems with adversarial ones. As one scholar of Latin American court systems put it, "The current reforms constitute one of Latin America's best-ever opportunities for adopting institutional changes capable of improving quality of life." (Bischoff, 2003: 53).

It must be borne in mind that local political, economic, social and cultural conditions exert a powerful pull on legal institutions in any country, and not surprisingly, local conditions affected – and continue to affect – the implementation of legal reforms as they occurred throughout Latin America, so that the story of adoption and implementation of adversarial reforms in any particular Latin American nation bears the unique stamp of those specific conditions (see Langer, 2007; Hammergren, 2007; Pulecio-Boek, 2014: 93–108). While the process of transitioning from one system to the next has not always been smooth and without controversy, there is no current significant opposition to the implementation of an adversarial justice model in the countries that have committed to the process. Whether we look at the process in Guatemala (Hendrix, 1998) or Ecuador (Johnson, 2013) or Mexico (Wright, 2010) or Chile (Tiede, 2008), the pattern remains the same: inquisitorial practices giving way to adversarial trial processes, particularly in the replacement of judge-led admission of written evidence by lawyer-conducted oral witness examination (Pulecio-Boek, 2014: 100).

A few Latin American nations—Brazil, Cuba, and Uruguay—have not joined the parade of its neighbors in turning to adversarial models as a way of reforming their criminal justice systems. In the case of Cuba, its socialist government is largely ideologically isolated from jurisprudence in the rest of Latin America. Uruguay, according to a number of Uruguayan scholars and legal experts, has had various reforms of its criminal justice system stymied by political reactions and counter-reactions to problems created by former dictatorial governmental regimes (Ronzoni, 2008).

Brazil, divided by language from other Latin American countries, was thereby insulated from the transnational legal activism of promoters of adversarial reforms like Alberto Binder, who traveled and lectured in Spanish-speaking Latin America in support of the reforms (Langer, 2007: 653–654). Brazilian legal reformers like Ada Pellegrini Grinover concentrated their efforts on more piecemeal reform of the Brazilian justice system rather than on its wholesale replacement (Langer, 2007: 665). However, the Brazilian Constitution of 1988, in Article 5 Clause LV, for the first time introduced certain adversarial elements into the otherwise fully inquisitorial criminal justice system

by giving litigants the right to collect and present evidence in the fact-finding process (Da Silva, 2009: 14). This constitutional reform was later specifically implemented by a statute enacted in 2008 that explicitly guaranteed litigants the right to directly question witnesses at trial (other than the defendant, who continues to be initially questioned by the judge). Previously, only the judge could introduce evidence or question witnesses, with the litigants limited to merely suggesting questions to the judge, who might choose to ask them or not. Still, the current procedures as enacted are not fully adversarial, since judges are permitted under the 2008 statute to ask questions of witnesses for purposes of clarification, and judges still control the admission of documentary evidence in trials (Da Silva, 2009: 37–38). A Brazilian legal scholar recently concluded that, notwithstanding these constitutional and statutory changes, the Brazilian system remains a largely inquisitorial one, since ingrained behaviors by judges and lawyers are harder to change than laws are (Da Silva, 2009: 67–78, 80–81).

Looking at continental Europe, the birthplace of the inquisitorial model, so many elements of the adversarial system are being adopted that some scholars (e.g. Bradley, 1996; Ogg, 2013) speak of European justice systems as being convergent with common law-derived adversarial models. In some cases, wholesale statutory reforms have completely displaced the traditional inquisitorial systems and replaced them with adversarial systems, as in Italy with its 1988 reforms (van Cleave, 1997; Ogg, 2012, 2013). Other nations, such as Russia, have modified their inquisitorial systems by grafting substantial adversarial elements into their trial systems in its 2002 reforms (Thaman, 2008; Mack, 2012). Across the European Union, the European Court of Human Rights has itself imposed some features characteristic of the adversarial system as essential to protect the human rights of European citizens (Bradley, 1996; van Koppen and Penrod, 2003).

In East Asia, too, legal systems that had originated in modern times through transplantation from continental European inquisitorial systems have begun to adopt more and more adversarial features. Japan has undergone several waves of structural legal reform (Feeley and Miyazawa, 2002; Nakao and Tsumagari, 2012; Mack, 2012) that have brought many attributes of the adversarial model into their system. China, too, originally based its modern legal system on German, Japanese, and Soviet roots, such that the 1979 Criminal Procedure Code could fairly be described as a purely inquisitorial system where lawyers play at best a marginal role (Li and Yue, 2010). However, the 1996 Chinese Criminal Procedure Code brought in many adversarial features in the taking of evidence at trial, and the significant amendments to that Code in 2013 continue the process of change from an essentially inquisitorial system to a substantially adversarial one (Lancaster and Ding, 2006; Li and Yue, 2010; McConnell, 2011; Ming and Dai, 2014).

Given this sweeping global trend, one must ask whether this is a good thing or a bad thing. Comparative legal scholars have often debated the question of which system is preferable. The answer to that question depends, of course, on what one means by 'preferable.' Some scholars have asked instead, which system produces the most factually accurate verdicts? In other words, will an adversarial or an inquisitorial system result in fewer miscarriages of justice? Some (e.g. Slobogin, 2014) have argued that inquisitorial systems are less prone to erroneous verdicts, while others (e.g. Park, 2003; Brants, 2012) have maintained that adversarial systems are better at reaching correct results. One fact is clear—both inquisitorial and adversarial systems have been shown to sometimes fail in reaching the correct verdicts when scientific evidence such as DNA

results become available (van Koppen and Penrod, 2003). Because we have no externally verifiable way of measuring the ultimate accuracy of fact-finding, probably we will never know for certain which system is a more reliable route to true findings.

Other scholars, recognizing that we cannot determine which system might be more accurate, have asked the question, which system is more efficient? That is, is either the inquisitorial or the adversarial system preferable because it imposes lower economic costs? Again, economists have lined up on both sides of the argument (cf. Block, 2000; Froeb and Kobayashi, 2012), so an economic analysis turns out to be likewise unclear as to which might be better.

In this article, I will consider a different way of asking the question, by asking which system might provide greater procedural justice. Answering that question will first raise the issue of the contrasting ways in which legal narratives get created in each system, and will lead to a consideration of which typology of narrative construction is likely to be more satisfying to those who participate in and see the results of the justice system. In other words, it is necessary to consider the procedural justice implications of both systems in assessing their relative merits.

Procedural justice differs from substantive justice. Substantive justice is done when the verdict of the court is factually correct; that is, when an accurate determination of the facts occurs and the law is correctly and fairly applied to those facts. Procedural justice, on the other hand, addresses a very different aspect of fundamental justice, one which is directly tied to high degrees of litigant satisfaction with the process itself through a belief that the system has operated in a fundamentally fair manner (Thibaut and Walker, 1978; Solum, 2004). One might well ask, why care at all about procedural justice? Isn't it enough if trial verdicts end up being factually and legally correct? To understand why procedural justice might matter, social psychologist Tom Tyler in the 1970s began a lifelong study of analyzing why people obey the law. What he discovered through thousands of survey questionnaires (Tyler, 1990) was that people obey the law, not because they fear being punished if they break the law, but because they feel the law and its attendant legal processes seem fair to them. When the legal order seemed to the respondents to be unjust, unfair, inaccessible, or corrupt, they thought of the legal system as illegitimate, and they tended to evade the laws when they thought they could get away with doing so. On the other hand, when they imagined the workings of the legal system to be fair, they tended to obey the law even when they did not necessarily agree with its substance.

This discovery then raised for Tyler a second question: what makes people think that their legal system is a fair one, worth obeying even when the respondents believed they could flout the law without being caught? One intuitively appealing idea is that those who had prevailed in legal disputes would come to think of the legal system as just and fair, while losers in disputes would conclude that the system is unjust and unfair. Surprisingly, however, this is not what Tyler's survey research found. Instead, people who felt that the process had treated them fairly had positive feelings, even if they had not won their cases, whereas even winners did not feel positively about the system if they felt they had been treated unfairly in the process. Being treated fairly, according to the survey answers, had three components: that the party felt able to give voice to and articulate their side of the story, that the adjudicator gave evidence that they had been listened to, and that throughout the process, the party felt that they were treated

with dignity and respect. Other research (see summaries of this research in MacCoun, 2005 replicated Tyler's findings in both civil and criminal cases, and in a variety of countries and cultures. For example, researchers studying litigants in American small claims courts – where lawyers are not permitted and litigants plead their own cases – found that litigant satisfaction with the process was highest when litigants felt they had had a fair opportunity to tell their side of the story and that they were listened to by the judge. Ironically, many of these litigants presented narratives that were insufficient to satisfy the legal elements of their cases, but losing the case did not appear to sour their perception of the fairness of the process (O'Barr and Conley, 1985). Winning or losing one's case, it appears, may not be the major determinant in how people judge the fairness of their legal systems after all.

These studies on procedural justice suggest that differences between adversarial and inquisitorial systems that relate to procedural justice factors – being able to tell one's story, being listened to, and being treated with respect in the process – might be significant in judging which system is preferable, and even in determining which features of each system should be considered desirable to best promote public perceptions of fairness and legitimacy in a legal system. The contrasting manners in which legal narratives are constructed in each system result in linguistic and discursive regimes that may have significance for the procedural justice perceptions of the parties and the public in each system. Lawyer control of presentation of evidence in the adversarial system can be contrasted with the inquisitorial trial in which legal narratives are second order constructions of judges, constructed from written information obtained largely outside the courtroom process.

Inquisitorial practices inherently provide less opportunity for litigants to shape their cases and control the legal narratives in the trial. Since the judge decides what information will be presented at trial, the legal narrative constructed at trial of what happened and what it means is exclusively within the control of the judge. Parties have no access to or control over the judge's narrative and cannot seek to construct their own narrative, even as a potentially competing narrative to that of the judge. Under those circumstances, the litigants and other witnesses have no space in which they can attempt to have their stories heard, so that they lose both voice – the opportunity to tell the court what matters to them – and the chance to be listened to as well, and thus to be accorded respect through the process of being deemed worthy of being formally heard. True, the inquisitorial judge can choose to open a space for litigants to express their side of the story, but if this occurs, it is as a kind of grace or favor, not as of right. And, given the preference of inquisitorial courts for written witness statements over oral testimony, parties and witnesses in practice seldom have the chance for such grace to be shown to them. Since their oral testimony is not needed, they are symbolically and literally excluded from the fact-finding process. Procedural justice research would predict that this exclusion from the process of the construction of the legal narrative that gives meaning to the case would leave the witnesses and parties to such proceedings less likely to conclude that the process was essentially fair and just, regardless of the outcome. Indeed, this is precisely what was found in a study (Sevier, 2014) in which European respondents were asked to assess proposed dispute resolution practices for extra-legal community disputes. Despite the respondents coming from countries with historically inquisitorial practices, which it might be expected they would tend to favor

out of familiarity, most of the subjects instead favored more adversarial processes when they were asked to choose which kinds of processes they thought would be most fair.

In contrast, adversarial systems – at least in theory – would seem structured to enhance procedural justice perceptions of litigants. Adversarial processes vest the creation of legal narratives with the lawyers, who are structurally the agents of the litigants and act in their interests and under their direction. Presumably, the litigants should be able to exercise control over the lawyer-directed construction of legal narrative in court in a way which is impossible in an inquisitorial court. Even witnesses who are not parties to the litigation are more central to the dispute resolution process in the adversarial system – in which witness testimony is overwhelming provided orally in court – as opposed to inquisitorial systems – in which more evidence is admitted at trial only through written statements produced outside the trial process itself. If being able to tell one's story directly and be listened to is central to inculcating a sense of procedural justice, then adversarial processes would seem far more likely to result in positive perceptions of procedural justice by those who participate in them than would inquisitorial systems.

Unfortunately, in practice there are barriers within the norms of trial practice in many adversarial systems that undermine the structural advantage inherent in procedural justice. In particular, the practices in the United States fail to deliver on the potential that adversarial systems could provide with respect to procedural justice. The reason is simple: adversarial trials as actually practiced vest the creation of legal narratives, not with the litigants and witnesses, but instead with the lawyers. Despite the ideological norm that lawyers act under the direction and control of their clients, the reality is that lawyers themselves determine the unfolding of trial evidence with little or no such client control (Park, 2003). Lawyers in court ask precise and detailed questions that, especially during cross-examination, witnesses can merely assent to or reject. Limited to saying “yes” or “no” in response to the lawyers' questions, witnesses are deprived of the ability to tell their story in the terms that they think are significant. In essence, the language in which the testimony is given in adversarial courtrooms is provided by the lawyers, not the witnesses. Witnesses cannot volunteer information but must instead wait for the lawyers to ask questions of them, even when the witnesses feel that important evidence has been left out of their testimony. Lawyers see the process of questioning witnesses as merely the vehicle through which they establish the raw data needed to argue their theory of the case in their closing argument, not as a mechanism to discover information that the fact-finder will need in order to reach a true verdict (see, e.g., trial manuals offering advice to trial lawyers, such as Jeans, 1999; Mauet, 2007). Even in a recently published lawyer training manual that claims to be promoting much less rigid lawyer control over witness questioning, the sample cross-examinations it provides for the reader consist of sequences of lawyer questions that allow little scope for witnesses to determine the shape of their testimony (McComas, 2011). It is the very dynamics of the lawyer-centered adversarial model that ensure that the contours and content of witness testimony is almost exclusively under the direction and control of the lawyers.

It is true that witnesses and litigants in inquisitorial systems may feel estranged from the process through which their cases will ultimately be resolved, because the development of legal narratives in inquisitorial courts is literally distant and indirect from their participation. However, lawyer control over legal narratives in adversarial courts is more obvious to the witnesses and litigants, who sit in court while the lawyers maintain

their iron grip on the construction of the legal narratives at trial. Worse yet, lawyer exertion of control over testimony is not only direct but constitutes a personal face-threat to the witness (cf. Goffman, 1955 because the examining lawyer has the power to select the precise language through the questioning format in which the witnesses testimony will be given. Witnesses who experience this process are forced to agree with characterizations provided by the lawyer; they in effect have words 'put into their mouths' by the lawyers.

Tight lawyer control over the process of the development of witness testimony is compounded when it is the sole province of the lawyers to organize the admitted testimony into a coherent legal narrative, such that witnesses may feel that the lawyers have distorted, ignored, or reframed their experiences in this process. Although inquisitorial trials also exclude witnesses from this process of framing a coherent legal narrative at trial, this interpretive work is done in the absence of the witnesses, and so may be less jarring to the witnesses' perceptions of the fairness of the trial. A witness in an inquisitorial courtroom never sees the reframing of her written witness statement and may be forever unaware of the ways in which the judge has distorted the written evidence through that interpretive reframing process.

In conclusion, the wide-spread adoption of adversarial trial practices in many parts of the world will undoubtedly have an impact on how the participants in those trials – both litigants and witnesses – experience and evaluate the trial process. Adversarial processes have the potential to promote positive perceptions in the public of the procedural fairness of the justice system by giving litigants and witnesses a more direct experience of being able to shape their own legal narratives and of having an opportunity to have their stories heard and respected in court. That advantage, however, is undermined when tight lawyer control of the trial process occurs, as has historically been the case in many common law adversarial nations such as the United States. For the greatest enhancement of procedural justice, the newly developing and emerging adversarial systems should rebalance the control of legal narratives by giving witnesses and litigants greater control over their own testimony.

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Disorder in the Court: Language Use by “Gray Area” *Pro Per* Defendants

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Abstract. *In California, criminal defendants may serve as their own advocates at trial, even in capital cases, if the trial judge deems them mentally competent to do so. Nevertheless, the extent to which some pro per litigants are able to understand and follow the rituals of the courtroom may be seriously affected by mental symptoms.*

This paper examines courtroom interactions in a small number of cases where such defendants attempted to fulfill a dual role, reviewing their expressions of legal theories, questioning, and attention to guidance by the trial judge – all of which features would be in stark contrast to the prosecution’s expertise, and all of which would be arguably affected by mental illness.

While the defendants vary in control of legal lexicon and courtroom formalities, close analysis shows that they tend to share difficulties in self-monitoring, pragmatic perspective and coherence – deficits which may confuse or perplex other courtroom players and doom their efforts at advocating for themselves.

Keywords: *Mental health, competence, trial, pragmatics, defendant.*

Resumo. *Na Califórnia, em processos penais as partes podem ser os seus próprios advogados em tribunal, inclusivamente em casos de pena de morte, desde que o juiz as considerem mentalmente capazes para o efeito. Contudo, a capacidade de algumas partes pro per compreenderem e observarem os rituais da sala de audiências pode ser profundamente afetada por sintomas mentais.*

Este artigo analisa interações em salas de audiências de um pequeno número de casos nos quais esses réus tentaram desempenhar uma dupla função, estudando as suas expressões de teorias jurídicas, questionamento e atenção à orientação do juiz – características essas que se encontram em nítido contraste com os conhecimentos da acusação, e que serão inquestionavelmente afetadas por doença mental.

Embora o grau de domínio do vocabulário jurídico e das formalidades da sala de audiências varie de réu para réu, uma análise mais detalhada mostra que aqueles tendem a partilhar dificuldades na auto-monitorização, perspetiva pragmática e coerência – défices que podem confundir ou causar perplexidade aos restantes atores da sala de audiências e condenar os seus esforços de se defenderem a si mesmos.

Palavras-chave: *Saúde mental, competência, julgamento, pragmática, réu.*

Introduction

This paper examines legal and linguistic issues in cases in which capitally charged defendants, that is, defendants facing a potential death sentence, were allowed to forgo defense counsel and represent themselves at trial despite indications of their mental illness.

Attorneys and linguists may find self-represented defendants' cases intriguing for many reasons, not the least being, in some instances, for how surprisingly good some defendants can be in mimicking the legal language lawyers have spent so many years studying (see Greenlee, 2012).

The manner in which that language is used, however, may be strange indeed and may baffle or alienate the legal professionals in the courtroom as well as the jurors, leading to a death sentence which might have been avoided with competent defense counsel.

Thus, trials of *pro per* defendants in these very serious cases can be shocking and perplexing in the same way that freeway accidents are – the observer is left appalled by a disaster. In many such trials, predictable devastation affects both the integrity of the justice system and the cause of the defendant.¹

Why do these “wrecks” occur? And how could disastrous outcomes be avoided?² As many in the legal and mental health professions have argued, the standards and methods for determining mental competence must be revised, made more rigorous and informed by as complete a picture of the defendant as possible.³

Part of that necessary information includes the *language use* of the defendant whose competence is evaluated.⁴ A small sample of defendants in California capital trials, discussed below, is in accord with much psychological research showing that very significant clues to mental illness are found in pragmatic aspects of language use.⁵ When those clues are given the weight they deserve, in conjunction with a more thorough mental health examination, they can perhaps serve to convince even skeptical judges that mental illness, rather than rational choice, underlies the defendant's behavior as a litigant.⁶

This paper will proceed as follows: it will first give a brief background to the competence standards, describing an important change in those standards brought about by the United States Supreme Court's decision in *Indiana v. Edwards* (2008) 554 U.S. 164, and the group of defendants alleged to be in a “gray area” of the law under that decision.⁷

Then the particular communication skills that self-represented defendants must possess for trial will be examined, especially as these skills were defined in briefing before the High Court in that same case.

Following this background, transcript examples from a small group of *pro per* defendants' language will be presented, as well as the type of feedback that the adjudicator provided and the defendants' attempts to conform to that feedback in their efforts to serve as their own counsel.

In conclusion, the paper will maintain that for these defendants, a closer look at their language – as part of their overall functioning during the proceeding – may have meant they would not have been allowed to continue in a dual role (as defendant and advocate), and they may have been judged mentally unfit for trial at all. A more detailed and probing evaluation would thus serve to reduce the likelihood that in a death penalty trial, the State's prosecution would be opposed solely by a self-represented advocate

“who by reason of [a] mental condition stands helpless and alone before the court...”
(*Indiana v. Edwards*, 554 U.S. at 177.)

Background: Competence Standards

Competence to Stand Trial

The most basic applicable legal standard is trial competence (CST). Generally defendants are presumed to be mentally competent for an adjudicative trial unless a specific, two-pronged legal test is met.⁸ A defendant is considered legally incompetent to stand trial if (as a result of mental disease or disability) the defendant *cannot understand* the nature of the proceedings, or the defendant cannot assist defense counsel in a *rational* way. Defendants must have not only a factual but also a rational understanding of the proceedings in order to satisfy the mandate of due process. (*Dusky v. United States* (1960) 362 U.S. 402.)

When a doubt is expressed, prior to trial, about a defendant’s mental competence to be tried (CST) in California, the trial court will generally appoint mental health experts whose task is to examine the defendant and submit reports to the court. (Penal Code 1369(a)). In some instances, the court will rule on competence based solely on the reports, although there is a right to jury trial on the competence issue. (California Penal Code secs. 1368, 1369.)

Depending on the trial court’s resources, mental health experts may have little opportunity to examine the defendant’s mental health history and may be given limited time to examine the defendant. Some competence reports are based on a one-hour mental status examination, with little background information on the examinee, which may mean that the appointed mental health experts come to conflicting conclusions.⁹

A related problem is that some mentally ill defendants are so loath to be labeled as disabled that they will refuse to meet with the mental health experts, or refuse to undergo any formal testing, leaving the experts (and the trial court) with little to go on in their assessment of the defendant’s functioning.¹⁰

In California, where capital appeals and *habeas* proceedings generally take over two decades¹¹, one-hour mental status examinations were seen in many older-case competence determinations, while more recent cases attempt to apply standard metrics, some of which require considerable time and training on the examiner’s part to administer.¹² A brief excerpt from a training video for mental health experts on one of the competence instruments provides a helpful illustration; it can be observed that the examiner’s questions about the legal proceedings are, at least initially, fairly basic: <http://www.youtube.com/watch?v=HOKGS-XuFqk>.

However, even where standardized metrics are administered, experienced examiners have commented that these tests are better at measuring a defendant’s content knowledge (such as their knowledge of the parties’ roles) than they are at evaluating defendants’ ability to rationally assist counsel.¹³

Trial judges in a capital case may be especially skeptical of mental health diagnoses and vigilant for signs of malingering, as the outcome of a competence-to-stand trial examination in a capital case could mean that rather than face the prospect of execution, the defendant is sent to a mental hospital. (See, e.g., *In re Davis* (1973) 8 Cal. 3d 798, 801 [re procedures for commitment of defendants judged mentally incompetent to stand

trial].) Even though such a legal reprieve, in a hospital, could be only until such time as the court determines that a defendant's competence is restored,¹⁴ judges may believe that a wily defendant is faking or exaggerating symptoms to avoid prosecution. Many legal experts argue that the standard for competence is too low in *all cases*, but trial judges may be especially wary of incompetence claims in a capital context, and more likely to err on the side of finding defendants competent to proceed than in the reverse direction.

In general, the competence to stand trial standard (CST) is a very low bar, and one prominent defense attorney expressed the cynical view that standards are so low that if a defendant can "tell the difference between a judge and a grapefruit," he is likely to be deemed competent to stand trial.¹⁵ Mental health diagnoses are no bar to competence findings, with some surveys estimating that "approximately 10-25% of defendants found competent to stand trial have psychotic diagnoses".¹⁶

Under California law, theoretically, competence is not a one-time decision; if "a doubt is declared" at any point during the trial proceedings, the question of a defendant's mental competence may be revisited during the trial and the proceedings are suspended while the defendant's present mental competence is determined.¹⁷ However, in the sample cases reviewed, where calls for competence examination were made during the trial proceedings, judges generally opted to continue the trial without meaningfully readdressing the issue.

While some defendants will fail both parts of the competence to stand trial (CST) examination, as noted, it is the second prong of the legal test which may be the most problematic. This part of the test asks: Can the defendant assist counsel in a rational manner for his or her own defense? This determination puts the judge in the position of deciding whether the defendant is unable or merely unwilling to cooperate with defense counsel.

Mentally ill defendants may seek to represent themselves precisely because they are *unable* to cooperate with any defense counsel. Defendant 1, samples of whose language are presented below, went through seven trial attorneys. When queried about this client nearly a decade later, one of the seven attorneys commented that Defendant 1 was "one of the most difficult clients I ever dealt with."

Defense counsel may seek to withdraw from representation of a client where the client's mental symptoms so prevent meaningful communication and preparation of an informed defense that counsel feels unable ethically to continue in this role.

Example 1 shows a disagreement between Defendant 1 and his appointed trial counsel. Defendant 1 objected to this attorney on religious grounds. The trial court attempted to resolve the problem, hearing from both the defendant and his lawyer in turn.

Example 1: Defendant's Disagreement with Trial Counsel

Defense counsel to J: ...I don't believe any attorney who challenges [Defendant 1]'s preconception of the law or ideas of how the case should be run is going to have any better result than I have had.

D1: That's absurd, Your Honor, and it's not true.

J: Just a minute. You're going to get a chance.

Later, the defendant commented:

D1: There's just too many places in the Bible, your Honor, pointblank says that you're not going to trust someone who is an atheist, and [defense counsel] Mr. [X] has admitted that he's an atheist.¹⁸

As it turned out, Defendant 1's difficulties in getting along with defense counsel and in speaking out of turn, contrary to the courtroom procedures, characterized his trial from start to finish, and prompted him, with the trial judge's permission, to at least temporarily serve as his own defense counsel.

A higher competence standard for self-representation?

Assuming that a defendant has passed the very low competence to stand trial (CST) bar, what happens if the defendant then decides to dismiss counsel and serve as defense advocate? Until 2008, the legal standard such a defendant needed to meet was merely to show that this decision – for self-representation – was knowing and voluntary. (*Faretta v. California* (1975) 422 U.S. 806; *Godinez v. Moran* (1993) 509 U.S. 389.)

In *Indiana v. Edwards* (2008) 554 U.S. 164, the United States Supreme Court for the first time recognized a higher competence standard. In *Edwards*, the Court acknowledged that some defendants may fall in a “gray area,” with respect to trial competence. These defendants may pass the very low test for competence to stand trial, but they may not have sufficient mental competence for self-representation.

At least some of the defendants whose language is presented in the next section would arguably fall into that “gray area” group – they had some knowledge of trial proceedings and the players, but they did not possess the mental competence to serve as their own counsel. Other defendants were arguably so impaired that had a rigorous CST test been applied,¹⁹ these defendants' disabilities would have ensured that they failed it. This group would have been accurately described as both unable to assist defense counsel in a rational way (failing the second prong of the CST test) and incapable of serving as their own defense counsel due to handicapping mental illness.

An important consideration in the Supreme Court's (2008) *Edwards* decision was an *amicus curiae* (friend of the court) brief from the American Psychiatric Association highlighting the communication skills a defendant would need for self-advocacy.²⁰ These skills will be examined in detail below.

Examples 2 and 3 provide excerpts from trial court examinations of defendants proposing to represent themselves. As can be seen, the questioning by trial judges can be brief and may give the defendant little opportunity to display complex language, either in terms of comprehension or language expression.

Example 2: Judge Queries Defendant Seeking to Serve as Own Attorney

J: I'll ask you, have you ever represented yourself before? D2: Yes, I have. J: And did you end up going to the *joint* over it?²¹ D2: Yes.

In Example 2, the judge's questions are all simple yes/no in form, giving the defendant even odds to answer correctly.

In Example 3, although the judge asks the defendant multiple times what the aphorism (concerning “a fool for a client”) means, he does not wait for the response. Nor does the trial court probe deeply to find out whether the defendant truly comprehends the choice he is making. Nevertheless, this defendant also was allowed to serve as his own attorney.

Example 3: Judge Questions Defendant Seeking to Serve as Own Attorney²²

J: Now, the People are deciding if this is a death penalty. [¶] Do you understand...

D2: I understand that.

J: And there is a saying in the law ‘that a lawyer who tries his own case has a fool for a client.’

D2: I have heard that.

J: Do you know what it means? (x2)

D2: I heard that before...Do I know what it means?

J: Yes. What it means is...

The judge’s comments in the next examples show that judicial patience with competence claims may be fairly thin.

Example 4: Judge’s Concluding Remarks after ‘Examining’ Prospective *Pro per* Defendant

J: “...[c]learly this court is in no way competent to make a psychological evaluation on its own; however, what I have observed is that [defendant] appears to be abundantly aware of the nature of the proceedings and of the risks that he faces.”

Despite the brevity of the court’s dialogue with the defendant, and a concession that the judge alone cannot make a psychological evaluation, the court nevertheless proceeds to put on the record its impressions of the defendant’s mental state.

The trial court may also encourage arguably incompetent defendants to opt for a nonjury proceeding on the issue of competence, apparently in an effort to expedite the proceeding. The next vignette shows such an exchange between a judge and defendant.

Example 5: Trial Court Approves Waiver of Jury on Competence Issue

J to D1: “You waive a jury trial on that issue [competence to stand trial] so we can get on with the show; is that correct?”

D1: “Yes, Your Honor.”

As illustrated in Examples 2-5, the main concerns on the trial court’s part appeared to be the possibility of defendant malingering, or *pro per* litigants’ manipulation of the proceedings, on the one hand, and judicial efficiency, or moving the proceedings ahead, on the other. Neither of these concerns provides much motivation for a searching inquiry into mental symptoms, which may vary in severity over the course of a trial.²³

A sample of *pro per* defendants in California capital transcripts

In order to examine how the question of competence to represent oneself was determined in cases still in the postconviction process in California, a small sample of capital cases was selected from available transcripts of the approximately 50 *pro per* cases among the California capital appeals monitored by the California Appellate Project.²⁴ (See Figure 1). The number of defendants who were allowed to represent themselves throughout the proceedings at trial comprises a relatively small proportion of prisoners sentenced to death. In many instances, even if defendants initially convinced the trial court to allow them to defend themselves, later these defendants accepted appointed counsel.

