

Language and Law

A resource book for students

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First published 2016

ISBN: 978-1-138-02558-5 (hbk)

ISBN: 978-1-138-02557-8 (pbk)

ISBN: 978-1-315-43625-8 (ebk)

Chapter C9

Language Data as Evidence

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DOI: 10.4324/9781315436258-32

The complaints (www.asa.org.uk):
 Everything a pound: *Poundworld Retail Ltd*, 8 October 2014
 Trading in: *Richard F. Mackay Ltd*, 15 October 2014
 Single travellers: *Solitair Ltd*, 30 July 2014

LANGUAGE DATA AS EVIDENCE

C9

To illustrate how linguistic evidence is analysed and presented in legal contexts, in this unit we explore some kinds of data that a forensic linguist may work with.

Who wrote this?

Consider a situation of a kind we discuss in Unit A9. Suppose, for example, that the police are trying to find out who issued a bomb threat, wrote a suicide note or impersonated someone in a faked letter. A forensic linguist might be able to help in the investigation by narrowing down the search for the writer by deploying linguistic methods of **authorship attribution** (Love 2002).

Despite people's often very careful efforts at linguistic disguise, habits of language use can still expose someone's individual and social identity. Specific features of a speaker's **idiolect**, or distinctive pattern of language use (the legal analysis of which is sometimes called **forensic stylistics**), can provide a lead.

Authorship attribution

The word *authorship* suggests written documents. But it is not essential that the texts to be examined are written. Spoken texts (e.g. a recording of a phone call) as well as written texts (SMS messages, Internet forum posts, ransom notes or wills) may become data for authorship analysis. Spoken texts call for phonetic/phonological analysis; written texts invite analysis of **handwriting** (if there are handwriting data). Either type of data, however, allows analysis of word choice, style and manner, as well as grammatical abnormalities. All of these are linguistic footprints left by the particular language user.

Authorship attribution addresses either of two issues:

- determining whether a specific Person P produced Text T (spoken/written); and
- what characteristics an unknown author of a text is likely to exhibit (this second question arises where the need is to narrow down the field of likely suspects).

If the question is whether a particular, known individual wrote a text, then a **negative identification** would be one that shows, on the basis of clear evidence, that P did not produce T. By contrast, a **positive identification** would show that P did, or probably did, produce T. A positive identification is far harder to achieve. It needs to demonstrate something to a high standard of proof that is nevertheless inevitably based

on linguistic probabilities (with the result that all such authorship identification findings are presented as probability statements).

In circumstances where there is no suspect as regards the identity of the perpetrator of a crime, then instead of asking whether Person P produced Text T, investigators try to establish a general idea of who P might be by asking what sort of person might have produced Text T. This kind of analysis is called **speaker profiling** (and falls within the wider category of criminal profiling). A recording of a speech event might, for example, supply information about, or characterise, a suspect by suggesting his or her geographical origin or social characteristics. The oddly punctuated handwritten bomb threats left by the Mad Bomber (who planted homemade bombs in New York City during the 1940s and 1950s) are an instance of this: the threats offered clues that he might be an immigrant or first-generation American (Ewing and McCann 2006). This probability, along with additional psychological profiling data, helped locate the offender.

Methodologically, the basic principle for determining authorship is comparison. This can be done qualitatively or quantitatively, depending on the sample data set available. Here is an example of authorship detection of an unusual kind in an academic context. A professor of business information systems was puzzled by this line in an assignment written by one of his students (*Times Higher Education*, 7 August 2014):

common mature musicians [and] recent liturgy providers are looking to satisfy . . . Herculean personalised liturgies.

After informal ‘forensic’ work, the professor discovered that the student had plagiarised from the following sentence in a source text:

The current big players and new service providers are looking to supply more powerful personalised services.

Now ask yourself some analytical questions:

★ **Activity**

- In what ways do the two texts resemble each other, and how do they differ?
- What method do you think the student used in trying to cover up his or her plagiarism?
- How do you think the professor was able to find the source of the plagiarised text?

A complication with authorship attribution

Authorship analysis is complicated by the fact that authorship is not a clear-cut, single concept, even setting aside collaborative writing. Imagine a witness giving an account of events in a police station. The police officer summarises what she says, and requires

her to sign the statement at the end of the document. In such circumstances, the witness is a **precursory author** (someone whose ideas inspire a text) and a **declarative author** (someone whose name is put down as the author); but the police officer is the **executive author** (the person who actually did the writing; for different types of authorship, see Love 2002: Chapter 3). These distinctions matter in cases where legal investigation is not primarily of the verbal behaviour of the defendant but whether, and if so how, police officers may have distorted words of an interviewee by fabricating a confession or altering a witness statement. As we discuss in Unit A9, Coulthard (2002) compared murder accomplice Derek Bentley's confession with a corpus of police language and submitted that some features of the confession resembled police sociolect far more than they resembled Bentley's.

Modern modes of communication can make analysis of some language crimes or disputes more challenging. There have been a number of libel lawsuits against search engine giant Google, for example, regarding its **autocomplete function**. An alleged defamatory imputation can be created when a person's name is entered into the search box and the search engine automatically suggests keywords that portray the person in a damaging light (such as 'rapist', 'bankrupt' or 'conman'). In defence, Google has argued that such suggestions are produced by computer algorithms based on searches by previous users, and are not actively published by Google itself. Similarly, smartphones speed up typing by providing predictive text based on complex algorithms; but authorship questions may arise in future in the event of claims as to liability for what is communicated as a result.

- Who do you think is the 'author' of potentially defamatory 'messages' communicated (in a hybrid, human-machine sense of communicated) by search engines and smartphones? Who, if anyone, should bear legal responsibility for such allegedly defamatory suggestions?

Activity 

Did they commit a crime?

Perjury

Perjury is the crime of wilfully making a false statement on a material matter when testifying under oath in court. Consider one aspect of a widely discussed US perjury case, *Bronston v. United States*. At a bankruptcy examination, a lawyer representing the creditor engaged in the following exchange with the defendant, Bronston:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months, in Zurich.

It was later revealed that Bronston had had a large personal bank account in Switzerland for five years.

When Bronston was tried for perjury, a crucial question was whether a literally true but misleading answer falls within the scope of the offence. The trial court convicted Bronston and the Court of Appeals affirmed; but the Supreme Court reversed the decision, reasoning that perjury is about what the witness *states* rather than what he or she *implies*.

★ **Activity**

- ❑ Should the court have focused in this way on the literal meaning of a statement? Consider general arguments for and against.
- ❑ Now use Grice's account of implied meanings to develop your analysis. Did Bronston's answer fulfil the maxims of quality, quantity, relation and manner? What implicatures did his answer generate (construct a brief account of steps involved in how that implicature is produced)?
- ❑ Could a Gricean approach have been helpful to the court in this case, or are the underlying assumptions associated with such an approach in conflict with the adversarial nature of perjury proceedings?

Tiersma (1990) reviews this case extensively, drawing on a Gricean account of indirect communication.

A similar scenario can be found during the Clinton Grand Jury hearings. Consider this short extract from the transcript:

Q: Now, do you know a woman named Monica Lewinsky?

A: I do.

Q: How do you know her?

A: She worked in the White House for a while, first as an intern, and then in, as the, in the legislative affairs office. . . .

Q: . . . At any time were you and Monica Lewinsky together alone in the Oval Office?

A: I don't recall . . . She – it seems to me she brought things to me once or twice on the weekends. In that case, whatever time she would be in there, drop it off, exchange a few words and go, she was there. . . .

★ **Activity**

- ❑ President Clinton later admitted they had been alone on some 10–15 occasions. Had the president therefore made a false statement?

Throughout the hearing, President Clinton stuck to the literal meaning of words and to this extent appears to have misled his antagonists on numerous occasions. Read Tiersma's analysis at: www.languageandlaw.org/PERJURY.HTM.