Since there are currently over 700 persons on California's Death Row, *pro per* prisoners at trial make up less than 10% of those so sentenced. Nevertheless, *pro per* representation is not merely a phenomenon of the past. In a local county, an aged and arguably mentally ill defendant was sentenced to death in November, 2013, after representing himself throughout the trial proceeding.²⁵

DEFENDANT	D1	D2	D3 ²⁷	D4
AGE (trial)	41	50	46	36
EDUCATION	College grad	High school grad	11 th grade	Some community college
ETHNICITY	White	African American	White	African American
OFFENSE	Burglary/rob murder	Poison-murder	Murder for hire	Murder of officer
EVALUATION	Paranoia; thought disorder; persecutory delusions OR narcissistic personality disorder	Chronic Psychosis of Schizophrenic Proportion	Paranoid Schizophrenia	Temporal and frontal lobe damage to brain OR Antisocial Personality Disorder

Figure 1. Defendants in California case examples

Figure 1²⁶ shows brief background information on the four defendants whose language was sampled. In all four cases, the defendants were charged with homicide and a "special circumstance" rendering them death-eligible under the California Penal Code. All of them had at least a high school education, and all of them had been evaluated previously as having serious mental disorders. Most of the time, these defendants represented themselves with "advisory counsel" appointed by the trial judge.²⁷

The most extreme of the four was Defendant 1. Defendant 1 was permitted not only to serve as his own advocate for part of his capital trial, but he was also permitted to serve as his own lawyer at the pre-trial competence hearing, at which the very objective was to determine his mental competence to stand trial and to represent himself.²⁸ Needless to say, he was not a very "objective" judge of his own mental state, and the resulting transcript provides for some absurd interchanges.

To be charged capitally in California, a defendant must be accused of murder. But as capital homicides go, the four sample cases in Figure 1 were not the most extreme; these were single victim crimes, and the special circumstances which earned the defendant eligibility for the death penalty were usually murder in the course of another felony, such as robbery or burglary (California Penal Code sec. 190.2(a)(17).)

An Interloper New Yorker for contrast

Along with data from these rather more mundane California cases, one may contrast information contained in a brief illustrative videoclip from the trial of Colin Ferguson, a notorious *pro per* defendant in a New York mass shooting incident, who was allowed to represent himself despite very serious mental health problems.²⁹

Mr. Ferguson did not face a death sentence but is now serving what is effectively a life sentence in the New York prison system. Mr. Ferguson's trial was seen as a theatre of the absurd by many commentators; it provoked voluminous legal discussions and calls for revision of the competence evaluation methods and standards among psychological researchers as well.³⁰

The next step: proceeding to trial: requisite communication skills

Once the California defendants (and the notorious Mr. Ferguson) have taken on the advocate's role and are representing themselves in these homicide cases, what are some of the identified communication skills they must display? The brief of the American Psychiatric Association in *Indiana v. Edwards* provides a useful, but nonexclusive list.

In the advocate's role, the *pro per* defendants will have to command the linguistic and pragmatic skills, as well as the knowledge of courtroom protocol, to (1) pose questions to jurors, (2) express a coherent case theory in opening statement, (3) question and cross-examine the state's witnesses, (4) choose and question their own defense witnesses, and (5) persuade jurors in closing argument.

The next section provides illustrative examples, from the capital case transcripts of these four defendants, analyzing how well the defendant/advocates managed these necessary skills.

Questions to prospective members of the Jury:

Defendant 3 had peculiar requirements for jurors for his capital trial. In the *voir dire* session (the questioning process in which individual jurors are selected), Defendant 3 spent a great deal of time quizzing prospective jurors about a Biblical character, the Beast of Revelations. A representative exchange is shown in Example 6.

Example 6: Defendant 3's Questions to Prospective Jurors

D3: If somebody...told you that the Beast in Revelations...is supposed to be evil, would it convince you that my interpretation is that he cannot have society at heart, that he must be evil, that you would not be convinced by somebody that...read the Bible that I would have to be evil?

Juror: No.

D3: Would my attempting to go down in history as this individual cause you to view the evidence that if [the prosecutor] shows a different outlook?

Although Defendant 3's obsession with the Biblical character may have seemed relevant to him, his questions could only have left the prospective jurors baffled, wondering what on earth the Beast had to do with defendant's guilt or innocence of the charged crime.

Opening arguments:

After the jurors are seated, the defendant's next task is to present an opening argument in which a defense theory is set forth. From the outset, the defendant must come up with a coherent story, an explanation of what the trial is about, and reasons why the jury should doubt the prosecution's case and reject the charges. Ideally, this theory of defense should not only make sense to the defendant, but also to the judge and jury. It should be a defense he can support factually, or at least use to attack the prosecution evidence.

In the small California sample, some of the defendants were forceful and articulate in this initial presentation. An opening argument by Defendant 2 is shown in Example 7.

Example 7: Opening Argument & Defense Theory: Reasonable Doubt

D2: Now, the defense contends that what happened in the case is not the way the prosecutor has described it. On the contrary, defense contends and *knows vigorously* that the facts will show an entirely different version of what occurred and that the – and the facts will show that the defendant did not do what the prosecution contends he did.

Defendant 2's opening argument was forceful, but contains a semantic oddity: One might wonder how someone "*knows [facts] vigorously*" as he claims the defense does, as the verb "to know" does not describe physical activity.

Defense theories among the California sample and in Mr. Ferguson's case are shown in Example 8.

Example 8: Defense Theories in Sample Cases of Self-Representation

- Mistaken Identity: (Ferguson, NY) Defendant fell asleep on the commuter train while carrying the murder weapon (a gun) in a bag; another man took the gun and shot victims; Defendant was accused out of societal racism; the number of murder counts matches the year.
- Third Party Culpability, Defendant Wrongfully Accused
 - Framed: (D3) Prosecution witness was not reliable; Defendant was falsely accused because persons are angry at his emulation of the Beast of Revelations
 - Alibi: (D1) Defendant was in court on another matter [M1] on the day of charged homicide; transcripts of that day's (i.e., M1's) court proceeding were falsified through a conspiracy of court actors

As Example 8 shows, these defense theories were not, in themselves, unusual at all. The theories advanced by these *pro per* litigants were common ones, and viable defenses if presented by a competent advocate. Third party culpability (false accusation or wrong identification), Ferguson's defense, is used daily in courtrooms. Third party culpability

was also the defense theory in the case of Defendants 2 and 3. Defendant 3 sought to establish reasonable doubt also about the reliability of the state's witnesses.

Defendant 1 relied on an alibi, and a seemingly very solid one: What better alibi could there be than for a defendant to have been in court [for something else] on the day he allegedly killed the victim?

When these apparently viable theories are examined closely, however, many problems emerge; the defendants' rationale for these defense theories in all three instances was untenable or bizarre. For example, although Mr. Ferguson insisted that another (white) person had done the shooting of which he had been accused, there were numerous eyewitnesses at the scene (including surviving victims) as well as forensic evidence which contradicted him. His firmly held, yet false, belief in this mystery shooter was an apparent delusion contradicted by voluminous evidence.

Defendant 3's theory of wrongful prosecution was in fact, a very strong defense, as the main prosecution witness was an unreliable drug addict. Unfortunately his expression of this defense theory was muddled, and his rationale for why someone might want to falsely accuse him did not make sense to jurors. He had claimed he always wanted to emulate the Beast of Revelations, and persons opposed to this idea would try to kill him.³¹

Defendant 1 sought to rationalize ambiguities in the record of his alibi court proceeding (M1) by claiming that his defense attorney, the judge and many other court personnel were engaged in a grand conspiracy to falsify the transcript of that proceeding. The difficulty with his alibi in fact had to do with vague information on the time the conflicting court session (M1) had ended, and whether he could have committed the homicide after it ended. These facts were disputed by the parties. Although Defendant 1's notion of a conspiracy to falsify the M1 transcript had no support in the evidence, it was one to which he appeared strongly committed.

Needless to say, none of these irrational defense theories were successful as a foundation for reasonable doubt about the defendant's culpability. Nevertheless, they were central features in the *pro per* defendants' presentation. The reaction of the audience – jurors and spectators – is telling. In the case of Mr. Ferguson, a defense theory so clearly in conflict with the eyewitness testimony of injured victims met with vehement outrage. The press reported that spectators at his trial broke out in cheers at the verdict.³²

In the California cases, the audience would likely have found the defense (as the prosecutor in Defendant 3's case argued), "a farce," or incomprehensible.³³ All four California defendants were convicted, as well as sentenced to death.

Questioning Witnesses

Having seen that these legal defense theories were viable, but flawed in pragmatic support, we may examine a seemingly more ordinary task – questioning witnesses. A survey of the transcripts showed that both the form of questions and their content were problematic. *Pro Per* defendants had trouble with the prohibitions on hearsay and on compound or repetitive questioning, drawing warning comments from the trial judge.

Example 9: Defendants' Questions to Witnesses

D2: You have said that you heard that somebody said that he was going to get [the deceased V] and you. Where was this at? Where did you hear it?

W to J: What is he saying?

...

D3: [I]f our governments are spending this money on space, if they put a large enough volume of people in space, are these people going to want to form a government of their own?

W: I haven't got the foggiest idea....

In the first exchange in Example 9, Defendant 2's question concerns vague *hearsay* – something that the witness heard “somebody” say in a context other than the courtroom. Presentation of hearsay evidence is generally barred by the rules of evidence. In addition, the defendant's utterance includes several questions, and is subject to further objection as compound. It is little wonder the witness was confused, and so remarked to the judge.

In the second exchange in Example 9, it is the content of the question, as well as its length that appears to baffle the witness. In questioning the witness, a mental health expert, Defendant 3 asked him an apparently irrelevant question about space colonies.

Other examples show that in terms of courtroom protocol, the *pro per* defendants' mental symptoms led to long, convoluted and rapid-fire delivery. Defendant 1's questions often displayed such characteristics, which made him very hard to follow.

Example 10: D1's Long and Involved 'Question'³⁴

D1: You said that I was rambling to the point where the court reporter had to ask me to slow down. Now, is there a *distinguish* between talking too fast for her recording what I'm saying as per somebody else could still at least understand what I was saying but my forgetting about the fact that she was having to work so hard? ...

W: I'm having difficulty with that question.

Another feature which marred Defendant 1's courtroom talk and made him hard to follow was his varied manner of referring to himself, as seen in Example 11.

Example 11: Varied Self-Reference

D1 to J: ...I would like to ask the court to enforce the granting of the Brady...material. And if I can't ask the court, I'm asking my attorney at this time to ask the court to enforce my right to a complete copy. The defendant knows this case, he was at the preliminary examination, not [defense attorney]. He [=counsel] can read the transcript but Mr. L also knows...

Defendant 1 used both first and third person pronouns (“I” and “he”) to refer to himself as well as “the defendant” and his own name, Mr. L. This aspect of his argument, whether delivered to the judge or the jury, made his presentation confusing. Part of his referential problem had to do with his dual role, but wavering between the different forms wreaked havoc with the notion of linguistic cohesion.

Thus far, it has been shown from these few examples that in all of the cases, the *pro per* defendants had difficulties with some of the most basic trial communication

skills which marred their case presentation and defense. While on the surface, their defense theories were common ones, and their speech attempted to adhere to the question/answer form of the courtroom, in actual practice, both the form and the content of their courtroom performance was seriously impaired.

Attention to guidance by the trial court

Although the trial court allowed these litigants to proceed solo with “advisory” counsel, at various points, the trial judges tried to steer them toward appropriate courtroom language and protocol.

In nearly every one of the California case vignettes, there are examples of the judge administering lengthy scoldings to the defendants on the record, usually in front of the jurors. Much of the time the judges’ remarks are expressions of exasperation for what the court perceived as defendants wasting judicial time on irrelevant matters.

Example 12 presents representative comments by judges in the individual cases; although spoken by different judges, the four samples show an escalating scale of annoyance.

Example 12: Judges’ Admonitions to *Pro Per* Defendants

J: I’m sorry to interrupt. But some of what you’re saying is not helpful to the issue that’s in front of me.

J: Your argument is rambling, your argument makes no sense.

J:...you’ve got about two minutes to tell me the answer to that question

J: You are not going to argue with this lady [=W]. You are going to ask her questions. And we are going to get through this. If you are not going to do that, then we are going to have a discussion.

Nevertheless, what prompted the judges’ scolding in Example 12 is less likely to be willful defiance of the courtroom protocol than a matter of defendant’s unfamiliarity with courtroom rules. These lapses also may well be a symptom of mental illness, manifesting an inability to self-monitor and make necessary corrections.

These defendants were apparently unable to match their speech to the metalinguistic descriptions of their own talk. For example, when the judge ordered a defendant to *confine your remarks to the scope of the case*, the defendant asked what the scope was.³⁵ When another defendant attempted an explanation of his question to a witness who had answered negatively, the defendant apparently did not realize he was “arguing” with the witness.

Clearly, if the defendant does not recognize his speech as fitting what the judge is describing or proscribing, he or she will be unable to alter it. Yet often the arbiter in these proceedings appeared to treat the bafflement of the defendants, or inability to conform, as an instance of willful defiance.

Another persistent problem in interaction with the judge and jury arose from the defendants’ apparent inability to think through the consequences of their arguments, or to gauge the effect of their remarks on the listener, which resulted in ill-considered remarks to the legal powerbrokers, such as those seen in the next example.

Example 13: Defendants' Remarks Alienating the Adjudicator

D3: The D.A., the D.A. wants the death penalty, and I can't see that I'm much concerned. You want to put me away for natural life or death. Neither way is too much to look forward to. If you want – I am disappointed in you as jurors.
D1: I think there's going to be improper appointing of counsel if the Judge does it and protecting his own people who walk among his intimate footing himself. And so far you've [=J] made nothing but bad decisions.

These utterances were very likely to insult or annoy the hearers, to the defendants' detriment. It is not prudent for a speaker to insult the jury who will later be making a life or death decision about that speaker's punishment. Similarly, telling the judge that all of the judge's decisions have been "nothing but bad" is unlikely to draw much sympathy from the court who will later be pronouncing a sentence.

Language features are consistent with those symptomatic of mental illness

As observed, many features of the language used by defendants in this small sample would make them difficult to follow and far from ideal advocates in their own cause. In fact, a survey of the psychological literature confirms that many features of these *pro per* advocates' language are listed among symptoms of mental illness, such as the fast, *pressured speech* of Defendant 1 which vexed the court reporters, and his problems in *consistently clear reference*. A great many pages in this defendant's case transcript contain admonitions to, "slow down!" from the court reporter, judge or other trial players.

Like the defendants observed by LaVigne and Van Rybroek, the *pro per* defendants in the California sample had difficulties taking others' perspectives into account. Two additional features were also telling – Word Approximations and Circumstantiality – commonly observed in the communications of schizophrenics, although they are not limited to that diagnosis.³⁶

Samples of the defendants' word approximations are shown in Example 14. Their courtroom talk could sometimes display rather subtle lexical problems – either in invented words or novel usage.

Example 14: Defendants' Word Approximations

D1: This is not me, Your Honor. I'm not a *pre-child*
D3: You may not *speed the rate* of my, as long as I keep covering new ground.
D4: And you indicate you've got an opportunity to *review me*, or did you?
W: To examine you, yes.

Defendant 1's utterance in Example 14 was given in response to the notion that he lacked understanding, to rebut the notion that he was naïve or had the comprehension ability of a baby.

Defendant 3's expression "speed the rate" protested the judge's trying to hurry him along in his presentation.

And finally, Defendant 4 used a verb which often takes an inanimate object (“review a book”) and substituted it for the verb which appropriately described a psychological assessment (“examine”).

Two defendants showed a general pragmatic aberrance which marked their expression as strange. As shown in previous examples, Defendants 1 and 3 were preoccupied with certain topics and regardless of their relevance, the defendants raised these issues frequently, such as the notion of the forged transcripts (Defendant 1) and the Beast of Revelations (Defendant 3).

Both defendants tended to be long-winded on topics of only slight relevance to the question or issue at hand, which exasperated the court. Defendant 1’s speech in his advocate role showed particular circumstantiality, giving long-winded responses to questions which were only tangentially related to the query. A sample is shown in Example 15, where, in response to the court’s question about why he wanted to represent himself, he veered off topic.

Example 15: D1’s rationale for self-representation

...Been brought up competitive swimming all my life. It [a]ffected everything about my life. It’s been a real pleasure to have the parents I had to support those things when I was a child.

If Defendant 1 had said, “I want to represent myself because I enjoy competition and was raised in a competitive way,” perhaps his rationale would have been more intelligible. Instead he careened off the path into a discussion of his family. During his self-representation, many transcript pages were taken up with such oblique and tangential remarks.

Summary and limitations

The examples of language in these four California cases were taken from court transcripts, but had the defendant/advocates been observed live in court or on video, as Mr. Ferguson was, they would likely have appeared even more impaired, as the written transcript does not record their demeanor, facial expressions, or prosodic oddities (of volume, rate, or tone) except to the extent that others in the courtroom reacted to them, remarking, e.g., “Slow down!”, “Could you repeat that? I didn’t understand,” or as in the case of Defendant 3, commenting to the judge, “I don’t know what he is trying to prove.”

While the four defendants varied in how well they could follow the courtroom protocol, Defendant 1 appeared to be the least able to follow the court’s admonitions to slow down and to refrain from talking out of turn. At his sentencing hearing, after the jury had rendered its death verdict, a news photographer’s documentation revealed that the trial judge had ordered him to be bound and gagged for that court session.³⁷

Although Defendant 1 was the most extreme, all four of the cases of self-represented defendants presented some of these same basic pragmatic problems in communication. They had difficulties in self-monitoring, maintaining pragmatic perspective and coherence – deficits which may confuse or perplex other courtroom players and doom their efforts at advocating for themselves.³⁸

In contrast to Mr. Ferguson, whose courtroom presence and presentation were remarkably articulate and measured (albeit espousing delusional and irrational views), the pressured speech, circumstantiality and other features of Defendant 1's speech, which he clearly could not control, marked him as a particularly impaired advocate. Yet both men, for a time at least, were evaluated as proper advocates in a *pro per* role.

Conclusion

Although the balance between a defendant's right to self-representation and the integrity of the judicial system is a delicate one, it is evident that in none of the instances discussed and illustrated above was either the justice system or the defendant very well served. Whether the defendants would be assessed as being in the "gray area" between competence to stand trial and competence to represent themselves is debatable. Nevertheless, if the trial-competence standard were made more rigorous, as many have advocated, defendants with such serious symptoms probably would have been sent to a mental hospital rather than subjected to a capital trial.

Among the most tragic cases are those in which a viable defense and strong doubt about the defendant's guilt was obscured in the muddle created by defendant's mental symptoms, as in Defendant 3's case.

The features of the four defendants' language and discourse, along with the other players' reaction to them, thus played an important role in determining whether such a trial "proves [as] humiliating as ennobling" for defendants who sought to serve as their own lawyers (*Indiana v. Edwards* (2008) 554 U.S. 164, 176.)

It is to be hoped that a more interdisciplinary approach to trial competence evaluation, with full attention to the language as symptomatic of mental illness, will aid in making more valid and dynamic assessments both for the so-called "Gray Area" defendants, and for defendants in general.³⁹

Many commentators have pointed out that for every notorious case like Mr. Ferguson's, or the serious capital homicide cases presented here, there are many lower-stakes everyday court proceedings where the mental competence of the defendant is at issue,⁴⁰ yet only rarely is the defendant determined to be incompetent to proceed to trial.⁴¹ While the rate of mental illness among incarcerated persons is estimated to be three times that of the general population, less than 2% of the felony defendants are determined to be incompetent to stand trial.⁴²

These statistics strongly suggest that improvement is in order, and those whose field of study is language and pragmatics would be very helpful adjuncts to the mental health professionals who make these critical evaluations, and to the judges whose decision may lead to either a fair trial or (as suggested in the cases sampled above) a devastating wreck.

Notes

¹The balance between a defendant's autonomy – or right to defend him or herself under the Sixth Amendment to the United States Constitution – and the government's expectation and protection of fairness in an adversary proceeding has been much debated, especially in those instances in which the defendant appears to suffer from mental illness. See, e.g., Sabelli and Leyton (2000), who argue the protection interest may be strongest, in contrast to Wilson (2010), who argues that defendant autonomy must be the strongest consideration. Slobogin (2006) also is a strong voice for self-determination for mentally ill defendants. See also Frigenti (2012).

²Bardwell and Arrigo (2002) argue that a lack of rigor and consistent standards in competency assessments must be corrected.

³Davoli (2009: 313) maintains that current competence standards inappropriately focus on the diagnosis, or the “cause” of incompetency, rather than the resulting symptoms of disability. Colin Ferguson’s former lawyers focus on the leniency of the competence bar (Kuby and Kunstler, 1995). The “outmoded” nature of the competence standards has been the subject of much scientific and legal commentary as well (see Davoli, 2002).

Hashimoto (2010: 1147–1187) suggests that current proposals for limiting self-representation would infringe all defendants’ Sixth Amendment rights (to choose self-representation) to protect a few. Instead, the author advocates making the test for mental competence to stand trial more rigorous, noting that only a very small percentage of criminal defendants receive competency examinations and only a tiny percentage are found incompetent to stand trial, despite demographic surveys of prisoners indicating a large population with serious mental health symptoms, such as delusions or psychosis. Based on Hashimoto’s statistics, it is possible that the proportion of capital charged defendants whose competency is in question may be higher than among simple felony defendants, but the percentage of capital defendants found incompetent is likely to be similarly very low.

⁴LaVigne and Rybroek (2011, 2014) have surveyed communication problems impairing defendants’ abilities to assist their defense counsel, including deficits in pragmatic competence, a “lack of social cognition, an inability to take the perspective of the other person, and a failure to appropriately adapt in interactions.” (LaVigne and Rybroek, 2014: 75).

⁵Covington *et al.* (2005) identified pragmatic deficits as an extremely common problem among schizophrenics.

⁶LaVigne and Rybroek (2014: 105) have observed that communication deficits may be misconstrued as obstructionism by legal professionals. The authors have made a strong case for more searching examination of mental competence in conjunction with greater attention to language impairments, as well as more training for lawyers in effective representation of clients manifesting these problems.

⁷The notion of a “gray area” comes from law review examinations of the *Indiana v. Edwards* decision (see, e.g., Appelbaum, 2008; Goldschmidt, 2011), as well as from the *Edwards* decision itself.

⁸The defense bears the burden of bringing forth evidence to rebut the legal presumption of mental competence, and of establishing incompetence by a preponderance of the evidence. *People v. Marks* (2003) 31 Cal. 4th 197.

⁹Where opportunity for assessment is limited, such conflicts are hardly surprising. Further critiques of competence examinations allege a lack of uniform standards and subjectivity in reaching judgments of mental fitness. Davoli (2009: 330) observes “three major flaws” in the assessment of CST: “vagueness, lack of uniformity in diagnostic criteria and failure to consider the etiology of serious mental diseases.”

¹⁰For example, Defendant 1, whose language is discussed in the next section, refused to undergo testing as he insisted there was nothing wrong with his mental abilities. Lack of insight into one’s own mental symptoms is itself a recognized symptom of mental illness. See, e.g., Amador (2007), Amador and Shiva (2000), 10 Civil Rights J. 401.

¹¹See, e.g., Alarcon and Mitchell, 2011.

¹²See, e.g., Rogers *et al.*, 2004.

¹³See, e.g., Testimony of Dr. George Woods, a forensic psychiatrist, in *U.S. v. Duncan*, USCA NO. 08-9903122, RT 5923. Dr. Woods stated that such tests “do relatively well when you are looking at issues of factual: do [defendants] know who their attorney is, do they know the rules of an officer of the court. They do not do as well when you look at issues of rational assistance.”

¹⁴California Penal Code § 1372, which sets forth procedures after restoration of competence.

¹⁵Defense attorney Ronald Kuby, in “The Long Island Railroad Massacre (Dark Documentaries)” available at: <http://www.youtube.com/watch?v=8MPoz5DioPE>

¹⁶Bardwell and Arrigo (2002: 119)

¹⁷*Drope v. Missouri* (1975) 420 U.S. 162, 181 (“Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence. . . .”) California Penal Code § 1368 provides that when

doubts about defendant's competence are raised by either counsel or the trial judge, proceedings may be suspended.

¹⁸In fact, hyper-religiosity, and injection of the theme of religion into contexts where it was arguably irrelevant, was typical of this defendant's remarks to the court. A preoccupation with religious themes and religious delusions may go along with psychotic disorders. (Brewerton, 1994).

¹⁹For example, distinctions among symptoms (as advocated by Davoli) may have precluded trial for actively delusional clients, such as Defendant 2, or other defendants manifesting psychotic symptoms.

²⁰Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law, *Indiana v. Edwards*, 2/11/08.

²¹"Joint" is a common slang term for a place of incarceration.

²²Example 3 is a continuation of the talk between the judge and same defendant as in Example 2.

²³In California as in most states, defendants in such serious cases are incarcerated throughout their capital trials; thus, their mental symptoms may also be exacerbated by conditions of confinement, warranting a re-assessment of competence during the course of trial proceedings. See e.g., <http://www.latimes.com/local/lanow/la-me-ln-jails-20140606-story.html>

²⁴This number is an extremely rough estimate, as of December, 2013. More recent transcript data for additional *pro per* defendants is not yet available.

²⁵<http://www.sfgate.com/news/article/Serial-killer-Naso-sentenced-to-death-5002487.php>

²⁶Among the group of defendants in Figure 1, defendant 3 is one whose trial performance was discussed in an earlier paper on narrative to the IAFL in 2006. See Greenlee (2007).

²⁷However, the role of advisory counsel is a limited one (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1165). While a *pro per* defendant may confer with advisory counsel and advisory counsel may question the defendant if the defendant testifies, most other advocacy tasks are left to the defendant.

²⁸On appeal, the California Supreme Court determined that allowing the defendant to serve as his own counsel for the competence hearing was an error and remanded the case to the trial court. In a bizarre development, a retrospective competency hearing was then held in the lower court to determine the defendant's CST some 20 years earlier; he was held competent, and the prior conviction and sentence reinstated. Nevertheless, as acknowledged by the High Court, such retrospective determinations present special problems (*Pate v. Robinson* (1966) 383 U.S. 375, 387.) Press accounts of the retrospective competence hearing for D1 noted that because the defendant could not stop speaking out of turn, he was absent for much of the latter proceeding.

²⁹Mr. Ferguson was determined to have a delusional disorder, persecutory type by a defense psychiatrist, Dr. Dudley, while more cursory examinations by two other mental health experts labeled him as merely having a paranoid personality (Bardwell and Arrigo, 2002: Chapter 5). Excerpts of Mr. Ferguson's trial, including his opening and closing statements are found in "The Long Island Railroad Massacre (Dark Documentaries)" available at: <http://www.youtube.com/watch?v=8MPoz5DioPE>.

³⁰Bardwell and Arrigo (2002) summarize varied responses to the Ferguson case.

³¹See Greenlee (2007: 168): "A press summary of Lowry's defense at trial characterized it accurately and succinctly as 'some ill-defined conspiracy by police and others to frame him because he aspired to emulate the Beast of Revelations in order to rid the world of homosexuals and restore religious faith to humanity in the future.' "

³²*Railroad Killer Gets Life Term as Cheers Erupt*, Los Angeles Times, 3/25/95. http://articles.latimes.com/1995-03-23/news/mn-46266_1_colin-ferguson. Mr. Ferguson was sentenced to 6 consecutive terms of 25 years to life in prison. He was also sentenced to 50 years on additional counts, including multiple counts of attempted murder, *People v. Ferguson* (1998) 670 N.Y.S.2d 327 (App. Div. 1998), appeal denied, 706 N.E.2d 750 (N.Y. 1998).

³³Greenlee (2007: 169).

³⁴This example also shows odd use of the word "distinguish" as a noun, apparently intending the word "distinction."

³⁵Greenlee (2007: 167)

³⁶Inadvertent lexical slips are of course not limited to the mentally ill. However, inventions of novel words whose meaning is idiosyncratic to the speaker is more symptomatic.

³⁷See note 28; Defendant 1 was ordered removed from the courtroom in his subsequent retrospective competence hearing, as well.

³⁸These deficits are well-known features of mental illness. See Andreasen, 1979; Covington *et al.*, 2005. Research with mentally ill patients found that patients whose diagnosis was schizophrenia demonstrated considerable impairment in understanding legal rights and waivers. (Roessch and Zapf, 2002).

³⁹The work of LaVigne and Van Rybroek with juvenile and adult defendants has emphasized and highlighted the need for consideration of communication and language deficits along with assessments of mental competence in an interdisciplinary approach (see LaVigne and Rybroek, 2011, 2014.)

⁴⁰Davoli (2009: 316)

⁴¹Even those who are psychotic may also be considered competent to stand trial. Davoli (2009: 316) (see also note 22) observed that even “evidence that the defendant suffers from a mental illness and is currently psychotic, delusional or hallucinating is no bar to a judicial determination of competence.”

⁴²These figures suggest that many defendants are in fact, adjudicated while suffering from serious symptoms of mental illness. Hashimoto (2010: 1186) reviewed survey data showing that over half of state prison inmates disclosed “recent history or symptoms of mental illness” and “approximately 15% of state prison inmates reported experiencing symptoms within the preceding twelve months that met the criteria for a psychotic disorder, including hallucinations or delusions.”

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Lay Litigation Behaviour in Postcolonial Hong Kong Courtrooms

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Abstract. *Many jurisdictions have recently experienced a significant increase in the number of litigants in person (LiPs) in their civil justice systems; related research (e.g. Baldacci, 2006; Moorhead, 2007; Richardson et al., 2012; Zuckerman, 2014) has assessed the impact of this on the legal system. In postcolonial Hong Kong, implementation of legal bilingualism (as a result of which ordinary citizens may use their local language, Cantonese, to litigate) and the changing political environment following the 1997 transfer of sovereignty, have also led to a surge in unrepresented litigation. Drawing on both observation data collected in Hong Kong courtrooms and interviews with litigants, this interdisciplinary study explores how LiPs in Hong Kong engage, and struggle, with the justice system, and how changing patterns of interaction in these courtrooms reflect a postcolonial legality. It illustrates the strategies LiPs adopt in presenting their case, which are not displayed by represented litigants or professional advocates, and explains their behaviour in linguistic and sociocultural terms. It is argued that the communication gap between laypersons and legal professionals is ideological and structural, and cannot be bridged simply by adopting present approaches to either assisting or educating the former.*

Keywords: *Unrepresented litigation, litigants in person, courtroom discourse, Hong Kong, post-colonialism.*

Resumo. *Várias jurisdições registaram recentemente um aumento significativo do número de litigantes em pessoa (LiPs – litigants in person) nos seus sistemas de justiça civil; estudos nesta área (e.g. Baldacci, 2006; Moorhead, 2007; Richardson et al., 2012; Zuckerman, 2014) avaliaram o impacto deste aspeto no sistema jurídico. Em Hong Kong pós-colonial, a implementação do bilinguismo jurídico (decorrente do qual os cidadãos comuns podem utilizar a sua língua local, o Cantonês, para efeitos de litigância) e a mudança do ambiente político que se seguiu à transferência de soberania de 1997 também conduziram ao aumento de litigância não representada. Este estudo interdisciplinar baseia-se, quer na observação dos dados recolhidos nos tribunais de Hong Kong, quer em entrevistas com as partes, para analisar de que modo os LiP em Hong Kong se relacionam, e lutam, com o sistema de justiça, e de que modo a mudança dos padrões de interação nestes*

tribunais reflete uma legalidade pós-colonial. O artigo ilustra as estratégias adotadas pelos LiP para apresentarem o seu caso, que não são expostas por partes representadas nem por advogados profissionais, e explica o seu comportamento em termos linguísticos e socioculturais. Defende-se que o fosso comunicativo existente entre os leigos e os profissionais jurídicos é ideológico e estrutural, e que não pode ser eliminado simplesmente através da adoção de abordagens atuais para assistir ou educar os primeiros.

Palavras-chave: *Litigância não representada, litigantes em pessoa, discurso em sala de audiências, Hong Kong, pós-colonialismo.*

Introduction: The Phenomenon of Unrepresented Litigation

Despite a substantial body of research showing that effective legal representation improves the chance of winning a case (e.g., Genn and Genn, 1989; Seron *et al.*, 2001; Latreille *et al.*, 2005; see Kritzer, 1998 for an exception¹), many litigants choose not to be represented. They are known as ‘litigants in person’ (or ‘LiPs’) in the UK and in Hong Kong; in the US, typically ‘*pro se* litigants’; in some other jurisdictions, ‘unrepresented litigants’ or ‘self-representing litigants’. These litigants may or may not have received advice in preparation for trial. The phenomenon of self-representation is on the increase internationally. Such increases have been reported in the US, in both state and federal courts (Landsman, 2009), and it is particularly alarming for defendants, following a Supreme Court decision in 2004, that they do not need to be advised about the dangers and disadvantages of a counsel waiver (*Iowa v Tovar*; analysed in Cook, 2005), despite their competence to stand trial on their own being subject to questionably low criteria, even for capital defendants (Greenlee, this volume). In the UK, civil cases also show high levels of non-representation. In the wake of recent budget cuts in legal aid services, those rates seem set to show a further rise (Civil Justice Council, 2011; Judiciary of England and Wales, 2013). Growing concern has been reported in other countries including Australia (Law Council of Australia, 2004), Canada (Cohen, 2001) and New Zealand (Smith *et al.*, 2009). Although there may be shared reasons for the global prevalence of the phenomenon, such as an increase in literacy (Goldschmidt, 2002) and funding cuts for legal aid, there are likely to be regionally variable contributing factors.

This article shows how self-representation has acquired special significance in postcolonial Hong Kong. Unlike in the US, few would suggest that being litigious is deeply rooted in Hong Kong culture. In fact, a traditional Cantonese saying has it that stepping into court is analogous to going to hell. Although colonial law was often used as a tool of oppression, at the same time it allowed the colonized to take advantage of its services and develop the legal consciousness of the colonial legal system (Merry, 2004). As in many other postcolonial jurisdictions, the law of Hong Kong was forged in the colonial era. During 150 years of British colonial rule, establishment of the rule of law has inculcated ideas of rights and property and instilled faith in the legal system. Under Chinese rule, a weakening of the legislature² in Hong Kong has shifted political opportunities to the judiciary, prompting advocacy groups to use the law to pursue their own goals (Tam, 2013). The autonomy and efficiency of a ‘legal complex’ (especially an independent and functioning judiciary) has also inspired confidence in litigants to use the justice system to defend their rights. Further, with increasing contact and conflict between Hong Kong and mainland China, the rule of law, despite being a colonial legacy, is now seen as a

core part of Hong Kong's identity and used as a way of distinguishing the city from the mainland, with the consequence that a new form of legal consciousness is emerging from the ideological struggle (Silbey, 2005).

During most of the colonial period, English was the only official language used in the legal system, despite the fact that the vast majority of the population did not speak it fluently. It was not until 1987 that Chinese became an additional legal language, and then the translation of legislation into Chinese was only completed in 1997, the year of sovereignty change. Now that locals can litigate in Cantonese (the mother tongue of most Hong Kongers, although a low variety during the colonial days) and be heard directly (instead of through an interpreter), litigants no longer take it as self-evident that they should rely on lawyers, not least because of the lifting of the language barrier.

In 2011, 36% of litigants in the High Court and 51% in the District Court did not have legal representation (Information Services Department (Hong Kong), 2013). In addition to providing legal aid, which is granted if applicants pass a means test³ and a merits test⁴, the government set up a Resource Centre for Unrepresented Litigants in 2003 to offer assistance to LiPs; general counter enquires handled by the Centre grew steadily from 4,268 to 10,108 cases between 2004 and 2008 (LC Paper No. CB(2)601/08-09(04)). Even so, an earlier study by the author (Yeung and Leung, 2015) has shown that the written materials provided were largely incomprehensible to laypeople. This situation was to some extent acknowledged when, as further help for LiPs, a free, means-tested legal advice scheme on civil procedural matters was introduced, currently in the pilot phase for two years.

For common law jurisdictions, the phenomenon of unrepresented litigation is particularly problematic. The adversarial system places a considerable burden on opposing parties in many ways, making litigation a very challenging game for lay players⁵. The Interim Report of the Civil Justice Reform (Interim Report 2001, Hong Kong) specifically highlights the issue of LiPs, acknowledging that "the traditional civil justice system is designed on the basis that parties are familiar with the procedural rules and will take the necessary steps to bring the case properly to trial or to some earlier resolution". This fundamental assumption regarding the system is potentially disrupted by widening participation by laypersons. As in other jurisdictions where self-representation is common, trials may be prolonged and judicial resources consumed (Landsman, 2009). Judges also find themselves taking on an altered role in cases involving unrepresented litigants (Moorhead, 2007). That new and still evolving role involves fresh challenges in preserving crucial judicial functions, including maintaining impartiality, ensuring courtroom decorum and smooth process, and overseeing efficient use of judicial resources.

Current Study

Existing studies focus mainly on 'problems' that unrepresented litigants 'create' for a justice system (e.g., Schwarzer, 1995); they also examine reasons for litigants not having legal representation, the burden such litigants bring to the justice system, and ways to eliminate those problems (e.g., by providing judicial assistance in trials, or legal representation through legal aid). Such studies are necessary and laudable in illuminating the legal process as a whole, but they give insufficient attention to litigants' experience of the justice process. When it comes to interactions in the courtroom, for example, there is a tendency for legal professionals to dismiss litigant behaviour as irrational, unpre-

dictable or disruptive, especially from the opposing lawyers' perspective (Garland, 1998; Zuydhoek, 1989). Unrepresented litigants are also blamed for cluttering up cases "with rambling, illogical reams of what purport to be pleadings, motions, and briefs" (Nichols, 1988). Turning to the linguistics literature, studies of courtroom discourse have overwhelmingly focused on represented litigations (notable exceptions⁶ include Tkačuková (2008) and Tkačuková (2010)). The absence of counsel – at least to some extent – subverts the stereotypical interplay between power and language in the courtroom commonly portrayed in the wider legal discourse literature.

Similarly, in Hong Kong, previous legal studies have tended to take a top-down approach (Kelly and Cameron, 2003; Chui *et al.*, 2007), describing litigants' behaviour through the eyes of judges and lawyers. This exploratory study ventures into uncharted territory by documenting litigant behaviour in Hong Kong courtrooms, with a focus on explaining why such litigants behave as they do, and what strategies they adopt in order to handle a situation they are unlikely to have encountered before. It also highlights fundamental mismatches between litigants' expectations from a common law legal system and what that system is designed to offer.

An interdisciplinary approach to these issues is taken: the analysis offered is both socio-legal and linguistic. Courtroom observations and interview data involving unrepresented litigants were collected during litigation in the lower courts of Hong Kong (i.e., where LiPs cluster). Findings presented below are based on 119.5 hours of observation conducted between July 2012 and May 2013, involving 11 trials in: District courts (8), High Court (1), Land Tribunal (1) and Small Claims Tribunal (1). In terms of selection criteria, apart from screening out cases that involved legal representation on both sides (as indicated in the judiciary's Daily Cause Lists), as well as avoiding scheduling conflicts with the researchers' classes, cases were also chosen from different courts to cover a range of cases, including breach of contract, defamation, damages against a former employer, assessment of damage, medical negligence, debt, divorce, property, land and contractual disputes. In 8 out of the 11 trials examined, both parties were unrepresented, meaning that, excluding one LiP who was absent during her own trial, the courtroom behaviour of 18 LiPs has been observed. All 18 were participating in civil cases. They were approached by the researchers at the end of their trial for an interview regarding their reasons for self-representation, preparation for trial and courtroom experience. The interviews were audio recorded. The benefit of approaching these LiPs after having observed their trials is that the researchers could compare their subjective experience with our observation.

Because no official transcript or recordings are available⁷, courtroom data were collected in the form of notes and transcriptions made by the author and/or her assistant. As a result, the reported data cannot claim precision in terms of micro-linguistic features such as length of pauses, tonal changes, fillers, speech rates and overlaps, which can be highly important in sociolinguistic research (Jefferson, 2004). Instead of analyzing the language data at this level, this paper takes a more macro perspective and an interdisciplinary approach by describing recurrent patterns of litigant behaviour in both linguistic and sociocultural terms, comparing their discourse style with professional advocacy where appropriate, and interpreting litigant behaviour through the interview data. At some points, extended quotation is used to indicate more precisely the verbal texture of courtroom interaction. Unless otherwise stated, the original data are in Cantonese. For

the purpose of this article, however, my own English translations are used, except for stretches of code-mixing (where both languages are given).

Lay Litigation Behaviour and Strategies

This section reports frequently exhibited LiP behaviour and strategies, which are not commonly displayed by represented litigants or professional advocates. Legal normativity is generated through recursive performance, which is not bounded by a fixed set of rules, but reflects the law as “a distinctive manner of imagining the real” (Geertz, 1983), leaving those unfamiliar with it to struggle to perform effectively in the courtroom (Heffer, 2005). A great deal of the behaviour documented in the study is clearly not pre-planned but reflects litigants’ struggles to react to their situation; at the same time, there are observable patterns as regards the strategies that such litigants use to make their case. Data and discussion are presented in a series of sub-sections dealing with the following aspects: non-verbal behaviour, speech style, understanding of participant roles, familiarity with procedures, cross-examination, evidential matters and reasoning process and strategies in argumentation.

Non-Verbal Behaviour

Witnesses who have been ‘prepared’ by their lawyers learn the performative logic of the courtroom; for example, they know that they have to avoid excessive emotional displays (Boccaccini, 2002). Their lawyers also help them to organize their relational stories into rule-oriented accounts (Mertz and Yovel, 2005). By contrast, as has been described by lawyers who faced LiPs in court (Chui *et al.*, 2007), when expressing themselves some LiPs cried, knocked on the table, and pointed their finger at others (including the judge), behaviour that may be theatrically powerful, but is not allowed or expected on the courtroom stage. Numerous examples were observed of LiPs not knowing when to sit or stand and when to speak or remain silent. LiPs were asked not to express themselves by using gestures (such as nodding or shaking their head), not because such gestures are non-communicative, but because they would not be registered by the court recording system.

LiPs were also observed raising their hands to request a conversational turn and showing respect to authority, only to learn that turn-taking in the courtroom, as well as rituals including sitting down and standing up, follow different rules than they had assumed. At such moments of procedural irregularity or failure of etiquette, the layperson may have borrowed ideas from required classroom behaviour, a situational context with obvious resemblance to the courtroom in terms of power hierarchy, but not in terms of the adversarial and the adjudicative nature of the courtroom.

From an insider’s perspective, such litigant behaviour fails to show deference to legal authority by adjusting to the normative behaviour of the courtroom, in which lawyers have been trained. From an ‘outsider’ perspective, the litigants are simply bringing commonplace conversational practice from the wider social sphere into the highly unusual setting of a courtroom.

Pace, Lexical Choice and Speech Style

LiPs also face problems with speech. One such problem is that they tend to speak quickly. Their tempo might be normal in social interactions, but judges (and courtroom researchers) have problems following them, especially given the need for note taking.

The register used by LiPs typically shifts when speaking to judges and speaking to the opposing party, with whom a more informal style is used. Due to the lack of detailed linguistic analysis reported in the literature, it is unclear whether LiPs display similar speech patterns in other jurisdictions. Some verbal behaviour exhibited in the data, however, was undoubtedly distinctive of the Hong Kong bilingual situation. Common law Chinese, a variety of legal Chinese specifically developed for the common law jurisdiction of Hong Kong, is a relatively recent invention, and not something the average citizen is likely to be familiar with. Knowing that the courtroom situation is associated with the formal register, LiPs on occasion resort to archaic Chinese expressions that belonged to the feudal legal system (e.g. 法官大人, literally 'Judge, Your Big Man', roughly equivalent to 'Judge, Your Excellency' instead of 法官閣下, or 'Sir/Madam Judge', to address the judge, as previously documented in Ng, 2009). Such lexical items are commonly heard in historical dramas on television. An alternative form of address that some LiPs adopt is simply to use the pronoun "you" to address the judge which undermines the courtroom formality (and potentially symbolic authority; Stinchcombe, 2001) created by the physical distance and impersonality of legal personnel.

Other than in their address terms, in an effort to be formal some LiPs attempt to insert phrases from the written form of Chinese into their speech. Examples include 時間短促的關係 ("due to the shortness of time"), 好遺憾地 ("with great regret"), and 拎鐵尺警示佢 ("use the iron ruler to caution him"). The result is that their speech consists of an awkward mixture of informal, formal and occasionally hyper-formal vocabulary, sometimes within a single phrase or sentence. This highly distinctive register mix is especially striking in Cantonese because (unlike English and many other languages) the spoken language and the written language are markedly different.

Closely associated with hyper-formality is over-elaboration. In one case, when the judge asked a LiP whether he had submitted a document, the LiP gave a long-winded explanation of the time he arrived at a location and the address of the post office. The judge instructed him that, since his answers had not been challenged, he should "explain only when I ask you to explain". The issue at stake is not merely one of style: in a US study related to behaviour of this type, O'Barr found that mock jurors were more likely to discredit witnesses who spoke with a hypercorrect style (O'Barr, 1982). Such hyper-formality and over-elaboration are akin to over-acting in the theatre, which reflects LiPs' excessive effort to appear to be credible and innocent in front of the judge, a kind of performance that seems to be more important in adversarial than inquisitorial settings.

Code-mixing and lexical borrowing are common in the social sphere in Hong Kong, but can now also be heard in the specialised environment of the courtroom. Civil procedures in Hong Kong stipulate that mixing of codes in the spoken form in court is acceptable, but not in the written form in documents. So, the practice is permissible in court, although rarely employed by lawyers in order to avoid sounding unprofessional. When LiPs mix codes, the base language they are using is usually Cantonese, with legally-related English lexical items inserted, especially when a LiP is talking to the judge. Examples of lexical borrowing from the data include:

- 我想請問你個court的文件係有冇... – "I want to ask you whether the *court* has the *file*..."

- 咁我就收到梁生的一份civil litigation, 我覺得好奇怪, 因為佢唔係呢個trademark的持有人... – “Then I received the *civil litigation* from Mr. Leung. I found it strange because he does not own the *trademark*...”
- 同埋佢根本establish唔到, 話我偷野, 係邊度, 邊度偷, 邊張相... – “And he simply cannot *establish*, that I stole, where, which photograph...”
- 請佢prove返證據... – “Ask him to *prove* with evidence...”

While the mixing of codes may be habitual, the pattern it creates is not random (Myers-Scotton, 1993). The English insertions are linguistically marked, especially given that it is the ex-coloniser’s language and the native language of the common law. Possible explanations include that lexical borrowing is used to borrow authority, or to align with legal professionals, including the judge. The practice may in some cases be contrived to reflect positively on the speaker’s socio-economic and educational status. Codeswitching in the courtroom has been reported in other former British colonies. In her study of Malaysian courtrooms, David (2003) found that Malaysian lawyers codeswitch to English to show audience awareness, to highlight culturally alien concepts, and to add emphasis.

Understanding Participant Roles and Turn-Taking

LiPs are largely dependent on the judge when it comes to procedural matters (similar to what has been reported in Moorhead, 2007 in the UK context). Sometimes they expect judges to teach them what arguments to make in order to succeed, how they should proceed, and what kind of evidence they will need. Although judges are not tasked with facilitating trials by providing legal advice, they are generally sympathetic towards LiPs, despite occasional signs of irritation.

In many respects, litigants’ understanding of courtroom interaction may have been misinformed by what they have seen in the popular media. At trial, objections are properly initiated only for evidential or procedural reasons (Imwinkelried, 2012), and such reasons must be clearly stated within the same objection sequence (Heffer, 2005). Genuine grounds occur rarely⁸, but some LiPs act as if they can express their disagreement with an argument by objection:

D: Mr. X (*plaintiff*) never gave me the document –

P: (*stood up; interruption*) I object!

J: Don’t fight for a turn! You sit down. He was talking!

In this interchange the LiP has failed to appreciate that turn-taking in the courtroom is governed by a complex set of rules (illustrated in Heffer, 2005) based on participant roles and stages of the trial, and differs fundamentally from the patterning of daily conversation in which overlapped speech is frequent and speakers self-select to talk (Sacks *et al.*, 1974); during courtroom examination, for example, both turn order and the type of turn which each speaker is allowed to take are fixed (Atkinson and Drew, 1979). It is possible that the LiP was imitating scenes from TV courtroom dramas that tend to exaggerate the frequency of objections. Features of everyday conversation now encroach increasingly on courtroom discourse, as LiPs compete for the floor (incidentally posing a new challenge to accurate trial recording). This would have been unimaginable in the courtroom of British Hong Kong, given the presence of court interpreters who mediated exchanges mostly between Cantonese speaking witnesses and English speaking legal actors. By contrast, some LiPs in the data sought to gain a speech-turn by politely asking for one, as in the example below:

P: *Your Honour, can I talk now?*

J: *Ask all your questions in one go later. Take notes so that you won't forget!*

In a different case, when a request for a turn was declined an elderly LiP petitioned further. After the judge told him it was not his turn to talk yet, he said "I am old and my memory is not strong. I want to reply immediately. You are not allowing me to talk..." He pointed out, in a dignified protest but unsuccessfully, that he was illiterate and so unable to take notes, in effect highlighting how unrealistic it was for him to follow the established procedure. This example presents the kind of problem for which an adversarial system is not well prepared. When parties are represented, the presumption is that lawyers are literate, can remember the points they wish to make, and will make their submissions at the correct time.

Knowledge of Procedures

In order to ease some of the difficulties outlined so far, judges frequently assist by calling for breaks, for example, so that LiPs can photocopy documents they forgot to prepare for the witness, to amend a document, or think further about arguments they wish to submit. In one case, the judge found that the unrepresented plaintiff's oral submission in court was quite different from his written statement of claim. It turned out that the plaintiff did not understand his own statement of claim, either in terms of content or purpose, because the claim had been prepared in English by a lawyer who had then ceased to represent him. The judge ordered a three-hour break for the LiP to decide precisely what his claims were, but still ended up having to help him narrow down his list based on the limited evidence he had available.

Normally in a trial, the opening statement provides an opportunity to highlight the main issues and present a summary narrative of the case, in order to frame the facts which will be presented in witness testimony (Wilkinson, 1995). Confusion between statement and evidence is common among LiPs. On the other hand, given that it is the same LiP who does all the talking, it can be difficult conceptually for that person to distinguish between rehearsing their litigation strategy and testifying on the facts. Sometimes one or more procedures of the trial (such as opening statement and cross-examination) may end up being skipped in order to expedite the trial process.

LiPs show a tendency to see procedural matters as mere obstacles to their narration, as is evident in another case involving a land dispute in the course of a dialogue between the judge and an unrepresented respondent:

J: *You are going to testify in a moment. Will you use the witness statement you submitted to the court?*

R: *What?*

J: *The witness statement you handed to court – will you be making use of it?*

R: *What?*

J: *You handed the court a witness statement – will you use it?*

R: *Statement?*

J: *Use the witness statement or not?*

R: *He [the tenant] does not want it. (Switches to start narrating his story)*

J: *Wait, Mr. X, don't start yet...*

For the litigant, their version of the event naturally takes the form of narrative. But this manner of speaking is often deemed as irrelevant or rambling in the courtroom (Baldacci,

2006); as has been shown in other jurisdictions, rejection of narratives is a systematic way of silencing LiPs (Bezdek, 1992). The litigant's opposing party, also unrepresented in this case, appeared equally baffled and was unable to structure his narrative into appropriate legal sub-genres, as is evident in the following exchange:

J: *Do you want to take the witness stand first, to give your testimony, and then give your statement? If the two are the same and you don't want to repeat, you can go straight to the witness stand...*

A: *I have something to say.*

J: *Testimony or statement?*

A: *I have something to say*

J: *I heard you. Testimony or statement?*

A: *What's the difference?*

J: *A statement is a statement; the other party cannot ask you questions. If you are providing a testimony, both Mr. X and I could ask you questions.*

Examples of this kind (which echo bewilderment about trial process among LiPs reported in studies of UK tribunals; Genn and Genn, 1989) show unfamiliarity not only with procedures but also with the legal rationales behind them. What is at issue, accordingly – and something too easily passed over in analyses of courtroom dialogue – is not simply the register or style of interaction during court proceedings, but also the related effectiveness of advocacy.

Questioning and Answering

Cross-examination, which provides an opportunity to ask questions to a witness who has testified on behalf of the opposing party (Zander, 2007), offers another interesting lens through which to observe LiP behaviour. Except in these circumstances, it is rare to see laypersons occupying the shoes of a lawyer, questioning witnesses and challenging the different story they may have to tell (Tkačuková, 2010).

In cross-examination, a series of linked questions is frequently employed, with each question covering single facts one at a time but with the goal of cumulatively building up an effective account. Some legal advocacy guides in fact state that a successful cross-examiner should ask questions in such a way that the witness will keep saying *yes* throughout (Evans, 1993). Sociolinguists (for example Gibbons, 2003 and Eades, 2012) have also documented the way lawyers use coercive questioning techniques to control witnesses. The data collected bear little resemblance to such findings, however. Many LiPs we observed failed to appreciate the purpose of cross-examination (although it is possible that learning may take place over time if the case lasts long enough; see Tkačuková, 2010; however, see also the counter example below). As a result, they are often unable to benefit from this opportunity to cast doubt on others' testimony. In daily discourse, speakers rarely have to pose informational questions (as contrasted with rhetorical questions) to people they are arguing against. Some LiPs seem to believe that their best strategy is to not allow the witness to speak, by dominating the discourse or by avoiding rather than asking questions. More generally, LiPs struggle to formulate suitable questions. In one case, an unrepresented defendant (D) simply wanted to concede his turns, unknowingly waiving his right to question witnesses.

D: *I don't know how to ask (questions), your Honour.*

J: *Just say you don't agree with... (detailed instruction omitted in transcript), then you are asking a question. I can't ask questions for you.*

D: *Then I don't have a question.*

J: *That would mean that you agree with everything that was said in the statement.*

D: *I see...*

In another case involving a rental dispute, the judge asked the respondent to cross-examine the applicant. But the respondent appeared to view this as simply a chance for his opposing party to speak, so he would rather dictate what the other party should say rather than asking them questions.

J: *You can now cross-examine, Mr. X.*

R: (respondent) *What?*

J: *Ask him questions!*

R (to applicant): *Eh then, you say you don't rent it (a property) to me, you say it!*

These examples contrast strongly with professional advocacy, in which lawyers show great skill in demonstrating through questioning that witnesses may be wrong, forgetful or dishonest, by exploring a witness's forgetfulness, asking leading questions and setting traps (following the kind of advice proposed by Evans 1996, 103, such as 'don't spring the trap until the witness is inside').

As in other respects already discussed, the justice system shows itself to be premised on an assumption that parties will be represented, with the result that cross-examination procedures, for example, can seem redundant when LiPs are involved instead. On one occasion, after an unrepresented defendant answered questions from the plaintiff, he had to be re-examined as a witness by the defendant (i.e., by himself). When the judge asked him whether he wanted to re-examine himself, he was puzzled and merely said 'no'.

Faced with these seeming distortions of established legal process, some judges offer more extensive help to LiPs, by reformulating their questions or even asking questions on their behalf, a line that judges in some other jurisdictions try not to cross, though without uniformity (Moorhead, 2007). In this way common law judges in Hong Kong, when LiPs are involved in a trial, seem increasingly to take on a more inquisitorial role than is customary in a common law system (see comparisons between the inquisitorial and the adversarial systems in Ainsworth (this issue) and Chapter 4 of Zander, 2007).

Documents, Evidence Rules and Legal Reasoning

Unlike barristers, few LiPs have developed the habit of referring to a page number and line number when referring to a document. As a result, judges and witnesses often struggle to follow the particular point being discussed in the trial documentation. In one case a LiP attempted to introduce into the bundle during trial a number of additional documents that had not been included in the process of discovery beforehand.

When the moment finally arrives, some LiPs are unable to provide evidence for critical "facts" that they have asserted are in their pleadings. In a case involving a financial dispute, a LiP failed to produce any documentary proof of a crucial insurance claim paid to him. In another (divorce) case, the husband (H) wanted to submit a police statement to the judge (J) regarding an earlier dispute between his wife (W) and himself about child abuse. She tried to stop him from submitting the evidence:

J (to H): *Do you understand me, sir? I am not refusing to accept it but it won't do anything to your case.*

W (raising her hand): *Your Honour, I agree with you, I don't accept the document either.*

J: *I don't need your acceptance.*

W: *I object.*

J: *You wait. Later if you object to anything you can ask him questions. You can disagree with points made but you cannot stop him from submitting evidence to the court.*

W: *I object.*

J: *Read it first! You haven't even read the document before you object.*

Due sometimes to a lack of understanding on the part of LiPs of the legal crux of their own cases, it happens that questions and answers deteriorate into squabbling. Sometimes LiPs do pick up on what has been said during cross-examination, but focus wrongly on points that may not be legally relevant. The following excerpt comes from a case in which an employer sued an employee for breaching his contract by delegating a job to a third party who then caused damage. Both parties were unrepresented. The following exchanges took place during a stage in the proceedings when the plaintiff (P) was supposed to cross-examine the defendant (D):

P (to D): *Do you sometimes look for part-time jobs?*

J: *How is that related to our case?*

P: *He said he is poor!*

J: *Whether he is poor or not has nothing do with this case.*

Such irrelevant squabbling not only prolongs trials, but also distracts everyone present from the genuinely important points of a case.

In their approach to amateur advocacy, LiPs often focus on their feelings and personal experience rather than substantive law; this is a legitimate persuasive device in everyday discourse but not part of legal reasoning. As Merry (1990: 147) has observed in a different context, litigants often fail to formulate their social problem as a legal problem. This may be unsurprising if one considers the rule of law as an imagined order, which is not interested in the whole story of what happened but a reduction of it to legal facts rendered from a specific social construction (Geertz, 1983). In the following excerpt, for example, the LiP displays limited understanding of what law can do for them:

J: *Law is law; grievance is grievance. (One) has to follow the spirit of the contract.*

D: *I feel cheated.*

As argued by Tannen in her general account of adversarial argument, the "requirement to ignore guilt, innocence, and truth for the sake of the law is deeply upsetting to many" (Tannen, 1999: 148). LiPs do frequently refer directly to the law in what they say, but usually they do so using stock phrases such as something being "against the law", or echoing very broad notions such as "Hong Kong has the rule of law". They tend not to be specific about what legislation they are relying on, or about the precise legal basis of their claims. Only one LiP out of the 18 observed cited a legal case, notwithstanding the importance of legal precedents in common law.

Domination, Bargaining and Quarrelling

In a manner that also echoes Tannen's general insights, common argument strategies used by LiPs include trying to dominate the conversation and objecting to anything the

opponent says, even if the point is not material. In a medical negligence case for instance, a LiP digressed to challenge the doctor's report by finding flaws in a statement that was immaterial to the case.

By contrast, the next aspect of LiP argument style to be discussed relates specifically to a Cantonese manner of speaking. A significant number of LiPs in the data attempted to make themselves more convincing by making statements that sounded more absolute than they had grounds to support. For example, they made an accusation more serious than had been alleged elsewhere in the case documentation, possibly in the hope of negotiating or haggling down, in the way a street vendor starts with an absurdly high price but expects to meet the buyer at mid-point after bargaining. This strategy, however, can prove detrimental to their case, as is shown in one judgment among the cases observed in which the judge describes an unrepresented plaintiff who was suing a hospital, "*Mr. X is clever and has received higher education. He obviously has some medical knowledge. I have considered his testimony and manner of presentation. I think he has exaggerated and distorted the facts on a number of occasions, therefore I find him unreliable*".