Threat

Threats, as generally described, are a declaration of one's intention to do injury to a person or his or her property. Consider the following scenarios:

- 1 'Resign or you'll get your brains blown out' (in a young person's letter to a US president).
- 2 'Just a friendly little warning – if you date my girlfriend again, you're dead meat' (from a jealous boyfriend).
- 3 'I'm going to get you, bitch' (from a man to a woman he had assaulted earlier).
- 4 'I don't want to hurt you' (by a rapist to a victim).
- 5 'Are all the windows insured?' (from a litigant, who had just lost his case, to a judge).

- Discuss the difficulty of distinguishing threats such as these from predictions, warnings, and other questions and statements.

Activity 

Now consider two more examples:

- 6 'We will kill Richard Nixon' (by an African American minister during a sermon).
- 7 'Let's hunt Sen. Tim Leslie for sport . . . I think it would be great if he were hunted down and skinned and mounted for our viewing pleasure' (posted online by a 19-year-old university student, in response to California state senator Tim Leslie's campaign to allow more hunting of mountain lions).

- These two examples concern the difference between making a political statement and a threat. What kind of contextual factors should be taken into account? (See also Unit A8 for discussion of the implications of speech act classification as regards free speech protection.)

Activity 

The examples considered here are taken from Solan and Tiersma (2005); read Chapter 10 of their book to find out how judges decided these cases and to see in more detail how such decisions have been analysed from a variety of linguistic perspectives.

What is 'likelihood of confusion'?

In trademark cases, two verbal marks may be compared across different linguistic dimensions when there is a dispute concerning them (typically sound; form including morphology and grammatical behaviour; and meaning).

An Australian example is provided in Gibbons (2003). The issue arose whether two trade names for drugs, *Alkeran* and *Arclan*, were sufficiently similar to cause consumer confusion.

★ **Activity**

- ❑ How similar do these marks appear to you (assuming no additional features of design such as colour, font, etc.)? Describe similarities and differences.

Now consider the following additional information (adapted from Gibbons):

- 1 The most likely Australian pronunciation for these words is ælk əræn and əklæn.
- 2 The initial vowels in a phonemic transcription look distinct, but the æ-ə vowels (as in *had* versus *hard*) are relatively close in Australian English.
- 3 In English, the ə sound (the schwa) is often lost in consonant clusters (e.g. secretary is often pronounced sekɹətri. This applies to the extra ə in *Alkeran*).
- 4 A significant proportion of the Australian population speak English as a second language.
- 5 'l' and 'r' sounds are often substituted one for the other in many languages of the world. This also occurred in the history of English, as with modern *turtle* being derived from Latin *turtur*.

★ **Activity**

- ❑ Now revisit the question above: do the two marks appear to you any more or less similar now?
- ❑ How clearly or effectively do you think the necessary distinctions regarding the sound of the two marks would emerge in court without assistance from a linguist?

What does this text say?

A US postal worker found guilty of destroying mail was sentenced to 60 months of probation and a fine, although the maximum sentence for the offence was six months of imprisonment. Some months later, he tested positive for cocaine. According to US law, the court should 'revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence' (18 U.S.C. § 3565(a)).

★ **Activity**

- ❑ Based on what the law says, calculate how long the new sentence should be.
- ❑ Is there ambiguity in the text – and if so, how would you explicate that ambiguity?

The ambiguity is whether ‘original sentence’ here refers to the actual probation sentence or the potential custodial range. The former interpretation leads to a sentence of 20 months of probation, resulting in a reduction of the penalty. The court decided instead that the former postal worker should serve 20 months in prison, a much longer term than the original maximum sentence. The court in fact sentenced the defendant to a term of *imprisonment* not less than one-third of the original term of *probation*.

- From the perspective of a linguist, construct an argument to explain to the judge why the court’s decision is questionable.

Activity 

Three US linguists and a lawyer (Cunningham *et al.* 1994) wrote a journal article criticising the decision. They argued that an ambiguous term cannot simultaneously carry both of its possible meanings. The Court of Appeals cited their paper as a reference and released the accused (he had already served 11 months in prison by then, longer than one-third of the original maximum sentence).