Sometimes a LiP does not appear to realize that serious accusations presented in exaggerated form can have legal consequences; and many LiPs have received a warning similar to the following from a judge in the data collected.

D: *(I confessed to a crime because) I thought it was a minor incident, the police said it's not a big deal, they misled me.*

J: *Your accusation is very serious! You said the police misled you.*

Here the LiP justified his own behaviour by putting the blame on others, not an uncommon strategy in social interaction, without being aware that this constitutes an accusation with legal significance. After being warned by the judge, the witness accepted that the word 'misled' was incorrect. In a similar vein, LiPs occasionally accuse the other party of forging documents or of lying when they disagree with what has been said. One LiP persisted in saying that "every single thing" the other party had said was a lie, to which the judge responded:

J: *This is a court. You can say you disagree. If you say they are lying, this may constitute defamation!*

Personal attacks are not uncommon, either, or LiPs calling each other names (such as 'villain', 'dishonest character', and 'a scum'). All the strategies discussed in this section are common in day-to-day quarrelling but fall into legal categories of understanding the world that bring consequences. Their use contrasts with professional advocacy where lawyers may persuade by highlighting or downplaying facts, but they must not suggest evidence that is irrelevant or inadmissible (Ross, 2005).

Sophisticated Self Representation

Two LiPs in the data displayed comparatively sophisticated advocacy styles and are now discussed separately. One of them had been coached by a lawyer before the trial, and the other (identified as P below) was a veteran litigant, who had represented herself in at least three lawsuits that she had initiated in the previous ten years. In addition to having litigation experience, this LiP was also a highly educated (doctorate-level) professional, spoke fluently the language of the proceedings (in the only case in the data tried in English), and had seemingly devoted a lot of time to researching and preparing

her submissions. She had evidently acquired sufficient basic legal vocabulary, addressed the judge correctly and had also acquired a range of stock phrases that lawyers use or are believed to use ('at the material time at the material place', 'let me just take you back to the time'). She appeared confident and argumentative, to the extent that she sometimes attempted to dominate the judge, as is shown in the following example.

J: *I don't care if she (P's supervisor) has made any changes (to P's appraisal).*

P: *I care!*

J: *I'll decide at the end of the day! Don't ask me. I'll take care of it, when defence witness is called.*

P: *Did you see it?*

J: *Don't ask questions!*

Despite her apparent familiarity with the courtroom setting, just like other LiPs portrayed above this educated litigant also focused overwhelmingly on her feelings and experiences rather than on legal reasoning. She made serious allegations against others without proof and had difficulty in keeping her testimony relevant. She displayed a tendency to use chains of intensifiers and adjectives to emphasise her points: 'every single', 'never ever', 'malicious, humiliating, discriminatory, degrading, abusive', all of which prompted the judge to remind her more than once how serious her allegations were.

J: *'manipulative', 'abusive', ... you know how strong were these words? You know your words?*

The contrast between this litigant and others is clear. The stereotypical unrepresented litigant is considered to have low income and low literacy (Alteneder, 2007), and as a result to be likely to make obvious mistakes in court. This litigant, by contrast, showed no obvious lack of capacity but nevertheless still faced challenging hurdles in the courtroom, which might therefore be systemic and have little to do with lack of general education, literacy, motivation or effort.

Understanding Litigants' Behaviour from their Perspective

Among the 18 LiPs observed in this research, 9 (50%) were later interviewed in a face-to-face setting in the court building following an approach made to them at the end of their trial. The resulting sample is small, so it cannot be claimed that this data is representative of LiPs in Hong Kong, but at the same time, this is the first Hong Kong study in which LiPs' voices are directly heard on the question of litigation. Their view of the justice process provides useful clues to explain the observation data; importantly, whether court users feel that the legal procedures they went through are fair can powerfully influence their acceptance of legal authority (Tyler, 2003).

Reasons for Not Having Legal Representation

The majority of LiPs interviewed cited financial reasons for representing themselves, implying that increased provision of legal aid services might well significantly reduce the present number of LiPs. However, as shown in Kritzer (2008) in other countries, different considerations may come into play. Some worried that the opposing party might deliberately delay trial to increase cost and so expose them to open-ended financial risk. Some thought they would be able to keep costs under control if they did not have to pay lawyer fees. Some knew that the other party would not have money to pay costs even if they succeeded at trial.

One had been refused legal aid on account of the lack of merit of his case, rather than for financial reasons. There are no statistics on the number of unrepresented litigants who proceeded to trial after having been declined legal aid for lack of merit, but this group of litigants deserves research attention given that debates surrounding increases in legal aid are almost always linked to assisting the poor.

Alongside financial explanations, another prevalent line of reasoning was that, if litigants could just “tell the truth”, justice would do the rest. This same belief in justice has been reported in American culture⁹, and reflects a strong reservoir of commitment to the relation between a common law system and democracy. It is not clear how specific this is to LiPs, rather than more widely to all litigants; but it appears to be this belief that explains some of the observations reported above, including the otherwise surprising lack of attention paid to legal reasoning and trial procedures. Indeed one LiP stated during her interview that she did not need a lawyer because she was not lying. Another interviewee showed confidence in his ability to represent himself by suggesting that lawyers could not be more familiar with his case than he was himself. Another commented significantly that she had faith that the judge would be impartial to unrepresented litigants.

Preparation and Courtroom Experience

Most interviewees claimed that they had spent a lot of time preparing their case, but they had limited access to professional legal advice. Some had undertaken research on the judiciary. Only one said he had not prepared at all, because he felt he would just do whatever the judge told him to do when he turned up in court, an attitude closely connected to the point made above about litigants’ belief in the adequacy of simply telling the truth. This LiP was however ignorant about cross-examination and did not understand either the relevant legal procedures or terminology. One LiP named a courtroom drama on TV as a useful reference point in preparation. Interestingly, none of the interviewees who attended their trials following the introduction of the free legal advice pilot scheme referred to at the beginning of this article had actually heard about the scheme. Neither had most of them heard of the Resource Centre for Unrepresented Litigants. The two who had heard of the Centre had not visited it because they imagined it would be bureaucratic and, in their words, useless. Some confused the Centre with the Legal Aid Department (whose service is means-tested). Two had visited the Resource Centre, but only one found it useful. These results suggest that both the publicity and the effectiveness of the existing resources available to LiPs could be strengthened.

Some LiPs felt there was a big difference between what they had expected and what actually happened in the trial. Interviewees indicated that legal terminology was difficult to understand and confirmed that they were frequently confused about who should speak when, as well as about other procedural arrangements. Overall, there is a high degree of consistency between their stated reflections on their courtroom experience and what was observed (perhaps other than their somewhat inflated confidence in their understanding of the trial and the strength of their own case). One interviewee, who felt there had been a huge mismatch of expectation, was disappointed that the judge “did not make any investigation before delivering his judgment” (showing confusion about the role of the judge in the common law system), and “did not rule in accordance with what the contract says”. He also felt that the judge was biased against the middle class (in this case, himself).

Discussion

Litigation in a common law jurisdiction has become a professionalized activity¹⁰, for a range of reasons to do with the increased complexity of social life, the reach and detail of administrative oversight, and increased legislative activity (Tai, 1994). If professional knowledge is considered power (Foucault, 1980), then what is on show when a LiP comes up against a lawyer amounts to a clear instance of power asymmetry. We can see an interweaving of language and power in cases involving LiPs on both sides. But the power struggle involved is different from cases involving legal representation. In cases involving two opposing LiPs, the power asymmetry lies less in how far an opposing lawyer can exploit the situation to the advantage of his or her client, or in the complicated legal language he or she may choose to use in advocacy, or even in trick questions apparently devised primarily to overpower witnesses (all of which are typical findings from forensic linguistics studies, see Coulthard and Johnson, 2007); rather, what is involved is a sometimes confused struggle between the two LiPs and the legal system with which they are both engaged.

Judged from the perspective of the legal professionals, unrepresented litigants are likely to be viewed as a burden to courts and their behaviour erratic. The picture that emerged from the above analysis is that lay litigant behaviour is reasonable and rational, but only if we interpret it with reference to where they come from. Ordinary people rely on narrative (O'Barr and Conley, 1985; Baldacci, 2006); by contrast, professional advocates rely heavily on logico-scientific reasoning, with some narrative elements skillfully incorporated to facilitate jurors' understanding (Heffer, 2005). For LiPs, legal procedures are merely an obstruction. When confronted with the opposing party, litigants may respond with accusations that have no strong evidential basis, as one might do in an ordinary argument. In fact, speech features displayed by many LiPs, such as excessive hedging, empty intensifiers, and hypercorrectness, are associated in the sociolinguistics literature with powerlessness (O'Barr, 1982).

Although ineffectual courtroom performance by unrepresented litigants is generally associated with low literacy rates, the data reported above show that there is also an ideological gap, even for highly educated veteran litigants. What LiPs struggle with is not only specific legal language or procedures. Rather, it is the underlying concept of an adversarial trial in a common law system, and the contrived boundary between social and legal worlds. LiPs seek help from the legal system because of their personal grievances; but their narrative and feelings are often ignored and deemed legally irrelevant. This echoes a constant complaint by witnesses whom Conley and O'Barr interviewed in the 1970s – that “I never got a chance to tell my story” Conley and O'Barr, 1998: 67. Given the expectation mismatch between what a LiP hopes to obtain from the justice system and what they are likely to achieve, there is little surprise that LiPs become frustrated users of the legal system. They find themselves caught in a paradoxical situation: they have chosen to mobilize the law in order to gain authority in resolving their personal problems but at times their helplessness is intensified rather than alleviated by their courtroom experience.

It is also of interest to note that whether a trial has been prolonged by the presence of LiPs – a frequent concern in the relevant literature – is not a good indicator of whether that trial is problematic. As shown in the data, trial procedures are sometimes skipped and rights may be unknowingly waived by LiPs (a problem emphasized in En-

gler, 2006, and at other times procedural clumsiness may lengthen a trial. Whether a trial is prolonged or not may also be correlated with judicial patience with LiPs. Courtroom ethnography shows that quality of justice is not something that can just be presumed.

The current bilingual policy has allowed Chinese cultural elements, once suppressed and lost in translation, to surface in colonial-style common law courtrooms in Hong Kong. A lot of the interactions documented in this paper would not have been seen when trials took place only in English in British Hong Kong, regardless of whether litigants represented themselves. In those trials, Cantonese-speaking litigants could only speak to the court via interpreters; such linguistic mediation made it extremely difficult for litigants to interrupt a judge, or raise objections as a way of conveying disagreement. The changing courtroom atmosphere, especially the weakening of judicial formalism, is one facet of the localization process of a colonial import.

The question that then arises is whether the system delivers the kind of justice, or even experience of justice, that meets their cultural expectations, which in turn shapes their perception of the legitimacy of the system. In postcolonial Hong Kong, despite increased legal mobilization and apparently improved access to justice, laypersons still face an ongoing struggle in dealing with the law. The rule of law, now reinvented as a core value of Hong Kong, has become a rhetoric that may inflate litigants' confidence in what the law can do for them.

Despite the struggle and the increased confidence, self-representation reflects the uniqueness of the legal ecology in Hong Kong. With its unusual mix of colonial heritage and political environment, under the 'one country two systems' policy, Hong Kong has become the only Chinese city where legal mobilization has emerged.

Conclusion

To the extent that communication breakdown does occur in the courtroom and that trials do not proceed effectively, there may be substance in warnings that an increase in LiPs may compromise the "quality of justice" (Hirsch, 2011). Who is responsible for that threat to the quality of justice, however, is another matter. In the United Kingdom, for example, Lord Woolf aptly noted in his highly influential report *Access to Justice* (Lord Woolf MR, 1995: 119) that

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of justice exists. The true problem is the court system and its procedures, which are still too often inaccessible and incomprehensible to ordinary people.

Litigation has become so professionalized that allowing litigants to represent themselves – if this involves subjecting them to identical standards of procedural competence as legal counsels – does not amount to giving them access to justice. The problem is arguably worse in Hong Kong than in many other common law jurisdictions, given the language hurdle: the vast majority of LiPs are Cantonese speakers, but legal reference materials, especially case law, are mostly available only in English. The question that faces the justice system, accordingly, is how far the court can accommodate the litigant procedurally without damage to due legal process. The main problem highlighted in this paper is not incompetence on the part of the litigants and therefore solutions should not seek to bring litigants up to par. For this reason, I argue that the kind of help that the Hong Kong government has been providing, namely judicial assistance, the Resource Centre, and the

legal advice scheme, does not address the fundamental problem. Given the dramatically upward trend of unrepresented litigation, the legal system needs to be organised in such a way that justice will be meaningfully accessible to LiPs. Increased use of narrative may be considered, especially given that jurors are predisposed to process stories more readily than discrete facts or statistical probabilities (Pennington and Hastie, 1991). Reforms at the structural level might include simplifying the rules of evidence and relaxing judicial formality in the lower courts, in a manner similar to how some American courts have relaxed procedural requirements for LiPs (Landsman, 2009). More radical advocates suggest that an inquisitorial system would be better suited for LiPs, and might be partially adopted in the lower courts of a common law jurisdiction (e.g., Baldacci, 2006; Finegan, 2009). Use of mediation or other settings that allow unrepresented litigants to communicate effectively may be encouraged.

The increased presence of LiPs in the postcolonial Hong Kong courtroom challenges existing practice and presumptions, and the legal system is now confronted with a pluralistic understanding of justice that was less visible during the colonial period. It may be argued, however, that such challenges present a timely opportunity to improve procedural justice and bridge ideological gaps.

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Notes

¹ Although the author challenges the necessity of having legal representation, he does stress the importance of legal assistance provided by lay specialists in effective litigation. In other words he does not dispute the relevance of legal expertise to advocacy.

² By changing the election system of the legislature and restricting legislative power, see Tam, 2013.

³ Currently under the Ordinary Legal Aid Scheme, for civil legal aid, a person is only eligible if his financial resources amount to less than HKD 269,620 (approximately USD34,567)

⁴ “The main purpose of the “merits test” is to determine whether an applicant has a reasonable claim or defence or whether the grant of legal aid to an applicant is justified.” Legal Aid Department.

⁵ In the course of professionalizing the justice system. The adversarial aspect of the common law is relatively recent. See Langbein, 2003).

⁶ A series of important papers have also been produced by O’Barr and Conley (1985), who are legal anthropologists interested in courtroom discourse.

⁷ Access to such official materials is granted at the discretion of the judge. The Hong Kong Judiciary rejected my application multiple times without any reason given, despite the fact that all the cases observed were tried in an open court.

⁸ In the UK and in Hong Kong. Objections are raised more frequently in the US.

⁹ As expressed in a lawyers’ joke in Galanter (2005), cited in Landsman (2009: 446), which suggests that only liars need lawyers.

¹⁰ Litigants represented themselves in ancient times (Roth and Roth, 1989). A class of persons who offer legal services emerged in western Europe shortly after 1200; prior to that, dispute resolution did not require expert assistance (See Brundage, 1988 for a historical overview). Three hundred years later, receiving legal assistance was seen as right in England; Henry VII declared the right to free legal counsel in 1495 (in force until 1883), see Johnson, 1985.

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On Product Warnings

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Abstract. *Patient information leaflet (PIL) is the official label for the written information that accompanies medicines and that is intended to maximize the effective use of the medicine (van der Waarde, 2004). However, studies show that this information is not simply inefficiently conveyed (Pander Maat and Lentz, 2011) but that it can even introduce health risks. This article examines the adequacy of the PILs included in a sample of over-the-counter medicines sold in the UK and in Brazil. The analysis focuses on textual characteristics of the warning sections of the PILs, in order to assess their readability and intelligibility. We also note that there are occasions when a consumer, although able to read and understand the text, may not realise the significance or the importance of the warning, as it is not expressed sufficiently strongly. In examining this problem we draw on Tiersma's (2002: 55) observation that a good warning "is one in such form that could reasonably be expected to catch the attention of a reasonably prudent [person] in the circumstances of its use and whose content is understandable". Results are presented to show that, despite the structural differences between the Brazilian and the English PILs, both present problems due to the overuse of indirect, complex and vague language, which can lead the reader to infer information that is inaccurate, incomplete and at times just plain wrong. In addition, it will be shown that the headings of some sections are an inadequate guide to their content, particularly as far as the location of warnings is concerned. Results strongly suggest that one major purpose of PILs is to help the manufacturer to avoid litigation.*

Keywords: *Patient Information Leaflets (PILs), warnings, efficiency, intelligibility.*

Resumo. *As bulas de remédios são informações escritas que acompanham os medicamentos com o objetivo principal de aumentar o uso efetivo dos medicamentos (van der Waarde, 2004). Entretanto, vários estudos apontam que estas informações não são simplesmente ineficientemente transmitidas (Pander Maat and Lentz, 2011), mas podem até mesmo trazer riscos à saúde do consumidor. Este artigo examina a adequação das bulas de uma amostra de remédios sem a necessidade de prescrição vendidos no Reino Unido e no Brasil. A análise focaliza as características textuais da seção de advertências das bulas, a fim de acessar a legibilidade e inteligibilidade. Notamos que também há ocasiões onde o consumidor, apesar de ser capaz de ler e entender o texto, não percebe a significância*

ou importância da advertência, visto que não é enfatizada adequadamente. Após averiguar este problema, nos referimos à observação de Tiersma Tiersma, 2002: 55 onde uma boa advertência “é de tal forma que poderia razoavelmente ser esperado que ela chame a atenção de uma pessoa razoavelmente prudente e que seu conteúdo seja inteligível”. Os resultados apontam que apesar da diferença estrutural das bulas brasileira e inglesas, elas apresentam os mesmos problemas referentes ao uso excessivo de informações indiretas, complexas e incompletas que podem levar o leitor a inferir informações, que são imprecisas, incompletas e às vezes, claramente desacertadas. Além disso, será mostrado que os títulos de algumas seções guiam inadequadamente aos seus conteúdos, principalmente quando a localização das advertências estão em questão. Os resultados sugerem nitidamente que ajudar o fabricante a evitar litígios é um objetivo principal das bulas.

Palavras-chave: *Bulas, advertências, eficiência, inteligibilidade.*

Introduction

Various linguistic and non-linguistic solutions have been proposed to cope with the dangers associated with specific products and the use of Warnings is only one of them. As Wogalter (2006) notes, warnings should not be seen as a substitute for both a) good design that can avoid, or at least reduce, hazards and b) for some kind of formal or informal training that will enable users to handle the product safely. Only when these strategies are insufficient to remove all the potential risks, should verbal warnings be considered necessary to “inform people about hazards so that undesirable consequences are avoided or [at least] minimized” (Wogalter, 2006: 3).

Legally, it is the product manufacturers who are responsible for hazard prevention and therefore who are liable if the consumer and/or his/her possessions suffer any harm, injury or damage. However, paradoxically, warnings seem designed specifically to change this relationship, because in fact they place the responsibility for most hazard prevention firmly on the shoulders of the customer. This seems to contravene at least the spirit of the law, especially when frequently the warnings are either vague or fail partly or entirely to inform customers about the potential risks and how to avoid them.

For example, the warning below, taken from a Patient Information Leaflet (PIL) accompanying a widely available non-prescription medicine, is a classic example of vagueness,

Take special care with this medicine if you have:

–liver problems, including those due to drinking too much alcohol.

The direction ‘take special care’ is opaque; what action(s) should the patient take or not take and what are the risk(s) that can be avoided or at least minimized by taking ‘special care’? Consequently, the message could easily be interpreted as meaning something very different from what the writer intended and indeed could lead the patient to actually adopt unsafe behavior. Furthermore, the expression ‘too much’ is equally vague. Within the semantic vacuum of non-specificity ‘too much’ is likely to be interpreted in the light of the patient’s current behaviour, rather than objectively and the resulting quantity could be very different from what a medical professional regards as ‘too much’. Hence the shock that greeted a BBC news item (25.01.15) titled “*Drinking three alcoholic drinks a day can cause liver cancer*”.

Dumas (1992) and van der Waarde (2008) observe that warnings and medicine leaflets, respectively, have a dual role: they do not simply provide information for the user, but also help the manufacturer to avoid litigation. This second role is evident in many warnings similar to the one quoted above, where the information required by the particular regulatory agency is provided, but the intended message is not conveyed successfully. The objective of this article is to examine a series of medicine leaflets, in order to assess the success with which warning messages are conveyed. In order to meet this objective, we will first provide a definition of warnings and the characteristics that influence their adequacy, then discuss how target readers are conceptualised. Next, we will describe and compare some English and Brazilian Patient Information Leaflets (PILs), and analyze the warnings contained in them. Finally, we will report two legal cases that involved patients who had suffered side effects after taking medicines, in order to illustrate the consequences of inadequate messages.

Warnings

Any attempt to describe or categorize warnings has to cope with uncertainty and ambiguity. Dumas (1992: 267) asserts that “no discipline recognizes a clear, unambiguous definition of warning”. Moreover, a closer examination reveals that *warnings* share some characteristics with *threats* and *promises*. All can be made in several different ways: they can be direct, indirect or conditional and many of them are context dependent. So, we can assume that sometimes intended recipients may fail to recognize a piece of text as a warning, which raises the question of what constitutes an efficient and effective warning.

Much of the current research in the area of warnings evaluates effectiveness in terms of the legibility and readability of the text provided; these are obviously essential characteristics of any informative text that accompanies a product or service. And there is also the need to examine the relationship between what is actually included and what should be included. Even then, assuming the consumer has read and understood the information in the warning, s/he can choose not to comply with it. For this reason a third characteristic seems to be necessary, the ability to both attract the purchaser’s attention and then convey the importance of the information. An adequate warning, according to Tiersma (2002: 55), “is one in such form that could reasonably be expected to **catch the attention** of a reasonably prudent [person] in the circumstances of its use and whose content is **understandable**”.

Pragmatic features of a warning also have an influence on the efficiency with which the message is transmitted. Tiersma (2002) suggests that there are two major types of warning: *informative* and *imperative*. While the first type provides information about risk, for example, “This product is flammable” or “Some people may have problems with their eyes such as blurred vision, while they are being treated with Voltarol Ophtha”, the second type details necessary actions to avoid the risk, such as “Do not spray it near flames or ignition sources” or “If you are affected, you should not drive or use machines”. Tiersma discusses the relative efficiency of both types of warning and concludes that it depends ultimately on the situation. Ideally, both types should be used, but as writers may have space constraints, Tiersma suggests that imperatives are preferable, because they clearly tell the reader what s/he should do or avoid doing, even though they do not inform directly about the nature of the risk. He also emphasises that if consumers are

not informed explicitly, they may not know how to avoid a particular risk and so make wrong inferences.

Imagined and Real Readers

In approaching warning texts we must always keep in mind how writers produce and how readers actually process texts of this kind. First, let us consider the writer(s). In a chapter entitled 'Evaluating Texts', one of us (Coulthard, 1994) observed that, in order to compose any kind of written text, a writer must first create, at least subconsciously, an Imagined Reader to whom s/he attributes certain knowledge and ignorance of the topic in question and certain linguistic and text-processing skills; only then, on this basis, can the writer construct her/his text.

One frequent major communicative problem with all kinds of informative texts is that the Writer fails to conceptualise sufficiently clearly the Imagined Reader and as a result makes inconsistent or even incorrect assumptions; a second problem is that, knowing what s/he intends the text to communicate, the writer may not realise that the text does in fact allow or worse, favour, other interpretations.

A third major and crucial problem is that once created the warning texts are in fact read by Real Readers, who may be significantly different, in terms of knowledge and text processing abilities and strategies, from the writer's Imagined Reader. Thus for example the author of an instruction leaflet writes:

"... we recommend that you read this entire booklet before your first use".

But it is very clear that many people, being the proud possessors of newly acquired equipment, typically use the accompanying *Instructions* text only to find answers to specific questions – few, if any, actually read the 'entire booklet' before starting to use a new piece of equipment, however expensive and complicated it may be. For this very important reason, all instruction and warning texts must allow the user to search for and find correct answers to questions as and when necessary.

A further complicating factor with instruction and warning texts is that they may themselves be communicatively problematic – the world is full of bad writers – and that raises the question of what the reader should do when faced with contradictory information, which the writer, (and the editor if indeed there was one), has allowed to creep into the text.

As Real Readers we are, of course, quite accustomed to finding contradictions in texts and having to infer interpretations and conclusions on the balance of probabilities. Here is an example from a Brazilian Product Information Leaflet (PIL) for a medicine requiring a doctor's prescription. Coulthard, suffering from a persistent cough, was prescribed some anti-allergic medicine. There was a doubt about whether the medicine caused drowsiness and whether it was permissible to drive, even though the doctor hadn't mentioned either as potential problems. The medicine was accompanied by a very detailed 4-column, two-sided PIL produced in a very small font.

Near the beginning of the leaflet was the clear assertion "The medicine does not cause drowsiness" and shortly afterwards under a general heading of *Warnings* was the information "No effects on the capacity to drive cars and operate machines were observed". So one could deduce apparently categorically, that there would be no problems. However, further down the same column, if indeed the reader had bothered to continue, under a heading of *Cautionary Advice* – what one wonders is the pragmatic difference

between a *Warning* and *Cautionary Advice* in the Real World and would any non-linguist reader attach any significance to the distinction – the leaflet cautioned:

“During treatment the patient should **not drive vehicles** or operate machines,
as his (sic) ability and attention could be prejudiced [our highlighting]”.

How is the reader to square this observation with the earlier one which noted that “no effects on the capacity to drive cars ...were observed”? Was this just an example of the manufacturers protecting themselves from legal responsibility, because they hadn’t actually bothered to test? Subsequently, the identical warning with identical wording was discovered in instructions for another medicine, so it would appear to be a standard sentence, but, in the case of this medicine, dangerously confusing. Even more disquieting was the fact that, hundreds of words later in the PIL in a section entitled *Technical Information for Health Professionals* – which, in principle, is a section that is specifically written for the medicine-taker **not** to read and probably only accessed by text-obsessed linguists – the same sentence was repeated word-for-word

“During treatment the patient should not drive vehicles or operate machines, as his ability and attention could be prejudiced”

Word-for-word, *except* that it had been metalinguistically upgraded to the status of a *Warning*! The important question here is, what is the status of *cautionary advice* as opposed to a *warning* or are the two in free variation in the real world of medical leaflets. And, if the patient had driven, become drowsy and had an accident would there be any basis for a claim against the manufacturer for inadequately advising about the danger? Could they be prosecuted for either not bothering to test for, or for failing to observe, ‘effects on the capacity to drive cars’?

PILs accompanying Medicines

There are many factors and characteristics that make warnings, and thus PILs complex. Askehave and Zethsen observe that PILs are ‘mandatory genres’ that “emanate from a legal directive and are introduced into the community by regulatory force” (2008: 170). In the case of PILs, the communicative purpose, the content and the structure are defined by official documents. This creates an additional challenge for the writer, who needs to adapt the official language to the ordinary reader, that is, to ‘translate’ the technical content into plain language. In fact the PILs analyzed in this article present many communicative problems that can impede their intended purpose, which is “to increase the effective use of medicines” (Donnelly, 1991, as cited in van der Waarde, 2004: 75). To use a medicine properly, the patient must have some knowledge about side effects, storage, warnings and treatment, that is, how much medicine s/he should take and how often s/he can take it safely, that is avoiding toxicity.

The following sections of the article will describe and compare the organs responsible for overseeing the structure and content of PILs’ in the UK and in Brazil.

The UK Medicines and Healthcare Products Regulatory Agency

The UK Medicines and Healthcare products Regulatory Agency (MHRA) “is responsible for regulating all medicines and medical devices in the UK” (home page: <http://www.mhra.gov.uk>). These UK guidelines follow the European Community template, set out by the European Medicine Agency (EMA). The template takes into account four aspects:

1. Content, which is based on the Summary of Product Characteristics (SPC);
2. Sequencing of information;
3. Headings; and
4. Wording.

The European Union directive for Patient Information Leaflets (PILs) states that they have to include six sections (see Appendix 1 for an example of a complete PIL).

1. What the drug is and what it is used for;
2. What you need to know before you take it;
3. How to take it;
4. Possible side effects;
5. How to store it;
6. The contents of the pack and other information.

The content of all PILs must be based faithfully on the Summary of Product Characteristics (SPC), which is essentially a report of clinical studies, written by medical professionals and addressed to other medical professionals. This report contains a detailed summary of the medicine, as well as its effects and side effects. According to Askehave and Zethsen (2003: 32), “the law requires a close relationship between these two texts [the SPC and the PIL] in the name of consumer protection”. However, as the authors point out, this ‘close relationship’ can cause significant communication problems, since the recipients of the two texts, which belong to markedly different genres, are also markedly different. Whereas the intended recipients of the PILs are ordinary readers, who may possess little previous knowledge about the content, effects and side effects of the particular PIL and indeed may not even be competent readers, the recipients of the SPC are experts. Thus, there can be a major conflict between the two requirements: faithfulness to the original text and effective communication with the target readership. Thus the document that emerges from the text conversion process can be highly deficient communicatively when read by the target lay audience.

Brazil – ANVISA (Agência Nacional de Vigilância Sanitária)

In Brazil ANVISA (*Agência Nacional de Vigilância Sanitária* / the National Sanitary Surveillance Agency) is responsible for producing the guidelines for medicine leaflets and in 2009 introduced RDC 47 (*Resolução da Diretoria Colegiada* / the Resolution of the Board of Direction) aiming to improve the quality of the documentation. Whereas the British PILs have six sections the Brazilian PILs distribute information into only three sections:

- Identification of the medicine;
- Information to the patient;
- Legal Information

The second section, specifically addressed to the patient, is the most important and is organized into 9 question/answer items, obviously intended to facilitate the reader’s understanding (see below).

1. What is this medicine used for?
2. How does this medicine work?
3. When should I **not** take this medicine?
4. What should I know before taking this medicine?

5. Where, how and for how long should I keep this medicine?
6. How should I use this medicine?
7. What should I do if I forget to take this medicine?
8. What side effects can this medicine cause?
9. What should be done if someone takes a higher dose of this medicine than recommended?¹

This directive is clearly concerned with how the message is conveyed, as can be seen in Art. 6, below:

Art 6

In relation to the content, the insert must have the information provided in attachment 1 of this directive, following the established order and items.

§ 1. The patient package inserts must include items related to: medicine identification, information for the patient, and legal information and the text must;

I – be organized in a question / answer format;

II – be clear and objective without repeating information;

III – be written in accessible language, with concise and clear wording, according to the guidelines for writing inserts, with the aim of enabling patient comprehension.

IV – have explanatory terms following technical terms when these are employed and if necessary an explanation to aid patient comprehension²

Although there is a concern with the readability of inserts, the term ‘clear wording’ is problematic for at least two reasons which are intrinsically linked: 1) each writer may interpret the term in a different way; 2) the definition of what is ‘clear’ will depend in part on the readers, whose level of content and linguistic knowledge can vary widely. As one might expect there is no consideration of communicative problems caused by reader variation.

Comparison

As is evident, there is a significant difference between the English and the Brazilian PILs regarding the organization of the information, even though in principle both are setting out with the same communicative intention. The English PILs have an initial section, which first alerts the reader about the importance of the PIL and then indicates the content. After this initial section, the English PILs contain the 6 sections, presented above. The Brazilian PILs, on the other hand, do not have this initial section and are organized into only three main sections. The second section ‘Information to the patient’, corresponds to the first five sections of the English PIL, while the first section of the Brazilian PIL, ‘Medicine identification’, which brings information related to the medicine, corresponds to the final section ‘Further information’ of the UK one. To us it does seem more reasonable to provide information related to the ingredients of the medicine at the beginning of the document. The final section of the Brazilian PILs is devoted to legal text, that is, information regarding the manufacturer, the pharmacist and the registration number at the Ministry of Health. The English version presents information about the manufacturer, but there is nothing related to the pharmacist or the registration number.

The specific pattern of the PILs might benefit the readers who know the genre, facilitating comprehension (Pander Maat and Lentz, 2011). Moreover, some problems emerge from adopting a specific format, especially, when it is far from being reader-friendly.

Pander Maat and Lentz (2009) investigated the pattern of medicine leaflets and concluded that they presented ‘findability’ issues, that is, readers experience difficulties in finding the information they want, especially when the heading does not correspond with the information contained in the section. The Beechams Powders leaflet (Appendix 1) is an example of such a problem, given that Section 6, which is located under the heading ‘further information’, provides information about the medicine’s ingredients, whereas readers might reasonably expect to find this kind of information in Section 1, ‘what the drug is’.

In fact, many of the headings adopted in this PIL are problematic. Pander Maat and Lentz point out that in general “there is a mismatch between the wording of the headings and readers’ interpretations” (2011: 197). One problem derives from the fact that the headings are “phrased very generally”, for example, information on alcohol use and allergies is located counter-intuitively under the heading ‘before you take it’ in both the English and the Brazilian PILs. In addition, as mentioned before, warnings are not explicitly labelled as such and are placed in more than one section, which complicates their identification, and consequently minimizes compliance.

Sequencing of information can be another serious problem that impairs comprehension. As Shuy observes (1990: 296) ‘simply having all the proper pieces of information is not enough’, since they should be presented in such a way as to facilitate both comprehension and findability. Thus, one would expect the most important information, such as the most serious and frequent risks, to be presented first, because the reader will expect to find them at the beginning.

Pander Maat and Lentz (2011: 197) investigated readers’ preferences related to both information and sequencing. Their results showed that the preferred sequence would be “goal of the medicine – directions for use – potential problems – packaging and storage”, instead of goal of medicine – potential problems – directions for use – packaging and storage. (See the complete PIL in Appendix 1). However, one could argue that it is better to place information related to potential problems before directions for use, given that most of them are warnings that the patient should be aware of before taking the medicine.

Warnings in the English PILs

It is surprising that neither the English nor the Brazilian PIL pro-forma contains a section entitled ‘warnings’, (although until recently the Brazilian one did), and this, it could be argued, reduces their efficacy. As already noted, if risks are not highlighted, they may lose their visibility and consequently, the reader’s attention. For this reason, we argue that signal words are fundamental, because they not only inform about a possible risk, but also indicate the level of this risk (Coulthard and Hagemeyer, 2013). As we noted there the US guidelines, ANSI -Z535 4, strongly recommend the use of the following signal words, Danger, Warning, Caution, and Notice, also, if possible, colour coded:

DANGER indicates a hazardous situation, which, if not avoided, will result in death or serious injury.

WARNING indicates a hazardous situation, which, if not avoided, could result in death or serious injury.

CAUTION, used with the safety alert symbol, indicates a hazardous situation, which, if not avoided, could result in minor or moderate injury.

NOTICE used to address practices not related to personal injury. (Kundinger, 2008: 15).

Even though not signalled as such, most warning messages in the English PIL are placed in the second section which is headed ‘What you need to know before you take this medicine’, a very general and anodyne label – some patients may even fail to infer that this section includes warnings.

A corpus was created consisting of leaflets from 17 over-the-counter paracetamol products available in the UK, in July 2014. This corpus will be used to examine the nature of the warnings – 6 of these leaflets come from medicines specifically produced for children and 4 of them come from medicines that can be used by both children and adults, while 7 are produced specifically for adults. All the second sections of these 17 leaflets are divided into several subsections, varying in number from 3 to 8, (see Appendices 1 and 2).

Some brands contain more information and/or subdivide the section into a greater number of sub-sections – a fact which demonstrates that there is in fact no consensus about the optimum communicative strategy, despite the pro-forma. The apparently highly important subsection below, for instance, appears in only one of the 17 leaflets:

‘Paracetamol Oral Solution with food and drink

Do not drink alcohol whilst taking Paracetamol Oral Solution. This is because taking alcohol and paracetamol together can increase the risk of liver damage’
(Paracetamol - A17)

Although this heading predicts a general statement about food and drink, the warning in fact mentions no food and only one category of drink, alcohol. Clearly, a more appropriate heading would be ‘Taking Paracetamol Oral Solution with/and alcohol’ and might then attract more of the target readers. That said, this is actually a good warning, despite not being labelled as such, because it includes both of Tiersma’s types: *imperative* and *informative*: first a direction to avoid the risk, then a statement about the risk of non-compliance: liver damage.

Interestingly, this particular leaflet chooses to provide information about liver problems on 5 separate occasions sprinkled over 3 sub-sections. But the second sub-section, which mentions the risk 3 times, includes a confusing contradiction. It first warns the patient not to take paracetamol if they have a ‘liver disorder’.

Do not take paracetamol oral solution if:
- *you know that you are allergic to paracetamol, or any of the other ingredients*
(refer to section 6 below)
- *a liver disorder (sic)*

but follows this immediately with a second warning that appears to allow the patient to take Paracetamol provided s/he takes special care (see below).

Take special care and tell your doctor or pharmacist before taking Paracetamol Oral Solution if:

- *you have liver problems, including those due to drinking too much alcohol*
- *you have kidney problems.*

Do not take more than the recommended dose. (Paracetamol A17)

Worryingly, firstly this section fails to specify exactly what liver/kidney ‘problems’ are and how to recognise or discover whether you actually have a liver/kidney problem and secondly does not make it clear whether it is always better to approach your doctor before taking the medicine, just in case s/he knows you have a ‘problem’. Finally, it does not clarify whether it is only this particular sub-set of patients who must not exceed “the recommended dose”, or whether “*Do not take more than the recommended dose*”, is actually a badly misplaced general warning – as indeed it is.

One can at least safely conclude that Paracetamol and alcohol is a dangerous combination that can increase the risk of liver damage, but it is therefore surprising that the risk of this combination is not made explicit in all the leaflets. And although the term *alcohol* appears 20 times in the corpus, only 7 of the 11 leaflets aimed at adult users specifically direct the patient to not consume alcohol. As mentioned before, 6 of the medicines are said to be specifically for children and for this reason, one would assume they would not need to include warnings related to alcohol abuse. However, in fact one PIL does provide a section for any adults who do intend to take the medicine and does warn about alcohol:

Information for adults intending to take this medicine

This medicine may be harmful if you are dependant on alcohol or have alcoholic liver disease. Do not drink alcohol (wine, beer, spirits) whilst taking this medicine. (Paracetamol A7)

Even so, it both fails to give information about the nature of the risk and modalises the risk itself “may be harmful”. And, one wonders, if one manufacturer assumes adults do sometimes use children’s medicines, shouldn’t all manufacturers (be constrained to) make the same assumption?

Subsections entitled: ‘Do not take/give this medicine if (...)’ appear in all 17 PILs, although the specific warnings included differ not only in number but also in content. For example, while all 17 PILs warn about the risk of allergies, only 4 characterise and/or exemplify the symptoms, as in the example below:

‘[If] you are allergic (hypersensitive) to paracetamol or any of the other ingredients in your medicine (listed in Section 6: *Further information*) Signs of an allergic reaction include a rash and breathing problems. There can also be swelling of the legs, arms, face, throat or tongue’
(Paracetamol A15)

Requiring the patient to read a different section – “listed in Section 6: *Further information*” – in order to have the complete message is a recurrent characteristic of medicine PILs, and this can significantly reduce their effectiveness. The patient could wrongly deduce that a given piece of information is not particularly important, because if it were, it would be included in the same section.

Also, as already noted, the writer should always bear in mind that readers rarely read the whole PIL, but rather scan it searching for specific pieces of information. Silva *et al.* (2006) investigated with 1829 subjects, reader strategies and discovered that only 22% claimed to read the entire document, while the remaining 78% reported reading only for specific information, such as indications, contraindications, instructions for use and side effects.

This next extract has a different problem

‘Paracetamol 10mg/ml Solution for Infusion **may be used** during pregnancy, however, the doctor must evaluate if the treatment is advisable’. (highlighting in **bold** added)
(Paracetamol A13)

It apparently allows the patient to take the medicine, “may be used”, if she is pregnant; but if she reads to the end of the sentence – although she may well not bother to if she is simply looking for confirmation that she can take the medicine – she will discover that the second part of the sentence imposes a condition – the doctor’s prior evaluation. And, of course, this requirement is only presented in informative, and not in Tierma’s preferred imperative form: *Do not use ... without your doctor’s permission*. Also, there is no reference to, let alone a specification of the risk(s) and for this reason the text does not have the characteristics of a warning, which, as we have argued, should inform about an unwanted future event. It appears that the manufacturer is transferring the responsibility for any problems caused by taking the medicine to the doctor, or worse is simply covering against any claims from users who didn’t bother to consult their doctor.

At this point, we want to draw attention again to the comparative absence of signalling words. An analysis of a larger corpus of 85 medicine leaflets revealed that the word ‘warning(s)’ appeared in only 29 of the PILs, and then almost always just once in the subsection of the second section titled ‘What you need to know before you take it’. This markedly infrequent use of the term ‘warning’ is strange, given that the term is widely and frequently used on UK labels for many other products, such as food and domestic cleaning liquids.

And finally, as already noted above, the reader’s comprehension problems are too often compounded by the need to cope with badly written text. For example, the two extracts below alert the reader to ‘additional’ or ‘other important’ warnings, despite the fact that nothing has previously actually been labelled as a warning. So, the patient has to infer which piece(s) of text already processed was/were intended by the writer to count as warning(s).

This product is intended for use by children under 6 years old. However, the following **additional warnings** are included in case an adult is taking this medicine. (highlighting in **bold** added)
(Paracetamol A6)

Other **important warnings**: taking painkillers for headaches too often or for too long can make them worse. (highlighting in **bold** added)
(Paracetamol A10)

Warnings in Brazilian PILs

Section 2, subsection 4 of the Brazilian pro-forma is devoted to warnings, although, interestingly, just like the UK leaflets, there are no longer any signal words; instead it reads ‘What should I know before taking this medicine?’. An analysis of 23 Brazilian paracetamol PILs shows that the term ‘warning’ (*advertência*) appears only 3 times and then in only one PIL:

Overdose **warning**: taking more than the recommended dose can cause serious health problems. In case of an overdose, look for medical help immediately. Rapid medical attention is critical for both adults and children even if you yourself do not note any signs or symptoms.³ (highlighting in **bold** added)

Although this warning does not specify the nature of the risks, they are at least characterized as ‘serious’, (*sérios*), thereby attracting the patient’s attention and the lexemes ‘immediately’ (*imediatamente*) and ‘rapidly’ (*rápido*) convey urgency. Even so, the warning fails to specify how many ‘more than’ doses one needs to have taken before it is characterized as an overdose, nor does it list symptoms that would help the patient recognise that they have overdosed. Even worse, this leaflet actually includes information about these very symptoms in a later sub-section, reproduced below, but the first warning does not refer the reader forward to the later section and thus a panicking potentially overdosed reader who is looking for specific help would be totally and dangerously unaware of its existence.

Subsection 9. What should be done if someone takes a higher dose of this medicine than recommended? The initial signs and symptoms that follow the ingestion of a large quantity of paracetamol, possibly hepatotoxic are: nausea, vomiting, intense sweating and general malaise. Arterial hypertension, cardiac arrhythmia, jaundice, hepatic and renal insufficiency are also observed. (Paracetamol B 22)⁴

The above warning clearly employs many technical terms, ‘hepatotoxic’, ‘hepatic’, ‘arterial hypertension’ and ‘cardiac arrhythmia’, which not only prejudice the understanding of most ordinary readers, but are also in specific contravention of RDC 47 – 2009, art. 6 IV, which, as mentioned above, clearly tells the writer that there must be “explanatory terms after technical terms, when these are employed and if it is necessary also an explanation for the patient’s comprehension”. Furthermore, while subsection 4 adopts the term ‘overdose’ (*superdosagem*), subsection 9 instead uses the term ‘a large amount’ (*uma grande quantidade*); are these actually synonymous and if so will the general reader realise this?

Vague Language

While all the PILs contain the basic information that is required by the regulatory agencies (MHRA and ANVISA), the way in which the information is conveyed frequently leaves a lot to be desired. This is in no small part due to the number of vague phrases, sometimes whole sentences, that can raise doubts and at times even allow for multiple interpretations. For example: the warning “Drinking alcohol at the same time as taking aspirin increases the risk of bleeding”, in the second section of the English PIL reproduced in Appendix 1, under the title “**Take special care with Beechams Powders**”, contains a great deal of implicit information. The patient first has to infer what type of ‘special care’ needs to be taken, given that the term ‘special’ is not defined and then has to cope with the phrase ‘risk of bleeding’. Patients are likely to evaluate ‘bleeding’ as something serious and caused specifically by the combination of paracetamol with alcohol, but a closer reading reveals that there is already a risk of bleeding associated with the medicine even when it is taken without alcohol, otherwise the risk could not be ‘increased’ by the alcohol. This creates a dilemma for the patient: should the medicine in fact be avoided completely, because apparently it is inherently dangerous, or is bleeding in fact not particularly worrying because it is a normal and accepted, if not acceptable, consequence of taking the medicine? And if so, perhaps the increased risk of bleeding is also not particularly worrying.

But, the linguist asks, can we rely on the wording here? Should some of the words have been reordered? Should the text actually warn that not that there is ‘an increased

risk of bleeding’ but rather a ‘risk of increased bleeding’ and it is this increase that is problematic? As is evident this vague warning fails to inform about the scale of the risk, the consequences of any associated bleeding and of an increase in bleeding. Finally, there is no information about how the patient can find out if, with or without drinking alcohol, there is bleeding and if so how serious it is. Once again the reader is required to make multiple inferences, and runs the risk of making the wrong ones, which consequently, could lead him/her to make wrong decisions with serious consequences.

In this same section there is another example of vagueness:

Take special care with Beechams Powders

– Avoid **excessive intake** of caffeine (e.g. coffee, tea and some canned drinks) while taking this product. (highlighting in **bold** added)

‘Excessive’ is a vague relation term which only becomes meaningful when the reader knows what is normal or acceptable – in the absence of any such definition there is no way of knowing how much caffeine one should **not** ingest. Warnings like these flout the Gricean Quantity Maxim, which requires the instructions to be “as informative as is required”. The Maxim is multiply violated in the following example:

Side effects **may be minimized** by using the **lowest effective** dose for the **shortest duration necessary**. (highlighting in **bold** added)

In principle, the warning tells patients about how to minimize the side effects. However, firstly, there is no information about which side effects ‘may be minimized’, given that they are numerous and of course a sophisticated reader can see that the sentence allows ‘may not be minimised’ as an equally legitimate meaning – in other words, whatever the patient does may be of no avail. Secondly, there are two terms that can generate differing interpretations and neutralise the effect of the medicine: ‘lowest effective’ and ‘shortest duration’ – they fail to specify both the quantity of the medicine and the period of the treatment.

The warning below is even more problematic – although it is clear in relation to the risk – ‘risk of heart attack or stroke’ – it is totally unclear about what to do to avoid the risk, because of the vagueness of the terms: ‘may’, ‘large amounts’, ‘small’, ‘long time’, ‘lowest amount’ and ‘shortest possible time’.

Risk of heart attack or stroke: Ibuprofen **may increase the risk** if you take **large amounts** for a **long time**. The risk is **small**. Take the **lowest amount** for the **shortest possible** time to **reduce** this risk. (highlighting in **bold** added)

By contrast, the warning below is very precise about the quantity of alcohol that the patient can ingest safely, up to 3 doses, although, even so, it does not define ‘dose’ nor say if this is a daily or weekly limit. But, having said that, it goes on to suggest that the patient might be able to ingest more doses of alcohol, if the doctor is contacted, again implying that this may not be a very serious risk. Those patients said to certainly be in danger are the chronic drinkers, but this category is not defined; is it perhaps composed of drinkers of ‘3 or more’ or those who drink considerably in excess of this? And what does the ‘3-a-day drinker’ do when he discovers that he is apparently included in both the safe and the unsafe groups. For the reader coping with these interpretive problems the water is further muddied by the observation that liver disease is only a possible risk – ‘can present’ – and then only associated with overdosing.

If you take 3 or more doses of drinks, you should consult your doctor to know if you can take paracetamol + cloridrato pseudoephedrine or any other painkiller. Chronic drinkers **can** present a **higher** risk of liver disease if a **higher** dose than the recommended one of paracetamol + cloridrato pseudoephedrine is ingested. (Paracetamol B 12)⁵ (highlighting in **bold** added)

Court Cases

We mentioned at the beginning of this article that warnings, no matter how clear and efficient they are, in fact function to transfer the responsibility of hazard prevention onto the reader's shoulders. And this transferred responsibility is evident in two Brazilian court cases that will be briefly presented below.

The plaintiff, in *Maria Rodrigues v. ABBOTT Laboratórios do Brasil LTDA*, had an allergic reaction resulting in angioedema in the left eye, after taking the medicine Bio-press, and she alleged that the PIL had failed to provide adequate information. She compared the Brazilian and American PILs, and highlighted differences, for example: the item 'other allergic reactions' was omitted from the Brazilian PIL, which meant the doctor did not anticipate or warn about potential adverse effects. However, the comparison was not accepted because the PILs came from different brands. Furthermore, the defendant pointed out that the PIL did advise, and in upper case, about the 'possibility of unpredictable adverse effects occurring' (p. 114). This warning is obviously totally inadequate for the doctor and the patient, as there is no information about when and why these adverse effects could occur nor about how to avoid them and certainly no mention of angioedema. This warning only serves to defend the manufacturer against litigation and it seems that in this case it served its purpose, because the plaintiff lost.

In another medicine liability case, *Mickozs v. Mantecorp Indústria Química e Farmacêutica LTDA*, the plaintiff, a 12 year-old teenager, took the medicine 'Coristina D' and suffered serious adverse effects: strong nausea and gastric haemorrhaging and had to undergo cauterization. 'Coristina D' is a widely advertised over-the-counter painkiller and antipyretic. The plaintiff claimed that the adverse effects were aggravated for two main reasons: firstly, the medicine was sold without a PIL, which meant that the plaintiff did not have access to any information. Secondly, even if the plaintiff had been able to access the PIL, it would not have advised him about the hazards he actually suffered, given that the PIL included no information about gastrointestinal risks and the advisability of consulting a doctor before taking the medicine. In this case the jury found for the plaintiff.

Final Remarks

Due to the impossibility of removing all risks from medicines, given that there will always be some individuals that have some kind of reaction to the ingredients, the PILs and the warnings contained in them are of paramount importance to enable the patient to at least to minimize the risks. However, too often the PILs fail to do this. As linguists we have the tools to analyse the problems and improve the communicability of PILs, the difficulty is rather to gain access. Peter Tiersma managed to participate in the committee that rewrote the Californian Pattern Jury Instructions, we now need linguists to gain access to the committees who control the structure and content of PILs.

Notes

- ¹ 1. PARA QUE ESTE MEDICAMENTO É INDICADO?
2. COMO ESTE MEDICAMENTO FUNCIONA?
3. QUANDO NÃO DEVO USAR ESTE MEDICAMENTO?
4. O QUE DEVO SABER ANTES DE USAR ESTE MEDICAMENTO?
5. ONDE, COMO E POR QUANTO TEMPO POSSO GUARDAR ESTE MEDICAMENTO?
6. COMO DEVO USAR ESTE MEDICAMENTO?
7. O QUE DEVO FAZER QUANDO EU ME ESQUECER DE USAR ESTE MEDICAMENTO?
8. QUAIS OS MALES QUE ESTE MEDICAMENTO PODE ME CAUSAR?
9. O QUE FAZER SE ALGUÉM USAR UMA QUANTIDADE MAIOR DO QUE A INDICADA DESTE MEDICAMENTO

²Art. 6º

Quanto ao conteúdo, as bulas devem contemplar as informações preconizadas no Anexo I desta resolução, seguindo a ordem das partes e itens estabelecida.

§ 1º As bulas para o paciente devem conter os itens relativos às partes Identificação do Medicamento, Informações ao Paciente e Dizeres Legais e os seus textos devem:

I - ser organizados na forma de perguntas e respostas;

II - ser claros e objetivos sem a repetição de informações;

III - ser escritos em linguagem acessível, com redação clara e concisa, conforme proposto no Guia de Redação de Bulas, de forma a facilitar compreensão do conteúdo pelo paciente;

IV - possuir termos explicativos após os termos técnicos, quando eles forem utilizados e se fizer necessária uma explicação para compreensão do conteúdo pelo paciente.

³‘**Advertências** de superdosagem: tomar mais do que a dose recomendada pode causar sérios problemas de saúde. Em caso de superdosagem, procure socorro médico imediatamente. O rápido atendimento médico é crítico para adultos e crianças até mesmo se você não notar quaisquer sinais ou sintomas’

(Paracetamol B 22)

⁴**9. O QUE FAZER SE ALGUÉM USAR UMA QUANTIDADE MAIOR DO QUE A INDICADA DESTE MEDICAMENTO?**

Os sinais e sintomas iniciais que se seguem à ingestão de uma grande quantidade de paracetamol, possivelmente hepatotóxica são: náuseas, vômitos, sudorese intensa e mal estar geral. Hipotensão arterial, arritmia cardíaca, icterícia, insuficiência hepática e renal também são observados.

⁵Se você toma 3 ou mais doses de bebidas alcoólicas, deve consultar seu médico para saber se pode tomar paracetamol + cloridrato pseudoefedrina ou qualquer outro analgésico. Usuários crônicos de bebidas alcoólicas podem apresentar um risco aumentado de doenças do fígado caso seja ingerida uma dose maior que a recomendada (superdose) de paracetamol + cloridrato pseudoefedrina.

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Appendix 1 - Beechams Powders (Adult)



Please read right through this leaflet before you start using this medicine.

- Keep this leaflet, you may need to read it again.
- If you have any questions, or if there is anything you do not understand, ask your pharmacist.

In this leaflet:

1. What Beechams Powders do
2. Check before you take Beechams Powder
3. How to take Beechams Powders
4. Possible side effects
5. How to store Beechams Powders
6. Further information

1. What Beechams Powders do

Beechams Powders provide relief from cold and flu symptoms, including sore throat pain, headache, feverishness and aches and pains.

It also provides relief of mild to moderate pain including migraine, neuralgia, toothache, sore throat, period pain and rheumatic pain.

2. Check before you take Beechams Powders

Do not take:

- if you are allergic to **aspirin** or salicylates, **caffeine**, any other medicines known as **NSAIDs** or to any other ingredient (listed in Section 6).
 - if you have had an allergic reaction after taking ibuprofen or aspirin.
 - if you have had **asthma** or **shortness of breath** in response to **aspirin** before.
 - if you suffer from high blood pressure or heart disease.
 - if you have ever had a **stomach ulcer, perforation** or **bleeding of the stomach**.
 - if you have **blood clotting disorders** (e.g. haemophilia) or have ever had **gout**
 - if you have **liver** or **kidney disease**.
- . Do not give to children under 16 years of age unless your doctor tells you to.**

Take special care with Beechams Powders

- There is a possible association between aspirin and Reye's syndrome when given to children under 16 years. Reye's syndrome is a very rare disease which affects the brain and liver and can be fatal.
- Aspirin may cause bleeding. You must tell your doctor if you experience any unusual bleeding.
- Drinking alcohol at the same time as taking aspirin increases the risk of bleeding.
- Avoid excessive intake of caffeine (e.g. coffee, tea and some canned drinks) while taking this product.

-
- If you think you are dehydrated (you may feel thirsty with a dry mouth).

Ask your doctor before you take this medicine:

- if you suffer from **high blood pressure, asthma, allergic disease, kidney or liver problems.**
- if you are taking any prescribed medicines; particularly **methotrexate**; blood thinning drugs (**anticoagulants**) or blood pressure lowering treatments (**ACE inhibitors**); **oral hypoglycaemics** (to lower blood glucose) or medicines for treating **gout** such as **probenecid** or **sulfinpyrazone**; **ibuprofen** or other painkillers known as **NSAIDs** (e.g. **diclofenac**); **SSRI antidepressants** (such as **fluoxetine**); treatments for **epilepsy** (such as **phenytoin** or **valproate**); **beta-blockers** (e.g. **atenolol**); **acetazolamide**; if you are taking any water tablets (**diuretics**) or steroid hormones (**corticosteroids**); **antacids**; or have an intolerance to some sugars.
- Severe allergic reactions: Symptoms could include difficulty breathing, skin rash or swollen facial features, or tightening of the chest or asthma attacks in those sensitive to aspirin.

If you are pregnant or breast feeding

Do not take Beechams Powders if you are **pregnant or breast feeding**, except on medical advice.

3. How to take Beechams Powders

Mix the powder with a little water and stir before drinking.

Adults and children aged 16 years and over:

One powder every 3 to 4 hours as needed.

Do not take more than 6 powders in 24 hours.

Do not use for more than 10 days for pain relief (or more than 3 days for fever).

If symptoms persist **see your doctor.**

If you take more than the recommended dose seek medical advice immediately.

4. Possible side effects

Like all medicines, Beechams Powders can cause side effects, although not everybody gets them. **If you experience any of these effects then STOP taking this medicine immediately and contact your doctor or pharmacist:**

- Stomach ulceration or perforation: Symptoms could include severe abdominal pain, nausea and vomiting. People with sensitive stomachs may suffer stomach irritation and may experience bleeding (you may pass blood in your stools, or vomit blood or dark particles that look like coffee grounds).
- Severe allergic reactions: Symptoms could include difficulty breathing, skin rash or swollen facial features, or tightening of the chest or asthma attacks in those sensitive to aspirin.
- Occasionally the blood does not clot well, which may result in bruising or bleeding,

or yellowing of the skin and eyes may occur. Other side effects may include lethargy, weakness, shortness of breath, and generalised swelling or water retention, ringing in your ears or temporary

- High caffeine intake can result in nervousness and dizziness.

If you get any side effects, talk to your doctor, pharmacist or nurse. This includes any possible side effects not listed in this leaflet. You can also report side effects directly via the Yellow Card Scheme at: www.mhra.gov.uk/yellowcard. By reporting side effects you can help provide more information on the safety of this medicine.

5. How to store Beechams Powders

Keep out of the sight and reach of children.

Do not use this medicine after the 'EXP' date shown on the pack. Store below 25°C in a dry place.

6. Further information

Active ingredients Each powder contains:

Aspirin 600 mg and Caffeine 50 mg.

Other ingredients Lactose, maize starch, colloidal anhydrous silica, sodium lauryl sulphate, saccharin sodium, sodium cyclamate and spice flavour.

Packs of Beechams Powders contain either 10 or 20 powders.

The marketing authorisation holder is GlaxoSmithKline Consumer Healthcare, Brentford, TW8 9GS, U.K. and all enquiries should be sent to this address.

The manufacturer is QP-Services UK Limited, Yatton, Somerset, United Kingdom. This leaflet was last revised February 2014.

Beechams is a registered trademark of the GSK group of companies.

Appendix 2 = BOOTS Paracetamol (6 Years Plus) (Children)

Information for the user



Paracetamol 6 Years Plus 250 mg/5 ml Oral Suspension

Read all of this leaflet carefully because it contains important information for you.

This medicine is available without prescription to treat minor conditions. However, you still need to give it carefully to get the best results from it.

- Keep this leaflet, you may need to read it again
- Ask your pharmacist if you need more information or advice
- You must contact a pharmacist or doctor if your child's symptoms worsen or do not improve after 3 days
- The leaflet is written in terms of giving this medicine to your child, but if you are an adult who is intending to take this medicine yourself the information in this leaflet will apply to you as well

What this medicine is for

This medicine contains Paracetamol which belongs to a group of medicines called analgesics and antipyretics, which act to relieve pain and reduce fever. It can be used to relieve mild to moderate pain including toothache, headache and other pains. It can also be used to relieve the symptoms of colds and flu and to reduce fever.