Identifying problems of linguistic access to law

Child witnesses

Courtrooms, which are designed primarily for adults, may baffle a child participant. Brennan (1994) studied questions put to children in sexual abuse cases in an effort to understand children’s comprehension of lawyers’ questions. He asked children aged 6–15 to repeat questions from counsellors, teachers and lawyers. Counsellors’ questions were almost always reproduced with their sense intact. Teachers’ questions were reproduced with the sense intact about 80 per cent of the time. With lawyers, the main sense was missed 43 per cent of the time in random questions. When the questions were difficult, the main sense was reproduced only 15 per cent of the time. Problems lie in how questions are formulated as well as in what they ask.

Here are some cross-examination questions posed to children who were alleged victims of sexual abuse, as documented by Brennan (the first four examples are taken from Brennan 1995; the fifth example is taken from Brennan 1994).

EXAMPLE 1

Q: Were you the first to go into the shower that, after tea that night or not?

A: Yes.

Q: At any stage whilst you were in the bathroom did he ever enter the bathroom that previous week? (Transcript 11 years)

EXAMPLE 2

Q: December last year, and was that a weekend or week day?

A: I can't remember.

Q: Cannot remember. Were the circumstances much the same then as they were on the last occasion you can remember?

A: Yes, it was the same just about every time. (Transcript 8 years)

EXAMPLE 3

Q: How far was the trampoline from you when you were first helped on the bike by Mr Brown? (Transcript 7 years)

EXAMPLE 4

Q: Well you are not sure whether you said those things to the police which are wrong? (Transcript 11 years)

EXAMPLE 5

Q: You went to, went and got into the car outside your home, I withdraw that, whereabouts in relation to your home did you get into the car on this morning.

A: Well on the, when?

★ Activity

- ❑ Why do you think these questions appear difficult to understand, especially for children?
- ❑ How could the questions be rephrased so they would be understood by children more easily?
- ❑ In what ways do the questions exemplify unequal power relationships between the cross-examiner and the witness?
- ❑ Research (Brennan 1994; Brennan and Brown 1997) has shown that children can be reliable witnesses but that their reliability can be systematically destroyed by inappropriate interviewing techniques. One reason is that children are known to be 'suggestible' (i.e. children's beliefs and memories are susceptible to influence by suggestions made to them) and are generally eager to fit their behaviour to adult expectation, especially when under pressure. A second reason is that children are in a less powerful position than adults and do not have the language skills to negotiate power relations. Consider the implications and significance of these two reasons.

Second-language speakers

Below are some questions posed to second-language speakers, taken from Gibbons (2003). Consider why the second-language speakers answered the questions the way they did. What makes their response inappropriate? Read the examples and work through the questions that follow.

EXAMPLE 1 (POLICE INTERVIEW)

Q: But isn't it the case, that you decided prior to approaching those men, to steal from them?

A: I . . . say yes . . . or what? ['or what' not transcribed by police]

EXAMPLE 2 (POLICE INTERVIEW)

Q: Yes. Can you describe those two men?

A: Um – yeah. Yes.

EXAMPLE 3 (TRIAL)

A: When the child came, I initially examined the patient and I noted the moistness of the tongue, sunken eyes, the skin color, and everything was okay.

Q: Are you suggesting that there were no sunken eyes?

A: *No.*

Q: I think we better slow down a little bit more and make sure the record . . . did you observe sunken eyes?

A: *No.*

- In example 1, the interviewee shows clear signs of incomprehension and seeks help from the interviewer. Was the question posed to him difficult to understand? If so, why?
- Explain the witness's response in example 2 in terms of direct versus indirect speech acts and language proficiency.
- In example 3, language habits from the witness's first language may have affected how he responds to questions in English: in his first 'no' reply, is he answering the speech act or the propositional meaning of the question? What would have happened if the lawyer did not seek clarification?
- Is miscommunication avoidable in these circumstances?

Activity **SAME LAW, DIFFERENT TEXTS****C10**

In this unit, we explore how courts resolve linguistic indeterminacy in bilingual and multilingual jurisdictions. Two legal cases are discussed.

Arriving at a legal meaning

Two major kinds of **linguistic indeterminacy** contribute to legal indeterminacy in statutory interpretation. **Intralingual indeterminacy** refers to uncertainties such as