Before you give this medicine

This medicine can be given to children from the age of 6 years and over. However, some children should not be given this medicine or you should seek the advice of their pharmacist or doctor first.

X Do not give:

- **If your child is under 6 years**
- **If your child is allergic to any of the ingredients** (see "What is in this medicine")

- **If your child has an intolerance to some sugars, unless your doctor tells you to** (this medicine contains sorbitol)

! Talk to your pharmacist or doctor:

- If your child has liver or kidney problems
- If your child takes any other medicines (see “If your child takes other medicines”)

Other important information

Information about some of the ingredients in this medicine: Sorbitol may have a mild laxative effect. Each 5 ml spoonful contains 1.1 g of sorbitol. This provides 3 kcal per 5 ml spoonful. Methyl hydroxybenzoate (E218) may cause allergic reactions (possibly delayed).

Information for adults intending to take this medicine

This medicine may be harmful if you are dependant on alcohol or have alcoholic liver disease. **Do not drink alcohol** (wine, beer, spirits) whilst taking this medicine.

Oral contraceptives may reduce the pain relief obtained with this medicine.

If you are elderly your doctor or pharmacist may advise you to take less of the medicine or take the medicine less regularly. In this case follow their instructions.

Pregnancy and breastfeeding: Do not take this medicine, unless your pharmacist or doctor tells you to.

If your child takes other medicines

! This medicine contains paracetamol.

Do not give anything else containing paracetamol while giving this medicine.

Before you give this medicine, make sure that you tell your pharmacist about ANY other medicines you might be giving your child at the same time, particularly the following:

- Domperidone or metoclopramide (for feeling sick or being sick)
- Colestyramine (to reduce blood fat levels)
- Medicines to thin the blood (e.g. warfarin)
- Medicines for epilepsy (e.g. barbiturates)
- Medicines for depression (e.g. tricyclic antidepressants)

If you are unsure about interactions with any other medicines, talk to your pharmacist. This includes medicines prescribed by your doctor and medicine you have bought for your child, including herbal and homeopathic remedies.

How to give this medicine

Check the cap seal is not broken before first use. If it is, do not give the medicine.

! Do not give anything else containing paracetamol while giving this medicine.

Check the table on the back of the leaflet to see how much of the medicine to give to your child. Never give more medicine than shown in the table. It is important to **shake the bottle** for at least 10 seconds before use.

Always use the syringe supplied with the pack. The syringe can be used to measure 2.5 ml or 5 ml by drawing the liquid to the correct mark on the syringe.

Give this medicine to your child to swallow.

Age	How much	How often
6 years up to 8 years	5 ml	Up to 4 times in any 24 hours. Leave at least 4 hours between doses
8 years up to 10 years	7.5 ml	
10 years up to 12 years	10 ml	
12 years up to 16 years	10 ml to 15 ml	
Adults and children of 16 years and over	10 ml to 20 ml	
Don't give more than 4 times in any 24 hours		

Do not give to children under 6 years. Do not give more than the amount recommended above.

Do not give this medicine to your child for more than 3 days, unless your doctor or pharmacist tells you to.

If your child does not get better, talk to their doctor.

Directions for using the syringe:

1. Shake the bottle for at least 10 seconds before use.
2. Push the syringe firmly into the plug (hole) in the neck of the bottle.
3. To fill the syringe, turn the bottle upside down. Whilst holding the syringe in place, gently pull the plunger down drawing the medicine to the correct mark (2.5 ml or 5 ml) on the syringe.
4. Turn the bottle the right way up, and then gently twist the syringe to remove from the bottle plug.
5. Place the end of the syringe into the child's mouth, normally to the side of the mouth between the gums and cheek. Press the plunger down to slowly and gently release the medicine.
6. If the table above advises you to give more than 5 ml of the medicine, repeat steps 2 to 5 to give your child the correct amount of medicine.

After use replace the cap on the top of the bottle tightly. Store all medicines out of the sight and reach of children.

Wash the syringe in warm water and allow to dry.

! If you give too much or if anyone accidentally swallows some of the medicine:

Immediate medical advice should be sought in the event of an overdose, even if your child seems well, because of the risk of delayed, serious liver damage. Go to your nearest hospital casualty department. Take the medicine and this leaflet with you.

Possible side effects

Most people will not have problems, but some may get some.

! If your child gets any of these serious side effects, stop giving the medicine. See a doctor at once:

- Difficulty in breathing, swelling of the face, neck, tongue or throat (severe allergic reactions)

If your child gets any of the following side effects see your pharmacist or doctor:

- Other allergic reactions (e.g. skin rash)
- Unusual bruising, or infections such as sore throats. This may be a sign of very rare changes in the blood. If any side effect becomes severe, or you notice any side effect not listed here, please tell your pharmacist or doctor.

How to store this medicine

Do not store above 25°C. Store in the original package. Keep the lid tightly closed.

Keep this medicine in a safe place out of the sight and reach of children, preferably in a locked cupboard. Use by the date on the end flap of the carton or on the label edge. After this date return any unused product to your nearest pharmacy for safe disposal.

What is in this medicine

Each 5 ml of oral suspension contains Paracetamol 250 mg, which is the active ingredient. As well as the active ingredient, the suspension also contains purified water, sorbitol (E420), glycerol (E422), microcrystalline cellulose, carmellose sodium, methyl hydroxybenzoate (E218), acesulfame potassium, hyetellose, strawberry flavour and cream flavour. The pack contains 70 ml or 80 ml of an off white, strawberry-flavoured syrupy suspension. Not all pack sizes may be marketed.

Who makes this medicine

Manufactured by BCM Ltd for the Marketing Authorisation holder The Boots Company PLC Nottingham NG2 3AA
Leaflet prepared March 2013

If you would like any further information about this medicine, please contact The Boots Company PLC Nottingham NG2 3AA

Other formats

To request a copy of this leaflet in Braille, large print or audio please call, free of charge: 0800 198 5000 (UK only) Please be ready to give the following information: Product name: Boots Paracetamol 6 Years Plus 250 mg/5 ml Oral Suspension Reference number: 00014/0860

This is a service provided by the Royal National Institute of Blind People.

Linguistic Proficiency and Human Rights: The case for accent as a protected ground

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Abstract. *The goal of this paper is to argue for the inclusion of linguistic proficiency as a protected ground in human rights law generally and, in particular, under the British Columbia Human Rights Code. Specifically, I argue that L2 speakers are entitled to protection on the basis of their accent when they are required to operate in their L2. I outline the general law and policy with respect to human rights and argue that accent is analogous to those grounds explicitly protected in human rights legislation and should be protected as such. I outline the problems with the current approach from a linguistic perspective and show how the current approach is inconsistent with the goals of human rights law generally.*

Keywords: *Human rights, linguistic proficiency, accent, linguistic human rights, L2 acquisition.*

Resumo. *O presente artigo procura defender a inclusão da competência linguística como área protegida na legislação de direitos humanos, em geral, e no Código de Direitos Humanos da Colúmbia Britânica, em particular. Especificamente, defendendo que os falantes de L2 têm direito a proteção com base na sua pronúncia sempre que necessitarem de utilizar a sua L2. Descrevo sucintamente a legislação geral e as políticas relativas a direitos humanos e defendo que a pronúncia é análoga às áreas protegidas especificamente pela legislação de direitos humanos, devendo ser protegida como tal. Elenco os problemas existentes na abordagem atual numa perspetiva linguística e mostro como a abordagem atual é inconsistente com os objetivos da legislação de direitos humanos, em geral.*

Palavras-chave: *Direitos humanos, competência linguística, pronúncia, direitos humanos linguísticos, aquisição de L2.*

Introduction

The goal of this paper is to argue for the inclusion of linguistic proficiency as a protected ground in human rights law and, in particular, under the British Columbia Human Rights Code (the ‘Code’).¹ Specifically, I argue that minority language speakers who are required to operate in a majority language, which is their L2, ought to be protected against discrimination on the basis of their proficiency in that L2. While the BC Human Rights Tribunal (the ‘Tribunal’) and the courts have explicitly rejected the invitation to

extend human rights protection to linguistic proficiency, I argue that such a rejection is inconsistent with the goals of human rights law and show that linguistic proficiency is analogous to those grounds explicitly protected by the legislation. I describe the benefits of human rights protection and show how the current approach to language discrimination fails to protect L2 English speakers.

The importance of human rights protection is that it prohibits the making of distinctions based on group membership rather than individual merit. In the case of linguistic proficiency, human rights protection would prevent L2 speakers from suffering adverse consequences based solely on their proficiency in their L2. However, it is equally important to understand what human rights protection does *not* do. For example, it does not require an employer to hire anyone with an accent who applies for a position, nor does it prevent an employer from ever terminating a worker because of their lack of proficiency. Rather, it means that refusing to hire someone or terminating someone *simply* because they lack native speaker competence is *prima facie* discriminatory.

Language rights have received significant attention in the linguistics literature (see, for example, Skutnabb-Kangas, 2012; Del Valle, 2003). These language rights have, as one of their aims, to ensure “that language is not an obstacle to the effective enjoyment of rights with a linguistic dimension, to the meaningful participation in public institutions and democratic processes, and to the enjoyment of social and economic opportunities that require linguistic skill.” (Rubio-Marín, 2003: 56) Much of the research in this area has focused on language policy and language planning in multilingual nations; that is, it considers the positive language rights a group ought to enjoy in order to protect and promote minority languages and their speakers. As Del Valle (2003: 144) observed, the issue of accent discrimination is not a pure issue of language rights because the protection of L2 speakers is not about the protection or promotion of the speaker’s minority language. Perhaps as a result, fewer linguistic studies have been devoted to the question of how best to protect minority language speakers when they are required to operate in the majority language when the majority language is their L2.²

Matsuda (1991), Del Valle (2003) and Lippi-Green (2012) have considered the protection of linguistic proficiency as a human right in the American context. Like in Canada, linguistic proficiency is not explicitly protected by the governing civil rights legislation;³ Title VII protection extends only to race, colour, religion, sex and national origin. While the Equal Employment Opportunity Commission Guidelines recognize that national origin encompasses cultural and linguistic characteristics, linguistic proficiency is not independently worthy of protection, only as an example of national origin discrimination. Moreover, the Guidelines are not law and are not entitled to judicial deference. The case studies presented in Matsuda (1991), Del Valle (2003) and Lippi-Green (2012) show that American courts regularly reject accent discrimination claims, even when the complaint is founded under the protected ground of national origin.

Matsuda (1991: 1348) describes the doctrinal puzzle of accent and discrimination as follows:

1. Title VII absolutely disallows discrimination on the basis of race and national origin.
2. A fortiori, Title VII absolutely disallows discrimination on the basis of traits, like accent, when they are stand-ins for race and national origin.

3. Title VII absolutely allows employers to discriminate on the basis of job ability.
4. Communication, and therefore accent, employers will insist, are elements of job ability.

The puzzle arises because, as Matsuda, Del Valle and Lippi-Green describe it, the question of whether or not accent is a stand-in for race or national origin (and is therefore protected) or an element of job ability (and therefore not protected) is part of a single legal test. This puzzle should not manifest in the Canadian context, where the two issues are kept separate in terms of the legal analysis; the decision maker is first tasked with determining whether *prima facie* discrimination exists and, if so, whether the impugned job requirement is reasonably necessary so as to justify that discrimination. However, as I show below, Canadian L2 English speakers fare no better in terms of human rights protection than L2 English speakers in America.

‘Linguistic proficiency’ is a broad term encompassing notions such as foreign/native accent, communicative ability, word choice, etc. and both American and Canadian courts appear to conflate these notions in their decisions. For the purposes of this paper, I use ‘linguistic proficiency’ specifically to mean ‘accent’ and use those terms interchangeably.⁴ I adopt Lippi-Green’s (2012: 46) definition of ‘accent’ as the breakthrough of native language phonology into the target language. My reasons for limiting the discussion to phonological accent are threefold. First, as I motivate below, accents are highly salient to native and second language speakers (Munro, 2008) and are used to make negative judgments about speakers (Alford and Strother, 1990); this is precisely the sort of mischief human rights legislation is intended to prevent. Second, as Lippi-Green (2012: 54) observes, the idea of ‘communicative competence’ will often raise additional issues of cultural and stylistic appropriateness, discussion of which is beyond the goals of this paper. Finally, Matsuda, Del Valle and Lippi-Green all base their discussion of accent discrimination on phonological accent; I adopt the same definition in order to show that, while the Canadian legal tests are set up in a way that should better protect L2 speakers from discrimination, in practice they fail to do so.

Munro (2003) presents a background to accent discrimination in Canada, setting out a summary of issues and some discussion of the law. In this paper, I build on that primer and present a specific context in which language has been an obstacle to the enjoyment of economic opportunities; namely, the opportunities for employment and the lack of legal protection for workers who are not native speakers of English. I give an overview of the law with respect to human rights protection in British Columbia and show that, while accent is not explicitly protected by the Code, it ought nonetheless to be protected as being analogous to those grounds so protected. I describe the benefits of extending Code protection on the basis of accent and show how the current approach fails to adequately protect minority language speakers. Finally, I discuss some of the potential consequences for failing to recognize accent as a ground entitled to human rights protection.

Human rights law in British Columbia

In British Columbia, human rights are governed by three pieces of legislation: the Code, the *Canadian Human Rights Act*,⁵ and the *Canadian Charter of Rights and Freedoms*.⁶ The context in which the complaint arises determines which statute is operative; the

Code applies to provincially regulated activities, including employment and tenancy, the *Canadian Human Rights Act* applies to federally regulated activities occurring within the province, and the *Charter* protects individuals against discrimination by any level of government. All of these statutes have the same goals, which have been described by the Supreme Court of Canada⁷ as

...to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. (paragraph 51)

These goals are reflected in the Code at Section 3, which sets out its statutory purposes as follows:

(3) The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code; [and]

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

Thus, the Code's purposes include the prevention of the types of discrimination the Code prohibits. To understand what that entails, the Code and its resulting jurisprudence require further scrutiny.

'Discrimination' is not defined in the Code; therefore, the types of conduct that constitute discrimination are those that have been developed by the Tribunal and the courts. In *Law Society of B.C. v. Andrews*,⁸ the Supreme Court of Canada interpreted 'discrimination' to mean:

...a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. (paragraph 37)

Where a distinction is made on the basis of membership of a group, rather than on individual merit, that distinction will be discriminatory.⁹

The Code, however, is only intended to prevent the types of discrimination it explicitly prohibits. Therefore, in order to determine whether discrimination will run afoul of

the Code, it is important to determine the context in which the discriminatory conduct arises and the grounds on which the conduct discriminates. The Code explicitly prohibits discrimination in eight specific contexts, namely: in publications (s. 7), services regularly available to the public (s. 8), the purchase of property (s. 9), tenancy (s. 10), employment advertising (s. 11), wages (s. 12), employment (s. 13) and by unions and associations (s. 14). Any discriminatory conduct falling outside of these specific areas will not violate the Code.

The Code explicitly protects against discrimination on 15 grounds: physical disability, mental disability, sex (including sexual harassment and pregnancy), race, place of origin, colour, ancestry, age (19 and over), family status, marital status, religion, sexual orientation, political belief, unrelated criminal conviction, and lawful source of income (collectively, the “Enumerated Grounds”). Unless the ground is explicitly designated as protected by the Code, the Tribunal or court will only grant the Code’s protection where it can be convinced the ground is ‘analogous’ to the Enumerated Grounds.

The ‘analogous grounds’ test has emerged primarily in response to the failure or refusal to adequately protect sexual orientation in human rights legislation. Where legislators have failed or refused to explicitly designate sexual orientation as a protected ground, the courts have intervened and extended human rights protection on the basis that sexual orientation is ‘analogous’ to those grounds explicitly protected. The test for determining whether a ground is ‘analogous’ was developed in the context of Section 15(1) of the *Charter* in *Egan v. Canada*,¹⁰ where L’Heureux-Dubé J., held in dissent

...it is first necessary to identify the group which is affected. It is true that in some cases it may be useful to determine whether or not the affected group forms a “discrete and insular minority” which is lacking in political power and, thus, vulnerable to having its interests overlooked or its rights to equal concern and respect violated. Yet, that search is not really an end in itself. While historical disadvantage or a group’s position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may simply be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect. The fundamental consideration underlying the analogous ground analysis is whether the basis of the distinction may serve to deny the essential human dignity of the Charter claimant. Since one of the aims of Section 15(1) is to prevent discrimination against groups which suffer from social or political disadvantage, it follows that it may be helpful to see if there is any indication that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political or social prejudice. (paragraph 171)

That test was subsequently adopted by the majority of the Supreme Court of Canada in *Vriend v. Alberta*¹¹ and the current test for establishing analogous grounds, regardless of which statute the claim arises under.

The current approach to linguistic proficiency in British Columbia

Linguistic proficiency is not explicitly protected by human rights legislation in British Columbia; it is not designated for protection in the Code, the *Canadian Human Rights Act* or in Section 15(1) of the *Charter of Rights and Freedoms*. Moreover, attempts to argue its inclusion as an analogous ground have been unsuccessful. Rather, the Tribunal

has held linguistic proficiency is “not a ‘free standing’ prohibited ground of discrimination requiring positive steps to ensure that disadvantaged groups benefit equally from services;”¹² like in the United States, to the extent that linguistic proficiency is protected at all, it is only where language is established as an aspect of race, ancestry or place of origin.¹³

The current approach is set out in *Fletcher Challenge Canada Ltd. v. British Columbia (Council of Human Rights)* (“Fletcher Challenge”) and arises in the context of Section 13, employment.¹⁴ In that case, the complainant, a Punjabi speaking man, applied for and was refused a basic labourer’s position at the respondent sawmill on a number of occasions over a two-year period. The respondent employer justified its refusal to hire the complainant on the basis of his limited proficiency in English. The Tribunal concluded the respondent employer refused to employ the complainant because of his English language deficiency and that constituted discrimination on the basis of race, colour, ancestry and/or place of origin; because of its findings with respect to discrimination, it did not need to determine whether linguistic proficiency itself could be a protected ground.

The respondent employer appealed the Tribunal’s decision through the judicial review process. That appeal was successful; the court overturned the Tribunal’s decision, concluding that discrimination on the basis of linguistic ability will not always be evidence of discrimination on the basis of a protected ground. In doing so, the court specifically rejected the complainant’s analogous ground argument, concluding:

There is no question that language is the conveyor of culture. It shapes and is shaped by culture. A culture cannot survive without the ability of its people to give expression to themselves and the way in which they see the world through the articulation of thought in language. History teaches us that one of the oppressor’s most effective tools for maintaining power is the eradication of the language of the oppressed.

One could hardly disagree with the Member Designate that language is directly related to race, colour, ancestry and/or place of origin. But it cannot be said that it is necessarily related. Apart from its capacity to convey culture, language is also a communication skill that may be learned, and the ability to learn any language is not dependent on race, colour or ancestry.

So too in a work environment, language may simply be a means of communicating to accomplish a task. In that context the important aspect of language is not the expression of culture, but simply a means to communicate. Language is in this context a skill, not unlike the ability to operate a machine. It is the process by which job related information is passed back and forth from employee to employee and/or from employee to anyone he or she meets in the course of performing his or her duties.

Language then, has a dual aspect. It is inextricably bound with culture in one sense, but in another it is a means of communication unrelated to culture. When one examines the prohibited grounds set out in s. 8 [now s. 13], specifically those of race, colour, ancestry and place of origin it is clear that the legislature has prohibited discrimination on the basis of inherent characteristics that a person acquires or carries with him or her from birth – matters over which an individual

usually has no choice. I cannot think of any situation where discrimination on the basis of grounds would ever be justified. . .

I am of the view then that because of the dual nature of language it is not included as a prohibited ground per se in s. 8 of the Human Rights Act [now Code]. Applying the principles set out earlier, I find that the interpretation given to s. 8 of the Act is not one which the words can reasonably bear.

This is not to say however, that discrimination on the basis of language may not in some cases, when scrutinized, be found to actually be based on race, colour, ancestry or place of origin. If, for example, Mr. Grewal was denied employment at Fletcher Challenge because he spoke Punjabi, no other inference could be drawn other than the fact that he was being denied employment on the basis of race, colour, ancestry or place of origin. Discrimination can and usually does, take on more subtle forms. Refusal to employ someone on the stated basis of a language deficiency, when the ability to communicate in a particular language is not necessary to perform the job, would obviously be a veiled attempt to discriminate on the basis of race, colour, ancestry or place of origin. To put it another way, the stated reason for refusing employment would be a deceit, the real reason would be discrimination on the basis of ancestry or one of the other prohibited grounds. In such cases it may be said that language and ancestry are inextricably bound.

For a tribunal hearing such a case it will be a matter of examining the evidence to determine whether a language requirement is legitimate, that is, whether it is rationally connected to the performance of the job, or whether it is merely an attempt to discriminate on a prohibited ground. (QL 10-11)

The court concluded that, though language is inextricably bound with culture, it is also a learnable skill, not unlike operating a machine. Therefore, linguistic ability was not beyond the speaker's control; language was not entitled to protection in and of itself, but only where it could be used to support a claim for discrimination on the basis of race, colour, ancestry or place of origin.

Inherent limitations in adult language acquisition

The current approach to discrimination on the basis of accent results from the court's failure to appreciate the nature of human language and, in particular, adult L2 acquisition. The court understood that the ability to acquire any language is not dependent on race, colour or ancestry. Indeed, unless they are born with a specific or general language impairment, humans exposed to any language as children will acquire that language with native speaker fluency. However, the court failed to understand or recognize the diminished ability to acquire an L2 as an adult. That diminished capacity is an inherent characteristic that the person carries with him or her from birth and is a matter over which an individual has no control. The court erred in concluding otherwise.

Linguistic research has shown that the ability to acquire a non-accented L2 depends on the age at which the L2 is acquired; the later in life the L2 is acquired, the more likely it is to be perceived as accented (see for example, Ioup, 2008; Flege *et al.*, 1997).¹⁵ Some researchers attribute the diminished capacity for language learning in adults to

the Critical Age Hypothesis. According to Lenneberg (1967), language learning develops readily for the first few years of life, after which language acquisition is more difficult and less successful. The critical age is generally thought to end around the time of puberty. Scovel (1988) observed that phonological performance is particularly affected in late L2 learners; although adults can acquire the syntax and vocabulary of an L2 with very successfully, their phonological performance will not match that of a native speaker. He attributed the age effects on phonological performance to the fossilization of neuro-muscular programming that occurs around the age of puberty.

The Critical Age Hypothesis has been the focus of rigorous debate in the linguistics literature. However, as Munro observed, “whether or not one accepts the existence of a critical period for speech learning, the available evidence leads to the inescapable conclusion that having a foreign accent is a common, normal aspect of late second language acquisition” (2008: 194). To the extent that language is a communication skill that can be acquired, the ability to acquire it in an L2 is diminished for older language learners. This diminished capacity is inherent to all language learners and, while a few late language learners are able to learn to speak an L2 with native or near-native pronunciation, they are very much the exception not the rule (Munro, 2008). Therefore, for adult L2 learners, the inability to acquire L2 without an accent is an inherent characteristic that he or she carries from birth.

Further, language learners will generally have no control over what language(s) they are exposed to for the purpose of acquiring language with native speaker fluency. Regardless of whether the age effects of phonological performance are attributed to biology (Scovel, 1988), age of learning (Flege *et al.*, 1995), or age of arrival (Flege *et al.*, 1999), children are more likely to acquire language with native fluency. However, a child will not acquire native fluency without being exposed to the language and children generally have no control over which languages they are exposed to. Children simply cannot make all their own choices.¹⁶ So, the fact a speaker did not acquire the majority language as an L1 or as an early learner of L2 will generally be a matter beyond their control.

Therefore, the fact that an adult L2 learner speaks with an accent is the result of an inherent characteristic carried from birth and a matter over which the speaker has no control and the court erred in concluding otherwise. In any event, because of its erroneous findings with respect to the nature of language, the court failed to consider whether L2 learners suffer social and political disadvantage, which forms the basis of the analogous grounds test set out in *Egan and Vriend*.

Societal or political disadvantage

In determining whether a ground is analogous to those enumerated in the Code, the court must consider whether members of the group who share that ground have suffered societal or political disadvantage as a result and, therefore, have been denied the essential human dignity that human rights legislation is designed to protect. In the case of linguistic proficiency, minority language speakers required to operate in their L2 suffer negative social and economic consequences as a result of their limited L2 proficiency.

Accents are highly salient to native and second language speakers (Munro, 2008: 195). Speaking with a non-native accent entails a variety of possible consequences for L2 users, including accent detection, diminished acceptability, diminished intelligibility, and negative evaluation (Munro, 2008; Flege, 1988). Moreover, individuals readily make

judgments on the basis of language, using it as a cue to classify others into groups; when speakers know little about an individual, they tend to attribute to that person features they associate with the groups to which they assume the individual belongs (Alford and Strother, 1990).

Purnell *et al.* (1999) showed that the ability to discern a non-standard dialect is sufficient to determine ethnicity and, as a result, speakers can suffer discrimination on the basis of their speech alone without any visual cues. In that study, a tri-dialectal speaker contacted potential landlords over the telephone in order to inquire about apartments for rent. The speaker was more successful when using the standard dialect than using either of the non-standard dialects. Similarly, Anisfeld *et al.* (1962) showed that, when a speaker used Jewish-accented English, they were rated less positively on personality characteristics than when the same speaker used Standard English. In the specific context of work, communicative differences may lead to judgments that speakers with non-native accents are unqualified, which may in turn lead to exclusion from social and occupational cliques, thereby creating an isolation that makes it difficult to achieve full and equal participation in the workforce and in society as a whole (Fleras and Elliott, 2003).

Sociological and sociolinguistic studies have established that individuals excel at detecting foreign accents, that they use those foreign accents to make judgments about the speaker on the basis of their own perceptions, and that those judgments result in negative consequences for the speaker. Therefore, linguistic proficiency satisfies the test as set out in *Egan* and *Vriend* and ought to be treated as an analogous ground worthy of the Code's protections.

The benefit of human rights protection

The current approach to language discrimination set out in *Fletcher Challenge* arose in the context of employment discrimination, as have the majority of cases in which linguistic proficiency has subsequently been considered as a protected ground. As such, the focus of this section is on the prohibition against discrimination in the context of employment.

Unless the workplace is unionized, BC workers enjoy very few rights with respect to their employment; they can be terminated at any time, for any reason, provided that the notice requirements of the *Employment Standards Act*¹⁷ are met. The Code, which prohibits an employer from terminating a worker on the basis of the prohibited grounds for discrimination, is the primary source of protection for minority workers in a non-unionized environment. The Code prohibits an employer from refusing to employ or terminating an employee on the basis of any of the Enumerated Grounds.

In order to succeed with a complaint, the complainant must first establish that they were discriminated against on a *prima facie* basis. A *prima facie* case of discrimination is established where the complainant shows that they are a member of a protected group, that they have been adversely treated, and that there is a nexus between the adverse treatment and their membership of the protected group.¹⁸ Where a *prima facie* case of discrimination is made out, the onus then shifts to the employer to establish that it is a *bona fide* occupational requirement (a "BFOR") for the position that the incumbent possess a certain level of communicative proficiency. A workplace rule or standard will only constitute a BFOR where the respondent can show

- (1) that it adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must demonstrate that it is impossible to accommodate an individual employee sharing the characteristics of the complainant without imposing undue hardship upon the employer.¹⁹

Where the employer is unable to establish that the discriminatory rule or standard is a BFOR, then the complaint will succeed and a finding of discrimination will be made.

Problems with the current approach

Because accent is not a protected ground, speakers with accents will never be part of a protected group. A *prima facie* case of discrimination will never be made out on the basis of accent and, because the BFOR test is only invoked as a defence to a *prima facie* case, it will theoretically never come in to play in complaints of accent discrimination. Moreover, because language rules or standards will never be inherently discriminatory under the Code, they will never be subject to scrutiny under the BFOR test; an employer is never required to establish that a language standard is rationally connected to the position in issue, that it adopted the standard in good faith and that the standard is reasonably necessary to accomplish its legitimate goal.

The exception to this is where the complainant attempts to use the language rule to establish a *prima facie* case of discrimination on the basis of race, ancestry or place of origin; that is, where accent is a stand-in for race, ancestry or place of origin. There, the Tribunal will consider whether the language standard is rationally connected to the position for the purpose of determining whether a case of *prima facie* discrimination has been made out.²⁰ This approach is unsuccessful in protecting L2 speakers of the majority language on the basis of race, ancestry, and place of origin.

Consider the Tribunal's decision in *Zahedi v. Xantrax Technology Inc.*²¹ There, the complainant identified as a person of Persian ancestry, from Iran, who spoke Farsi and who spoke English with an accent. He alleged his employer imposed work requirements on him and limited his opportunities to advance because of his English skills and his accent so as to constitute discrimination on the basis of race, ancestry and place of origin. Specifically, the complainant alleged that he was advised orally and in writing that his English was insufficient, he was chastised for having an accent, and was emailed a link directing him to a college ESL accent class. His performance evaluations indicated his written English skills were a challenge and he needed to continue to work to develop his written English skills. He alleged his performance was regularly praised, but he was continually told he needed to improve his accent.

The employer sought to have the complaint dismissed on the basis it had no prospect of success. In an application to dismiss, the Tribunal will assume the facts alleged in the complaint are proven in deciding whether a *prima facie* case has been established. In this case, the Tribunal concluded the allegations about the complainant's written English skills and his accent were insufficient to establish a nexus between the adverse treatment he suffered and his race, ancestry or place of origin. It concluded the complaint had no reasonable chance of success on those grounds and dismissed that aspect

of the complaint. This case did not involve the imposition of a language standard or rule, *per se*. As a result, the Tribunal did not consider whether the employer's criticisms were rationally connected to the complainant's work; it simply held the employer's criticisms were not indicative of discrimination on the basis of race, ancestry or place of origin. Whether the employer could have established a BFOR defence, we cannot know because the employer was never required to lead the evidence necessary to do so.

If linguistic proficiency were a protected ground, the analysis would have evolved differently. Arguably, the complainant would have established a *prima facie* case of discrimination; on the facts alleged, the complainant spoke English with a Farsi accent, he suffered adverse treatment when he was denied the opportunity to advance in the company and there was a nexus between the protected ground and the adverse treatment; the employer's criticisms are evidence that his linguistic proficiency was partially to blame for his failure to advance. That is sufficient to constitute *prima facie* discrimination. The onus would then shift to the employer to establish that the standard it set for linguistic proficiency was a BFOR; that the language standard was rationally connected to the work to be done, that it imposed the standard in good faith and that the standard was reasonably necessary to accomplish the workplace goal.

If the employer can establish that the language standard against which it measured the complainant is legitimate and reasonably related to the work he was required to do, then it is less likely that the language standard is in reality a strategy to discriminate on the basis of race, ethnicity or place of origin. If the standard is *bona fide* and the complainant fails to meet it, then there is less concern that the complainant is being discriminated against in a way that violates the Code. Where there is no evidence the language standard is legitimate or even necessary to do the job in question, the complainant has a stronger argument for discrimination on the basis of race, colour or ancestry. By failing to make an employer accountable for the legitimacy of the language standards it adopts, the current approach fails to adequately protect against language discrimination on the basis of race, ethnicity and place of origin.

Moreover, the court took an unduly restrictive view of language by tying linguistic proficiency specifically to race, ancestry and place of origin. Indeed, language can be tied to other protected grounds; American Sign Language speakers may be discriminated without invoking race, colour or ancestry in any way. And while L2 speakers may be discriminated against on the basis of race, ancestry or place of origin, Purnell *et al.* (1999), as reported above, showed that discrimination also occurs on the basis of standard versus non-standard dialects. There, the speaker was fluent in three different dialects of American English: African American Vernacular English, Chicano English and Standard American English. Similarly, Appalachian English is a non-standard variety of American English that is regularly stigmatized and yet not protected by 'national origin' (Lippi-Green, 2012: 151). While a particular dialect may reflect race or ancestry, it may also reflect socio-economic status, social class and communities of practice. None of these are protected by human rights legislation and yet they may cause or contribute to the type of discrimination shown in Purnell *et al.* (1999).

The effect of including linguistic proficiency as a protected ground is to shift the burden from the complainant to the respondent. It means that, where a complainant can establish they suffered an adverse consequence as a result of their linguistic proficiency, the respondent must prove the language standard was legitimate and reasonably

necessary. While this will not always be a significant burden, it nonetheless offers some protection to complainants who might otherwise suffer significant economic disadvantage as a result of their linguistic abilities.

Conclusion

By failing to protect linguistic proficiency as an analogous ground, the Tribunal and the courts fail to protect people who suffer adverse consequences as a result of a characteristic inherent to individuals and over which individuals have no control. These individuals form an identifiable group who have suffered social and political disadvantage as a result of their group membership. Moreover, the current approach permits the very mischief the court warned against in *Fletcher Challenge*; it permits a discriminator to avoid liability by choosing their words carefully in the circumstances. This is entirely inconsistent with the goals of human rights as identified by the judiciary and by statute. Linguistic proficiency meets the analogous grounds test in *Egan* and *Vriend* and should be protected accordingly.

Notes

¹R.S.B.C. 1996, c. 210.

²It is useful here to distinguish between the protection of L2 speaker rights *within* the legal system itself (see Eades, 2003, for example, for discussion) and the protection of L2 speaker rights *by* the law. The latter assumes the existence of L2 speaker rights that the law is required to protect; the goal of this paper is to advocate for that position.

³Title VII of the Civil Rights Act of 1964.

⁴This is not to say that other aspects of linguistic proficiency are not similarly deserving of human rights protection. However, I leave discussion of that issue to future research.

⁵R.S.C., c. H-6.

⁶Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁷*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁸[1989] 1 S.C.R. 143.

⁹*Re Insurance Corporation of British Columbia and Heerspink et al.* (1978), 91 D.L.R. (3d) 520 (B.C.C.A.), affd. (1981), 121 D.L.R. (3d) 464 (B.C.C.A.).

¹⁰[1995] 2 S.C.R. 513.

¹¹[1998] 1 S.C.R. 493.

¹²*Yang v. British Columbia (Human Rights Tribunal)*, 2008 BCSC 1456 (S.C.) (“Yang”), at para. 138.

¹³*Yang; Bosco v. Smart Ant Solutions Ltd.*, 2014 BCHRT 234; *Chestacow v. Mount St. Mary Hospital*, 2013 BCHRT 96; *Norikova v. Thomson Rivers University*, 2013 BCSC 2156; *Medel and another v. De Lange*, 2012 BCHRT 144; *Bao v. St. James Community Service Society*, 2011 BCHRT 337; *Katayeva v. Vancouver Island Health Authority*, 2010 BCHRT 40; *Zahedi v. Xantrex Technology Inc.*, 2009 BCHRT 214; *Jones v. In 2 Business*, 2008 BCHRT 460; *Berezoutskaia v. British Columbia Human Rights Tribunal*, 2005 BCSC 1170; *Clau v. Uniglobe Pacific Travel Limited*, [1995] B.C.H.R.T.D. No. 1; *Guillen v. R. Dufour Enterprises Ltd.*, [1995] B.C.C.H.R.D. No. 24; *Fletcher Challenge Canada Ltd. v. British Columbia (Council of Human Rights)*, (1992), 73 B.C.L.R. (2d) 335; 97 D.L.R. (4th) 550.

¹⁴(1992), 73 B.C.L.R. (2d) 335; 97 D.L.R. (4th) 550.

¹⁵Courts and tribunals have limited their discussion of linguistic proficiency primarily to “accent”. For this reason, I have similarly focused my discussion on “accent” and not L2 grammar more generally.

¹⁶*Brown v. Brown*, [1988] B.C.J. No. 205, at QL 5.

¹⁷R.S.B.C. 1996, c. 113.

¹⁸*Wu v. Ellery Manufacturing Ltd.*, 2000 BCHRT 53.

¹⁹*British Columbia v. BCGSEU (Meiorin)*, [1999] 3 S.C.R. 3, paragraph 54.

²⁰The question remains whether the court's approach in *Fletcher Challenge*, which requires a consideration of whether a language requirement is rationally connected to the position as part of the *prima facie* discrimination test, reverses the onus and requires the worker to establish the absence of a rational connection. I leave this question to future research.

²¹*Supra*.

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Academic freedom in the United States after *Garcetti v. Ceballos*

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Abstract. *This paper focuses on the constitutional limits of instructor speech at public post-secondary institutions of learning in the United States. Specifically, the paper attempts to clarify these boundaries after the U.S. Supreme Court's uncertain ruling in *Garcetti v. Ceballos* (2006). In that case, a narrow 5-4 majority held that the government – in its capacity as employer – may discipline an employee for communications made pursuant to his/her official duties when that speech undermines the government's mission of delivering efficient services to the public. *Garcetti* would uphold the government's adverse employment decision even if the employee's controversial speech dealt with issues of relevance to the community. The *Garcetti* majority, however, declined to decide whether the ruling would also extend to "speech related to scholarship of teaching", that is, whether *Garcetti*'s "official-duties" standard would apply to a particular group of public employees: teachers and professors. This uncertainty is compounded by the indecisive jurisprudence of the Court over the beneficiary of academic freedom. Whereas some decisions seem to uphold an individual academic freedom – i.e., the teacher's liberty to seek and disseminate truth without fear of retaliation – other opinions have argued for an institutional type of academic freedom, whereby the public institution of learning – not the individual – decides what to teach and how to teach it. The analysis concludes with advice to faculty members of public post-secondary institutions so that they may protect themselves from the risk of adverse employment decisions justified by the Supreme Court.*

Keywords: Constitutional Law, Freedom of Speech, Public Education, United States, Academic Freedom.

Resumo. *Este artigo discute os limites constitucionais do discurso do professor em instituições públicas de ensino pós-secundário nos Estados Unidos. Especificamente, este artigo procura clarificar estes limites, na sequência do acórdão vacilante do Supremo Tribunal dos Estados Unidos em *Garcetti v. Ceballos* (2006). Neste caso, uma pequena maioria de 5-4 determinou que o governo – na sua capacidade de empregador – pode instaurar processos disciplinares a um funcionário por comunicações feitas no âmbito das suas funções oficiais sempre que esse discurso minar a missão do governo de prestar serviços eficazes ao público.*

Garcetti sustentaria a decisão laboral adversa do governo, mesmo que o discurso controverso do funcionário versasse sobre questões de relevância para a comunidade. A maioria Garcetti, porém, recusou-se a decidir se o acórdão também seria extensível a “discurso relacionado com os estudos em pedagogia”, ou seja, se a norma de “funções oficiais” de Garcetti também se aplicaria a um grupo específico de funcionários públicos: professores e docentes. Esta incerteza é agravada pela jurisprudência hesitante do Tribunal relativamente ao beneficiário da liberdade acadêmica. Embora algumas decisões pareçam sustentar uma liberdade acadêmica individual – i.e., a liberdade do professor para procurar e disseminar a verdade sem receio de retaliação –, opiniões concorrentes defenderam um tipo de liberdade acadêmica institucional, segundo a qual a instituição de ensino pública – e não o indivíduo – decide o que ensinar e como ensinar. A análise realizada termina com alguns conselhos destinados a membros de Faculdades de instituições públicas de ensino pós-secundário que lhes permitam proteger-se contra o risco de decisões laborais adversas fundamentadas pelo Supremo Tribunal.

Palavras-chave: *Direito Constitucional, liberdade de expressão, Ensino Público, Estados Unidos, liberdade acadêmica.*

Introduction: the First Amendment to the U.S. Constitution

The free-speech clause of the First Amendment to the U.S. Constitution forbids the government from curtailing the people’s freedom of speech. As interpreted by the U.S. Supreme Court – the nation’s highest judicial body – the Amendment protects oral, written, and visual expressions (e.g., a televised speech, a literary work, or a painting, respectively); expressions that have not yet occurred (e.g., a journalistic article barred from publication); and conduct conjoined with speech, also known as “symbolic speech” (e.g., burning the U.S. flag to express displeasure with the national government).

In principle, the Amendment shields speech against content-based restrictions, especially restrictions on political speech because of its deleterious effect on a democratic society. For example, the ordinance in *R.A.V. v. City of St. Paul* (1992: 379) punished the placing of “any symbol, object, appellation, characterization or graffiti ... which one knows or has reasonable grounds to know arouses anger, alarm or resentment ... on the basis of race, color, creed, religion or gender”. Citing its content-based nature, the Court struck down the ordinance for allowing abusive speech as long as it did not address the recipient’s race, color, creed, religion or gender.

Courts treat content-based speech restrictions as constitutionally suspect by subjecting them to an exacting test known as “strict scrutiny”. These speech restrictions will survive strict scrutiny only if they are narrowly drawn to further a compelling government interest. For instance, in *Wooley v. Maynard* (1977), the Court applied strict scrutiny to a New Hampshire statute that made it a misdemeanor to obscure the state’s motto “Live Free or Die”, which was embossed on passenger vehicles’ license plates. The Court (1977: 716) did not find sufficiently compelling the state’s asserted interests in facilitating the identification of passenger vehicles, and promoting “appreciation of history, individualism, and state pride”.

First-Amendment jurisprudence has also struck down speech restrictions due to their vagueness. A vaguely written law, the Supreme Court reasons, ends up chilling speech (*Reno v. American Civil Liberties Union*, 1997: 872) because it forces people of

common intelligence to guess at its purported meaning (*Connally v. General Construction Company*, 1926: 391). In other words, fear of punishment forces speakers to confine their speech to that which is undeniably safe (*Baggett v Bullitt*, 1964: 372). For example, in *Smith v. Goguen* (1974: 574), the Court invalidated a Massachusetts statute punishing anyone who treated “contemptuously” the flag of the United States for failing to distinguishing clearly between criminal and lawful treatment of the flag.

Furthermore, even clearly-drafted speech restrictions will be held unconstitutional if their scope is deemed so overbroad as to punish permissible speech. For example, in *United States v. Stevens* (2010), the Supreme Court struck down a federal statute criminalizing the creation, sale, or possession of portrayals of animal cruelty for commercial gain because of its substantial sweep over protected speech, such as depictions of lawful hunting.

Despite these protections, the Court held in *Konigsberg v. State Bar of California* (1961: 50) that the First Amendment does not amount to “an unlimited license to talk”. For instance, in *Burson v. Freeman* (1992), the Court upheld a law prohibiting, inter alia, the distribution of political campaign materials within 100 feet of the entrance to a polling site. Applying strict scrutiny, the Court found the law necessary to serve the government’s compelling interest of protecting the people’s right to vote freely.

In fact, the Court has carved out a series of exceptions for certain content-based speech restrictions. These are narrowly defined categories of low-value speech, i.e., expressions that do not further First-Amendment values (Stone, 2009: 283). For example, in *Brandenburg v. Ohio* (1969: 447), the Court ruled that the First Amendment did not protect speech that is aimed at inciting or producing “imminent lawless” activity, and is “likely to incite or produce” such activity. Likewise, in *New York Times Co. v. Sullivan* (1964), the Court excluded from constitutional protection defamatory statements about a public official when the speaker knows that these statements are false.

In the same restrictive vein, the government – in its role as employer – can punish employees for the content of their speech without having to meet strict scrutiny. Specifically, in *Garcetti v. Ceballos* (2006) the Court allowed the government to discipline public employees for making statements pursuant to their duties when such statements disrupt the government’s mission of delivering efficient services to the public.

The *Garcetti* majority, however, declined to address whether the ruling would also affect “speech related to scholarship or teaching” (2006: 425). In other words, the majority did not comment on the repercussions – if any – of the ruling on the free-speech rights of a specific group of public employees: educators. Due to this uncertainty, federal circuit courts have differed over whether – and, if so, when – *Garcetti*’s “official-duty test” applies to instructor speech (*Gorum v. Sessoms*, 2009: 186).

In the absence of guidance from the Court, this paper will attempt to clarify the extent to which *Garcetti* can restrict academic freedom in public education in the United States, with an emphasis on post-secondary education, because of the multifaceted responsibilities of its faculty members. Specifically, the analysis will focus on those instances in which a public college professor claims that his/her institution retaliated against him for his/her speech. In other words, the analysis will not discuss prior restraint, that is, situations in which an employee is forced into silence for fear of reprisal.

The analysis begins with a discussion of the notion of “academic freedom” as interpreted by the Supreme Court, followed by a discussion of the three standards currently used by courts to decide on the constitutional boundaries of public-employee speech: *Pickering*, *Hazelwood*, and *Garcetti*. The paper then narrows down its scope by focusing on the repercussions of *Garcetti* on *instructor* speech, and concludes with a series of recommendations for teachers and professors working for public institutions.

Academic freedom

From an intellectual perspective, academic freedom can be defined as an educator’s liberty to seek and spread truth. Academic freedom would, therefore, grant him/her the autonomy to further this intellectual pursuit – e.g., by selecting classroom content, or establishing the contours of their scholarship – without the threat of retaliation from school officials (Griffin, 2013: 9). Or, as put by Professor Arthur Lovejoy – co-author of the influential 1915 Declaration of Principles on Academic Freedom and Academic Tenure – “the distinctive social function of the scholar’s trade can not be fulfilled if those who pay the piper are permitted to call the tune” (1938: 414).

From a legal perspective, however, the level of protection conferred upon academic freedom remains unclear. In *Regents of University of California v. Bakke* (1978: 312), Justice Powell held that academic freedom has “special” First-Amendment ramifications, while also acknowledging that the concept “[is] not a specifically enumerated constitutional right”. This uncertainty is compounded by the indecisiveness of the Supreme Court over the beneficiary of academic freedom. On the one hand, the Court has praised the public school as the “cradle ... of democracy” (*Adler et al. v. Board of Education*, 1952: 508), where teachers instill the democratic values of open-mindedness and critical inquiry (*Wieman v. Updegraff*, 1952: 196). To undertake this “noble task” (*Wieman v. Updegraff*, 1952: 196), teachers must be free to produce and disseminate knowledge. Scholarship “cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die” (*Sweezy v. New Hampshire*, 1957: 250). Academic freedom is a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom” (*Keyishian v. Board of Regents*, 1967: 603). These decisions, therefore, seem to indicate that academic freedom belongs to the teacher.

Other Supreme Court opinions, however, have construed academic freedom as an institutional – not an individual – right. Put differently, academic freedom would not belong to the educator, but to the educational institution for which s/he works. Under this doctrine, institutions – not educators – must remain free to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study” (*Sweezy v. State of New Hampshire*, 1957:263). In other words, universities enjoy the freedom “to make ... [their] own judgments as to education” (*Regents of the University of California v. Bakke*, 1978: 312).

Predictably, lower courts have differed over the meaning of academic freedom. Some have argued for an institutional type of academic freedom, whereby the institution is the one party invested with the right “to be free from government interference in the performance of core educational functions” (Byrne, 1989: 311). The Court of Appeals for the Sixth Circuit, for example, has adhered to this view. In his concurrence in *Evans-*

Marshall v. Board of Education (2005: 235), Justice Sutton held that the school district “has the right [for First-Amendment purposes,] to retain control over what is being taught in the classroom”. Similarly, another appellate court, the Fourth Circuit, ruled in *Urofsky v. Gilmore* (2000: 412) that even if the Supreme Court had constitutionalized a right to academic freedom, it appears to have recognized “only an institutional right of self-governance in academic affairs.”

Other lower courts have adopted the individual interpretation of academic freedom. For instance, in *Demers v. Austin* (2013: 1019), the Court of Appeals for the Ninth Circuit leaned on the Supreme Court’s decisions in *Sweezy* and *Keyishian* to designate “teaching and academic writing” a special concern of the First Amendment, which protects the teacher’s freedom to seek truth. However, even a court’s preference for this type of analysis does not guarantee that the First Amendment will protect any form of instructor speech, given the constraints of the three judicial standards currently used: *Pickering*, *Hazelwood*, and *Garcetti*.

The pre-*Garcetti* years: *Pickering* (1968)

Pickering v. Board of Education (1968) focused on a public-school teacher who had written a letter to a local newspaper criticizing the Board of Education’s handling of proposals to raise revenue for the schools. The Board dismissed him because it considered the publication of the letter harmful to the efficient operation and administration of the district’s schools.

The Supreme Court held that the First-Amendment right to speak freely about issues of relevance to the community has to be balanced against the Government’s right to ensure a productive working atmosphere. In this balancing test, the Government will most likely prevail if: (1) the speech focused on a private matter, i.e., a matter that does not affect the community directly (*City of San Francisco v. Roe*, 2004: 83-84); or (2) the public-matter speech undermined the government’s mission of serving the public efficiently (*Connick v. Myers*, 1983: 146, 152-153). This mission is undermined, for example, when the employee’s speech interferes with his/her duties; when it leads to discord among fellow employees; or when the speech undermines a superior’s authority (*Pickering v. Board of Education*, 1968: 569-70). *Pickering*’s subsequent refinement in *Waters v. Churchill* (1994: 702-703) eased the government’s burden of proof, thereby increasing the government’s chances of winning the case. Instead of showing that the employee’s expression actually damaged its mission, the Government needs to show only that it was reasonable to predict that such damage might have resulted from the expression. The lower courts, however, are not forced to follow *Waters* because the ruling was delivered only by a relative majority of Justices (seven of the nine Justices arrived at the same conclusion, but only four applied the same reasoning).

The pre-*Garcetti* years: the *Hazelwood* standard (1988)

Alternatively, courts may analyze the instructor’s speech according to the Supreme Court standard established in *Hazelwood School District v. Kuhlmeier* (1988) to evaluate student speech. Specifically, the case revolved around a student newspaper that was part of a journalism class taught for credit during school hours. The administration barred from the pre-publication copy a section dealing with topics of interest to teenagers because “the references to sexual activity and birth control” in one of the articles were “inappropriate for some of the younger students at the school” (1988: 263). In

the Court's view (1988: 271), instructors may exercise greater control over "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school". This control over student speech is grounded in legitimate pedagogical concerns, which dictate that audience members be protected from inappropriate material for their maturity level, and that the speaker's views not be mistakenly attributed to the school (1988: 271). Applying the standard, the Court held that the section on sexual activity and birth control in the newspaper could have been reasonably construed as being "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen"¹ (1988: 274).

Soon after the Supreme Court decision, the Court of Appeals for the First Circuit extended *Hazelwood* to instructor's classroom speech: like the student newspaper in *Hazelwood*, the court reasoned, "a teacher's classroom speech is part of the curriculum. Indeed, a teacher's principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers' speech in that setting" (*Ward v. Hickey*, 1993: 453). Likewise, the Second Circuit used *Hazelwood* in *Silano v. Sag Harbor Free School District Board Of Education* (1994), a case about a guest lecturer who had shown photographs of bare-breasted women to tenth-grade mathematics students during a lecture on a scientific phenomenon. The court (1994: 723) rejected the lecturer's First-Amendment claim after weighing "the age and sophistication of the students, the relationship between the teaching method and valid educational objectives, and the context and manner of the presentation".

Some legal analysts (e.g. Gardner, 2008: 238–239) have criticized the incongruence of evaluating instructor speech through a test originally applied to student expression. Regardless of the validity of these criticisms, most cases dealing with instructor speech do not apply *Hazelwood* (Cooley, 2014: 269–270). Moreover, the standard is applied to teacher and student speech at compulsory levels of the educational system, and with post-secondary student speech (LaVigne, 2008: 1206). For this reason, the following sections will focus only on the two most commonly applied standards at the post-secondary level: *Garcetti* and *Pickering-Waters*.

***Garcetti v. Ceballos* (2006)**

Garcetti v. Ceballos (2006) shifted the threshold inquiry to the role of the speaker (employee vs. citizen) from *Pickering's* inquiry "into the content of the speech" i.e., into whether the speech touched on a public matter (*Spiegla v. Hull*, 2007: 965). The case focused on a controversial memorandum written by Richard Ceballos, a deputy district attorney. In this memorandum Ceballos criticized the manner in which the sheriff's office had obtained a crucial affidavit related to a particular case. At trial, Ceballos claimed that his superiors punished him for writing that memorandum by denying him a promotion and transferring him to a less desirable destination. The Supreme Court (2006: 421) held that the First Amendment does not insulate public employee speech from employer discipline when expressed "pursuant to" the employee's official duties. Otherwise, his/her expressions could end up disrupting the government's mission of serving the public efficiently. For example, a relaxed attitude towards sarcasm, criticism, etc. might end up disrupting the harmony among employees and/or undermining the supervisors' authority (*Rankin v. McPherson*, 1987:388). In Ceballos's case, the Court found that the First Amendment did not protect his (written) expressions because his duties as deputy district attorney included preparing memoranda on pending cases.

Conversely, in *Lane v. Franks* (2014), an administrator for a public community college had suffered adverse employment consequences for providing truthful subpoenaed testimony against a fellow employee. Shortly after his testimony, the fellow employee was indicted on charges of mail fraud and theft concerning a federally-funded program. Because the administrator's courtroom speech was made outside the course of his ordinary job responsibilities, the Supreme Court turned to *Pickering* to determine whether his speech – as a citizen, not an employee – touched on a matter of public concern. In a unanimous opinion, the Court (2014: 2380) found that the administrator's sworn testimony dealt with corruption in a public program and misuse of state funds, "obviously... a matter of significant public concern".

Garcetti has been harshly criticized by law scholars (e.g. Cooper, 2006: 91; Kleinbrodt, 2013; Wenell, 2007: 627–628), and members of the judiciary, including the dissenting Justices in that case. Three of the Court's nine Justices argued that *Garcetti* deters public employees from revealing first-hand information about the Government's operations (2006: 428). This restriction contravenes the spirit of the First Amendment because, as the Court itself has held (e.g. *Roth v. United States*, 1957: 484), the uninhibited exchange of ideas on public issues helps the people choose the representatives best fit to serve the nation. Furthermore, *Garcetti* leaves state employees without federal recourse with which to challenge an adverse employment decision against them for denouncing wrongdoing in the workplace (*Williams v. Riley*, 2007: 584-585). Moreover, Justice Souter's dissent expressed his concern about the effect of *Garcetti* on instructor speech: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to... official duties'" (2006: 438).

Despite these criticisms, *Garcetti* is still in effect. *Stare decisis* – the practice of adhering to the principles established by previous decisions – directs the lower courts to adhere to the opinions of higher courts when presented with indistinguishable facts (Berland, 2011: 697–698). The binding force of precedents thus directs lower courts to apply *Garcetti* when ruling on the constitutionality of disciplinary measures against public employees because of their speech. These rulings tend to favor the Government, given the courts' broad interpretation of what constitutes the employees' official duties (Cooley, 2014: 279), which, in turn, increases the already high frequency with which public employees are disciplined for comments made pursuant to their duties (Daly, 2009: 24); (Drechsel, 2011: 143). For instance, at least five of the twelve Courts of Appeals – with jurisdiction over 26 of the 50 states of the country – have found for the Government when the duties in question had not been "required by, or included in, the employee's job description" (*Weintraub v. Board of Education*, 2010: 203).

This sweeping trend is beginning to affect academia as well. Instructors, particularly those in post-secondary education, engage in a wide panoply of expressive functions that could be considered part of their official duties, and, therefore, within *Garcetti*'s sphere: classroom teaching, scholarly research, student advising, committee service, faculty governance, and public speaking, among others (Griffin, 2013: 20). In Cooley's (2014: 279) estimation, "most courts" using *Garcetti* to evaluate instructor speech have expanded the scope of official duties and, therefore, deemed a broader amount of speech – on and off school grounds – as constitutionally unprotected. Compounding the employee's chances of winning the case, even if the speech is found to be unrelated to the instructor's official

duties, it must still survive *Pickering*, one of the pre-*Garcetti* standards. The following section will analyze how instructor speech would fare in these scenarios.

***Garcetti* applied to instructor speech**

In the first scenario, the court decides to apply *Garcetti* (*Williams v. Dallas Independent School District*, 2007: 692). It follows that *Garcetti* would authorize school officials to discipline those instructors found to have undermined the educational mission of the institution² because of expressions made pursuant to their official duties. As mentioned above, instructors at the post-secondary level may be required not only to teach their classes, but also to engage in activities outside the classroom, such as research and committee work. Since these functions carry an expressive component, *Garcetti* severely restricts the zone within which a public university instructor can exercise his/her First-Amendment right to free speech. *Garcetti* also imposes a high clearance bar for controversial instructor speech because it emphasizes the role of the speaker (employee vs. citizen) at the expense of the content of the expression. Even if the content veered from teaching, academic writing, or service – e.g., the quality of the food at the faculty dining room, or the schedule of the campus bus (O’Neil, 2008: 20) – that speech would be unprotected for First-Amendment purposes if expressed as part of the professor’s duties (e.g., while teaching a class).

For example, the Seventh Circuit employed *Garcetti* in *Renken v. Gregory* (2008), a case dealing with a dispute over the administration of a grant that the National Science Foundation (NSF) had awarded to a public university to support a tenured professor’s project. The professor, one of the project’s principal investigators, alleged that the institution had reduced his pay and terminated the NSF grant in retaliation for his criticisms of the University’s proposed use of the funds. The court (2008: 773) noted that the grant helped the professor fulfill his teaching responsibilities because, as he himself had admitted, the purpose of the grant was “undergraduate education development.” In other words, the professor made his complaints about the use of NSF funds “pursuant to his official duties as a University professor” (2008: 775). Because his speech was unprotected for First-Amendment purposes, the court granted summary judgment in favor of the University.

Hong v. Grant (2007) also exemplifies a *Garcetti*-based ruling about the constitutionality of disciplining a public university professor for comments made outside the classroom. In this case, a tenured professor claimed that he had been denied a raise for criticizing at meetings the hiring and promotion of other colleagues. Applying *Garcetti*, the court held that the professor made those comments while carrying out the administrative duties of tenured professors at that institution³ (2007: 1167). Therefore, his speech was not protected for First-Amendment purposes.

As mentioned above, court decisions based on *Garcetti* tend to favor the Government even when the employee speech was made pursuant to duties not included in the original job description or contract. This tendency is evident in the academic context. For instance, in *Gorum v. Sessoms* (2009) a tenured university professor claimed that the institution dismissed him for helping a student appeal a sanction. The Court of Appeals for the Third Circuit (2009:185) ruled that an employee’s speech might be considered part of his/her duties when related to “special knowledge” or “experience” acquired through his/her job. In this case, the professor’s experiences with and knowledge about the Code

of Conduct of the institution (which he himself had written), made him the *de facto* advisor of students with disciplinary issues. Therefore, the professor was fulfilling part of his responsibilities when he advised the student on the appeal.

Perhaps the only exception to an outcome detrimental to the instructor's interests as a result of *Garcetti* would involve speech authorised by the institution's administrators (Forster, 2010: 707). This approval may stem from normative documents, such as the curriculum or a Collective Bargaining Agreement. For example, in *Stachura v. Truszkowski* (1985), a Primary Education teacher was dismissed after some parents complained that he had shown images of the reproductive organs in his Life Science class. The Court of Appeals for the Second Circuit held for the professor, arguing that school administrators had previously approved the content and methodology for his class.

Surviving *Pickering*

In the second scenario, the professor's speech would have to survive *Pickering*. This scenario can occur when the court cannot find a link between the expression and the instructor's official duties, or when the court holds that *Garcetti* does not apply to instructor speech. Only two appellate courts – the Fourth and Ninth Circuits – have declined to extend *Garcetti* to academic speech at the university level (Bauries, 2014: 716). The Fourth Circuit, for example, decided so in *Adams v. Trustees of the University of North Carolina-Wilmington* (2011), a case about a tenured university professor's failed bid for promotion. The court (2011: 562) held that “*Garcetti* would not apply in the academic context of a public university as represented by the facts of this case”. Specifically, if the speech in question involved scholarship or teaching, the court would apply *Pickering*, not *Garcetti*. The court, however, left the door open for *Garcetti* by holding that when the assigned duties of a public-university faculty member include “declaring or administering university policy, as opposed to scholarship or teaching”, *Garcetti* “may” apply to the speech of the faculty member discharging those duties (2011: 563). Likewise, the Ninth Circuit employed *Pickering* instead of *Garcetti* in *Demers v. Austin* (2013). In that case, a tenured university professor alleged that university administrators had retaliated against him – e.g., by giving him negative performance reviews – for, *inter alia*, a self-published proposal in favor of disaggregating the College of Communication. The court (2013: 1019) declined to extend *Garcetti* to “teaching and academic writing” performed pursuant to the official duties “of a teacher and a professor” because of *Garcetti*'s conflict with the Supreme Court decision in *Keyishian*, which enshrined academic freedom as a special concern of the First Amendment.

Under *Pickering*, the instructor would most likely win the case if his/her expression (1) were deemed of public interest; and (2) prevailed over the Government's right to fulfill its educational mission. Despite being less restrictive than *Garcetti*, even *Pickering* poses a difficult hurdle for the instructor to overcome. First, lower courts have differed over whether the same type of expression touched on a matter of public interest (Gardner, 2008: 219–222). For instance, the Court of Appeals in *Hardy v. Jefferson Community College* held that teachers prepare their students so that the latter may become responsible citizens. Consequently, classroom instruction frequently deals with aspects that the Supreme Court would deem as ‘of public interest’ (*Hardy v. Jefferson Community College*, 2001: 679). In *Cockrel v. Shelby County School District* (2001: 1051-1052), the same court reinforced this view by holding that the controversial presentation leading to the

teacher's dismissal – industrial hemp – was of public interest because it had appeared frequently in the local media. Conversely, the Fourth Circuit held in the post-*Garcetti* case *Lee v. York County School Division* (2007: 694) that curricular materials do not deal with public issues, which means the instructor would have no First-Amendment recourse, regardless of the speech's actual damage to the institution's educational mission.

Furthermore, even speech expressed outside the classroom can be found to touch on private matters, and be thus unprotected for First-Amendment purposes. For instance, the court in *Hong v. Grant* (2007: 1169) held that the tenured professor's criticisms about the hiring of certain professors and the assigning of certain courses to lecturers focused on administrative disputes that did not affect the community, i.e., private matters. Likewise, the district court in *Payne v. University of Arkansas Fort Smith* (2006: 13) ruled that the number of hours that professors had to stay on campus constituted an internal matter on working conditions.

These matters may remain private even when the community learns about them. In *Colburn v. Trustees of Indiana University* (1992), the Court of Appeals (1992: 586) held that even though the public would be displeased to learn about the biased evaluations of untenured professors at a public university, the issue at hand did not affect the community directly. Therefore, the First Amendment would not protect a professor's comments on this topic.

Even if the teacher's expression is deemed as touching on a public matter, *Pickering* dictates that courts balance the social value of the expression with the Government's right to keep the workplace free of disruptions that damage the delivery of efficient services to the public. In *Hardy v. Jefferson Community College* (2001), a college professor had used vulgar expressions in his class to exemplify the ostracism experienced by traditionally oppressed groups. After one of his students complained to the professor's superiors, the professor continued teaching the class for the rest of the semester without further conflicts with the students or his colleagues. Nevertheless, the institution did not renew his contract. Following *Pickering*, the Court of Appeals (2001: 679) held that the professor's speech on power conflicts in society focused on a topic of public interest. The court then weighed the professor's right to comment on matters of public concern with the Government's right to discipline employees who undermine its educational mission. In its balancing analysis, the Court (2001: 680-681) held that the class did not interfere with the professor's performance or with the institution's operations, nor did it promote disharmony among coworkers, undermine an immediate supervisor's discipline over employees, or undermine the 'loyalty and trust' required of employees. After concluding that the professor had satisfied "both prongs of the *Pickering* test in successfully alleging a First Amendment violation," the court remanded the case for further proceedings. Regrettably, however, the professor died of lung cancer in 2002, before the case was reheard by the federal district court.

On other occasions, however, the expression is found to be harmful to the institution's mission. As explained above, the Supreme Court has hinted that academic freedom belongs to the institution. Accordingly, some Courts of Appeals have granted public colleges and universities control over curricular matters⁴ (*Cohen v. San Bernardino Valley*, 1995: 1413). This control implies that the teacher risks undermining the Government's educational mission if s/he deviates from the decisions of the institution regarding what to teach and how to teach it. For instance, in *Piggee v. Carl Sandburg College* (2006), a

public university did not renew a Cosmetics professor because she had distributed pamphlets against homosexuality during class time. The Court of Appeals (2006: 672) ruled that, even though the subject matter of the pamphlet was of public interest, a public university may require a faculty member to hew to the subject matters that s/he was contracted to teach. In the same restrictive vein, the court in *Lovelace v. Southeastern Massachusetts University* (1986: 424) ruled that the government's control on curricular matters extends not only to the content of the course, but also to the amount of homework assigned and the grading system used to evaluate the students' performance in that course.

Instructors have even fewer odds of prevailing if the court follows *Waters v. Churchill* (1994: 702-703). As explained above, the Government relaxed *Pickering's* second prong by allowing the Government to show only a reasonable prediction of the disruptive consequences that the teacher's speech could have produced. For instance, the Court of Appeals in *Jeffries v. Harleston* (1995: 13) affirmed a public University's decision to limit a professor's term as Chair after he had criticized Jews during a televised speech. In the court's view, it was reasonable to believe that the criticisms could have undermined the institution's mission. However, because the lower courts are not bound to follow *Waters*, the ruling is applied to academic speech inconsistently (Hitz, 2010: 1170). For example, in *Settlegoode v. Portland Public Schools* (2004), a teacher for disabled students began to receive negative supervisor evaluations after complaining about substandard working conditions. The Court of Appeals found for the teacher in the absence of any actual destabilizing effects from her complaint.

Conclusions

As Blanchard (2014: 201) points out, academic freedom is another type of "freedom," i.e., a liberty in that it immunizes a group of people – teachers and professors – from the restraining power of others. *Garcetti*, however, leaves the door open to sweeping restrictions to this freedom.

Even before *Garcetti*, the *Pickering* standard already restricted the instances in which a public instructor could argue convincingly that the institution had violated his/her First-Amendment rights by making retaliatory employment decisions because of his/her speech. Under *Pickering*, the most favorable conditions for the instructor would involve speech on a matter of public interest not disruptive of the institution's educational mission. If *Garcetti* were applied to academia, the instructor's free speech would be restricted even more. *Garcetti* would justify adverse employment measures if the expression had been made pursuant to the instructor's duties – including not only those functions for which s/he was hired explicitly (teaching, research, service, etc.), but also any activities indirectly associated with these duties – regardless of the public nature of the speech.

In light of *Pickering* and *Garcetti*, the spirited defense of academic freedom mounted, on certain occasions, by the Supreme Court has waned to an exercise brimming with rhetorical flourishes, but devoid of judicial force. The Court would even allow the Government to discipline an educator for engaging in speech that does not immediately cause any workplace disruption (under *Waters*), when, in fact, the teacher's "noble task" of fomenting open minds (*Wieman v. Updegraff*, 1952: 196) is intricately linked to the expression of controversial opinions.

Perhaps the Court will begin to uphold academic freedom more firmly when it realizes the other consequence of insufficient guidance in *Garcetti*: instructors might end up deciding to refrain from speaking for fear of a disciplinary measure that a lower court might uphold under *Garcetti*. Ironically, the ruling risks creating the same chilling effect on speech that the Court has so vehemently opposed when striking down speech restrictions on the grounds of vagueness (e.g. *Smith v. California*, 1959: 151; *Stromberg v. California*, 1931: 369). Until the Court adjudicates on the issue more decisively, *Garcetti*, and – to a lesser degree – *Pickering-Waters* will continue hindering the “vital role in a democracy” (*Sweezy v. New Hampshire*, 1957: 250) performed by those who educate the country’s youth.

Until that moment, public-education teachers and professors should protect themselves from the risk of adverse employment decisions justified under *Garcetti* or *Pickering* by following a series of steps. First, these employees should familiarize themselves with the official documents specifying their duties. Second, they should be well aware of the culture of the institution that has hired them. Not all academic institutions are willing to risk exercising their authority on curricular matters oppressively lest they might start losing competent teachers (*Bishop v. Aronov*, 1991:1075). And third, instructors should familiarize themselves with the rulings of the courts with jurisdiction over the area where the institution is located.

Notes

¹In addition to the students’ younger age, the compulsory nature of primary and secondary education prevents teachers from enjoying the same degree of freedom as their post-secondary counterparts (Kuhn, 2006: 999); (Nahmod, 2008: 62). Specifically, the Supreme Court has reasoned that because these younger students must attend class, they cannot avoid being exposed to the ideas expressed by their teachers. Therefore, these students become a captive audience, which contravenes the people’s First-Amendment right to decide what ideas to listen to (*Cohen v. California*, 1971: 21; *Rowan v. United States Post Office Dept.*, 1970: 736).

²As a quintessential example of the educational mission of U.S. public universities, the University of North Carolina at Chapel Hill – the first public university in the country to admit students – aims to serve “as a center for research, scholarship and creativity and to teach a diverse community of ...students to become the next generation of leaders” (*University of North Carolina at Chapel Hill*, 2015).

³A Court of Appeals (*Hong v. Grant*, 2010: 237) affirmed the ruling, albeit on non-First Amendment grounds. Regardless of the new reasoning, it is reasonable to conclude that cases involving similar circumstances would be decided in the Government’s favor if the court applied *Garcetti*.

⁴This institutional prerogative over curricular matters, however, is not absolute. For example, in *Ep-person v. State of Arkansas* (1968, 1107), the state violated the neutrality of the government in religious matters (also mandated by the First Amendment) by prescribing the teaching of the origin of mankind based on the Book of Genesis.

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Recensão

Outras palavras sobre autoria e plágio

Recensão de Bruna Batista Abreu

Universidade Federal de Santa Catarina, Brasil

Outras palavras sobre autoria e plágio

Marcelo Krokosz (2015)

São Paulo: Atlas

Em *Outras palavras sobre autoria e plágio*, Marcelo Krokosz apresenta a publicação de seu trabalho de doutorado em forma de livro. Este é o seu segundo livro, que dá continuidade ao tópico, tendo sido o primeiro *Autoria e plágio*, uma publicação de 2012, em que também são trazidos aspectos importantes para reflexão acerca do tema.

Este novo livro está organizado em três seções precedidas de uma introdução e, ao final, com uma conclusão: 1) plágio: um assunto complexo e desafiador; 2) em busca de autoria; e 3) autoria científica.

Na parte introdutória do trabalho, o autor traz que é necessário ir além da superficialidade nos debates sobre o plágio e propõe a seguinte questão para ser estudada no livro: “O que significa ser autor e criador no processo de produção textual científica?”. Seguindo este objetivo, o trabalho se desenvolve apresentando reflexões bem fundamentadas, com dados e pontos de vista de importantes estudiosos que tem se debruçado sobre o assunto.

No primeiro capítulo, quatro pontos são apresentados acerca da definição de plágio: 1) as complexidades envolvidas ao se tratar do tema; 2) a forma como ele tem sido abordado em instituições internacionais; 3) o enfrentamento do plágio no Brasil; e 4) aspectos históricos e teóricos a respeito. É importante salientar uma importante contribuição de sua pesquisa acerca da identificação das duas principais abordagens que tem sido empregadas para se lidar com plágio: a legalista; e a colaboracionista. A primeira enfatiza o caráter normativo e punitivo, sustentando-se no conceito mais tradicional de autoria. A corrente colaboracionista, por outro lado, trata o plágio considerando o processo de aprendizado em escrita do aluno. O autor enfatiza que as duas perspectivas são importantes e que podem se complementar.

O segundo capítulo é voltado para questões de autoria, mais especificamente a definição de autor e as implicações a respeito, como o impacto das novas tecnologias na determinação de autoria. Um fenômeno interessante que vem se fortalecendo concerne a autoria coletiva, como por exemplo a Wikipédia. O autor apresenta importantes informações a esse respeito, como a existência da *Creative Commons*. Trata-se de uma organização sem fins lucrativos que cria licenças para os autores que queiram distribuir seus trabalhos gratuitamente¹.

No terceiro capítulo, que trata da autoria científica, é trazido a respeito da especificidade da produção autoral dentro do contexto acadêmico. O autor ressalta que diferentes critérios e objetivos se fazem presentes dentro da esfera científica, os quais diferenciam este contexto de produção textual dos demais. Ele aponta as complexidades bem como a ênfase na dimensão ética quando se trata da produção de trabalhos científicos.

Finalmente, na conclusão, o autor reitera alguns dos aspectos trazidos no livro e também apresenta as limitações e contribuições do trabalho bem como sugestões acerca das considerações que devem ser observadas em pesquisas futuras. A respeito das reflexões suscitadas no livro, ele destaca:

... as oscilações teórico-práticas nas idéias de plágio e autoria; as especificidades do texto literário em comparação com o texto científico; as características de autoridade e responsabilidade no processo autoral; as distinções entre propriedade patrimonial e moral; e as relações entre ética (leis morais) e técnica (normas e diretrizes). (p. 135)

O livro encontra-se muito bem organizado e objetivo, apresentando informações extremamente relevantes para discussão do fenômeno, que encontra-se em estágio embrionário no Brasil, onde ainda vivenciamos uma ausência de mais estudos no assunto e de políticas para se lidar com plágio nas instituições. Como sugerido pelo autor, o livro pode ser utilizado em disciplinas envolvendo escrita acadêmica, metodologia científica, entre outras. A obra proporciona uma leitura agradável e bastante enriquecedora, que possibilita ao leitor tomar contato com uma série de reflexões que permitem questionar certos preconceitos e práticas em relação ao plágio.

Notes

¹Mais informações podem ser encontradas no site da organização: <http://www.creativecommons.org>

Recensão

Plágio: palavras escondidas

Recensão de Bruna Batista Abreu

Universidade Federal de Santa Catarina, Brasil

Plágio: palavras escondidas

Débora Diniz e Ana Terra (2014)

Brasília e Rio de Janeiro: LetrasLivres e Editora FioCruz

Plágio é um tema altamente complexo e que envolve uma série de implicações. Apesar da ocorrência de casos e divulgação na mídia, ele tem sido pouco discutido no Brasil, especialmente no que concerne os âmbitos escolares e acadêmicos, onde muitas vezes ele é abordado como um “crime” sem se aprofundarem as discussões. Assim, com o objetivo de “passar do silêncio à fala” (p. 135), as autoras Débora Diniz e Ana Terra buscaram uma abordagem um tanto artística para conceituar plágio, elucidar questões e também discutir aspectos relacionados ao tema. Nesta breve resenha descrevo de forma geral os conteúdos do livro, apresentando aspectos positivos bem como limitações que podem ser encontradas numa leitura crítica em *Plágio: palavras escondidas*.

As autoras iniciam com a citação de um quadro de René Magritte, intitulado *A leitora submissa*, que apresenta a imagem de uma moça demonstrando espanto na expressão do rosto enquanto lê um livro que tem em mãos. Diz-se que é submissa porque não ergue o olhar e permanece estática sem tirar os olhos das páginas. Elas se apropriam de forma legítima da imagem, e a nomeiam *A leitora enganada*, para “simboliza[r] quem se perturba ao encontrar o plágio” (p. 14). Fica a critério do leitor extrair mais pontos que possam estabelecer a relação entre o quadro e o tema do plágio. Tal referência a uma obra de arte desde o início demonstra a preocupação das autoras em apresentar o plágio de forma um tanto atraente.

Plágio é definido como

uma forma de enganação textual em que um pseudoautor assume como suas as palavras de um autor. Intencional ou descuidado, o pseudoautor mente para o leitor: substitui assinaturas em um texto e não informa sobre a anterioridade da

criação. O plagiador pode ser um ladrão para alguns; para nós, é um sujeito tolo, um sebastião das letras e jamais um criador de textos. (p. 15).

Embora de fato em muitos casos seja esta uma grande verdade, tal definição apresenta o plágio de forma limitada, considerando-se sumamente os aspectos morais. Não se menciona a muitas vezes necessária ocorrência “descuidada” naqueles que estão se iniciando no processo de aprendizagem da escrita acadêmica.

É importante ressaltar que o trabalho das autoras apresenta reflexões e críticas bastante relevantes ao plágio particularmente no meio literário. Entretanto, há alguns aspectos que não foram abordados com a mesma ênfase mas que mereceriam ser destacados. Por exemplo, o plágio não se restringe ao aspecto moral e ético que, embora se evidencie em algumas ocorrências, não é o que particularmente está ao alcance do linguista forense. Além disso, tratar plágio como um crime pode trazer algumas repercussões negativas no contexto educacional para o aluno que está em processo de aprendizagem da escrita acadêmica e que muitas vezes inadvertidamente pode cometer um deslize.

O livro contém sete capítulos precedidos por um prólogo e uma nota explicativa para justificar a escolha da flexão de gênero masculino. Os capítulos são intitulados: 1) Plágio; 2) Intertexto; 3) Autoria; 4) Escritura; 5) Cognato; 6) Rasura; e 7) Sombra.

No primeiro capítulo são apresentados alguns aspectos sobre plágio com ênfase na relação com os direitos autorais e no plágio literário. Pontos muito importantes são introduzidos, como o que constitui um texto como original ou não e a responsabilidade autoral. No capítulo seguinte, menciona-se o pastiche literário, que se diferencia do plágio, e também a “máquina caça-plágio” (p. 39). Aqui faz-se importante destacar que é um engano referir-se aos softwares de detecção de similaridade textual como “máquinas caça-plágio”. Na verdade, até o presente momento, ainda não dispomos de tecnologia suficiente para que tais programas detectem plágio. Por exemplo, citações diretas são detectadas, e elas não constituem plágio. Além disso, muitas vezes ocorre plágio em paráfrases mal feitas, substituição de palavras ou troca de algumas estruturas que apesar de não serem detectados podem significar plágio.

No terceiro capítulo questiona-se o que é um autor e se faz referência a Foucault, que critica tal conceito. Também se explora a questão do autor e do escritor fantasma e o autoplágio. O capítulo 4, “Escritura”, onde se relatam alguns casos de plágio na dimensão ética, também se menciona a paráfrase, diferenciando-a da citação direta, e o ‘apud’, quando ocorre citação de citação. No quinto capítulo descreve-se a complexidade no ‘plágio de ideias’, fabricação de dados e também fabricação de textos em trabalhos acadêmicos. O capítulo 6 começa tratando mais especificamente das “máquinas caça-plágio”, e é interessante que as autoras mencionam a questão da comercialização desses serviços. Também se fala da vergonha que os plagiadores sentem, e o tanto que tal fato cria um estigma – como na retratação de um artigo. Nas palavras das autoras, “nada mais constrangedor para o currículo de um pesquisador que ter uma coleção de artigos retratados” (p. 123). No último capítulo o objetivo do livro é novamente trazido, e destaca-se que “o plágio é uma sombra, mas não deve ser um tabu” (p. 35). Entretanto, estamos inseridos num sistema de ensino falho em muitos pontos e também com preconceitos e temores sobre o plágio, advindos de nossa imersão neste sistema. Por exemplo, o padrão do tradicional sistema de ensino é mantido na seção ‘inquietação’, que apresenta perguntas retóricas e suas respostas prontas, remetendo ao que se observa nas práticas correntes de haver uma resposta correta para cada pergunta.

Desse modo, com ressalvas sobre as implicações que o debate sobre o plágio deve merecer na esfera educacional, isentando-o do estigma da culpa, *Plágio: palavras escondidas* apresenta narrativas e propõe reflexões muito importantes sobre um tema tão amplo e complexo como o plágio. Merece, portanto, ser lido não com uma “leitura submissa”, mas sim crítica e ativa, postura esta que deve ser adotada diante de qualquer texto.

Book Review

Language and Law

Reviewed by Hulya Kocagul Yuzer

Aston University, UK

Language and Law

Annabelle Mooney (2014)

Basingstoke: Palgrave Macmillan

As the title indicates, this book aims to provide students with an introductory overview of the field of language and the legal system; including how the legal process and legal texts are embedded in our daily routines not only in courtrooms and legal archives. At the same time, the editors make it clear that it is the first volume in a new series titled *Language &...* which is meant to provide the best new thinking about language for students. Forthcoming volumes in the series will focus on Language and Business, Language and Media, and Language and Journalism.

This volume is an introduction to Language and the Law. That it serves this purpose well is most clearly demonstrated by the concise explanations of terms and theories. The main argument that flows through the book is that language and the law are intertwined and that words have a great significance in the study of the law.

The book is organised in two ways: firstly, each chapter introduces either a linguistic concept or an analytical method, for instance the trials of language or analysing texts for the purpose of a trial; secondly each section details a stage of the legal process like legal languages that are found in formal documents (legislation and contracts), the construction of witness statements by police or the courtroom context. The chapters progress through the legal stages as they would usually be experienced by a participant in a case, except that in the first chapter explains the concept of legal language and at the final chapter spoken and written signs. By contrast, each section focuses on a different area where language and the law intersect using relevant examples, making reference to a wide variety of cases, and range of activities. A comprehensive list of references is also included. The real strength of this book lies in its interaction with the reader, it constructs a clear conception guided by theoretical knowledge and the activities provided

in each section (e.g. p.58), and the interesting real-life examples ranging from data taken from President Obama's first swearing into office (p.50) to the alcohol ban poster put up in London train stations in 2008 (p.7). This book really engages the readers.

Each chapter is clearly written and quite short – approximately 16 pages – which is a good length for those who do not already have any knowledge of the field. Chapter 1, "Finding the language", begins by giving examples of legal language taken from daily life and then introducing Jakobson's (1960) six functions of language. Chapter 2, "The language of law" defines the notion of written legal language especially in legislation and contracts and how it works. The next two chapters 'The Language of Law' and 'Don't do it!' explain the specific functions of language, and then discuss conversational maxims – including examples from police interviews in order to exemplify how the maxims operate – as well as introducing the reader to Grice's co-operative principle. Chapter 5, "The trials of language", examines both interactions with the police, by looking at how witness statements are created, and the way lawyers question witnesses and suspects in the courtroom context. There are examples of courtroom interaction from a variety of countries in order to demonstrate differing rules of interaction. Some concepts like turn taking and 'adjacency pair' from conversational analysis (Sacks *et al.*, 1974) are also explained in this subsection. The next chapter "Different Language different rules" concentrates on the issues of interpreting in the courtroom context and also the problems involved in trying to identify a person's origin by examining their linguistic output. It can be concluded that although native speakers may think of themselves as experts on their own language this is inaccurate and seldom the case in a legal setting.

Chapters 7, "The CSI effect?", and 8, "The pen is mighty", look at spoken then written evidence respectively in order to discuss how far linguists are able to help lawyers answer successfully such questions as; 'who wrote this text' or 'who was speaking'. In order to illustrate this, the author reports one of the famous forensic linguistics cases, that of Derek Bentley, in which Malcolm Coulthard (1994) focussed on certain linguistic features, for instance the recurrence and marked syntactic positioning of 'then' after the linguistic subject ("I then" as opposed to "then I") in order to argue that these linguistic choices were not compatible with Bentley's idiolect. The polemical concept of 'linguistic fingerprinting' is also explained in Chapter 8. Mooney's conclusion is that forensic linguists can be called to analyse texts in the court process and that linguistic text analysis can produce reliable evidence in certain cases.

Chapter 9, "Once Upon a Time", focuses on narratives in the legal context. It starts with the definition of narrative and continues with William Labov's (1972) model of analysis. This chapter is illustrated with examples taken from narratives produced in criminal trials. The final chapter, "Signs in time and Space". deals with such written signs as icons and symbols and pre-recorded spoken signs. The author illustrates the operation of these signs in daily interaction and explains their functions.

In conclusion, the author has collected a set of interesting real world examples of both written and spoken legal language. The book is intended as an introduction for students of legal studies and linguistics, it also provides an excellent basis not only for them but also for others who have had little experience and would like to learn about the field. Mooney manages to guide the reader on a smoothly flowing journey that begins with "Finding the language" and ends with "Signs in time and space". I strongly

recommend the book for any reader who has an interest in the connection between language and the law.

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PhD Abstract

Stylistics versus Statistics: A corpus linguistic approach to combining techniques in forensic authorship analysis using Enron emails

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Keywords: Authorship attribution, author profiling, idiolect, corpus linguistics, Enron, email.

This thesis investigates how a corpus linguistics approach can address the main theoretical and methodological challenges facing the field of forensic authorship analysis. This is pursued through three main research aims: to empirically test the linguistic theory of idiolect; to combine stylistic and statistical techniques in authorship attribution; and to augment quantitative evidence in sociolinguistic author profiling with corpus-driven descriptive analysis. The data used to achieve these aims is the Enron Email Corpus, a collection of 60,000 emails and 2.5 million words written by 176 employees of the former American energy company Enron. This unique corpus, used here for the first time

in forensic linguistics, offers a number of advantages for the analysis of authorship. It contains large amounts of naturally-occurring language data for 176 individually identifiable authors and allows for the investigation of the kinds of digital texts which are becoming increasingly common in forensic casework.

Linguists approach the problem of questioned authorship from the theoretical position that each person has their own distinctive idiolect (Coulthard, 2004: 431). However, the notion of idiolect has come under scrutiny in forensic linguistics over recent years for being too abstract to be of practical use (Grant, 2010; Turell, 2010), given that there is little empirical evidence to substantiate the theory (Kredens, 2002). This thesis, therefore, uses a corpus-based methodology to provide evidence of individual linguistic uniqueness and idiolectal variation. Building on research in corpus linguistics and psycholinguistics (e.g. Schmitt *et al.*, 2004; Hoey, 2005; Mollin, 2009) and forensic linguistics (Coulthard, 2004), the analysis investigates the personal and idiolectal nature of collocation patterns and lexical co-selections in authors' writing. Specifically, the analysis develops the notions of 'Base-Rate Knowledge' (Turell, 2010; Turell and Gavaldà, 2013) and population-level distinctiveness (Grant, 2010) by identifying author-distinctive collocation patterns when individual authors' linguistic choices are compared against those of the remaining 175 Enron employees, who can serve as relevant population data. Analyses reveal that even in shared communicative contexts, and when using very common lexical items, individual Enron employees produce distinctive collocation patterns.

The current situation in forensic authorship attribution research is one in which two competing methodologies have developed. On the one hand, there are qualitative stylistic approaches, and on the other there are statistical 'stylometric' techniques. This thesis demonstrates how a corpus linguistic methodology can combine these two divergent approaches. Building on the evidence of idiolectal collocation patterns, this method uses word n-grams between one and six words in length to capture this individual variation in a quantifiable way. An attribution experiment is performed in which word n-grams in combination with Jaccard's similarity coefficient are used to attribute anonymised email samples of between 4 emails (55 tokens) and 459 emails (14,000 tokens) to their correct authors. An average accuracy rate of 92.64% was returned when attributing the largest samples (100% for certain authors), but success decreases to as low as 17.08% with the smallest samples. That said, the method does correctly identify the authors of anonymised email samples as small as 77, 84 and 109 tokens in length. A main advantage of this approach, computed using a specially-designed program Jangle (Woolls, 2013), is that the analyst can identify specifically which word n-grams are responsible for the accurate attribution of emails. This allows us to isolate a set of lexical sequences which are powerful in identifying a particular employee's idiolect and using that to accurately assign authorship. The method developed here draws together the strengths of both stylistic and statistical techniques and produces an approach in which: (i) there is a clear theoretical motivation for the linguistic features being drawn on in the comparison of authors, (ii) that the similarities and differences between authors, and any subsequent attribution of disputed texts, are based on reliable and replicable statistical techniques, and (iii) that the statistical results produced can be explained and described in linguistic terms.

Finally, this synergy between quantitative and qualitative evidence is applied to the problem of author profiling, which seeks to determine social characteristics of a text's au-

thor on the basis of linguistic evidence. Current author profiling research is exclusively statistical in nature, and relies on relative frequencies of various linguistic features to discriminate between authors with different social characteristics such as age, gender, ethnicity and native language. Such work has produced very good results. However, given the over-generalisations necessary to 'categorise' different kinds of authors in this way, Coulthard *et al.* (2011: 538) argue that such methods are 'not certain enough to provide evidence to the courts'. The analysis in this thesis seeks to distinguish between male and female Enron employees, and employees with different occupations, on the basis of their email style. Initial analysis follows the trend of previous research (e.g. Argamon *et al.*, 2003) in using the relative frequencies of a wide range of function and content words to identify statistically significant differences in language use across males and females and employees in different occupations in Enron. Only 35/291 of the features utilised identified a difference between genders and 79/291 discriminated between those in different occupations, revealing that the groups of writers are actually more similar to each other than they are different. Furthermore, a closer qualitative analysis of a small selection of these 'discriminatory' features reveals that authors use particular linguistic features in response to different communicative contexts and functions, and to project different aspects of their identity accordingly, rather than because they are male or female, or because they have a particular role in the company. It is argued, therefore, that author profiling work assumes an over-simplified notion of language and identity which, by contrast, is regularly acknowledged in other fields of linguistics (e.g. Johnstone, 1996; Angouri and Marra, 2011). It is also proposed that quantitative results must be augmented by a descriptive analysis of word use in context to more accurately observe the complex relationship between language and authors' social identities.

The methodological and theoretical contributions of this thesis are various, and it is hoped that they serve as a basis for further developing corpus linguistic approaches to forensic authorship analysis.

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