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# Legal discourse: processes of making evidence in specialised legal corpora

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Questioning has often been the focus of institutional legal discourse research across the domains of police interviews and courtroom interaction both in terms of the institutional participants and the lay respondents (e.g. Drew 1992; Archer 2005; Newbury and Johnson 2006; Tracy and Parks 2012). Though we know much about question design and evidence construction and negotiation from this work, there is more to be learned from cross-domain corpus-based research, particularly in the area of reported speech and quoting in legal discourse. This chapter focuses on pragmatic uses of the verb SAY in police interviewing and cross-examination discourse, using large specialised corpora. Combining insights from previous research on reported speech (Matoesian 2000; Galatolo 2007) in legal discourse and using a cross-corpus approach, we look at how actions of settling on agreed and contested evidential facts are accomplished. We see how patterns of use with SAY are linked to a range of institutional activities: arguing and stance making, doubting and rejecting, time-shifting and framing, which constitute professional activities of shifting and fixing states of knowledge against legal and moral discourses. Construction, acceptance and denial of the verbal “facts” is given “intertextual authority” (Matoesian 2000) by institutional participants: judges and lawyers.

## 1. Introduction

What is said in police stations and in courtrooms by suspects and witnesses involved in civil and criminal offences is socially significant for citizens in that private and local discourse is made public in being repeated as it travels from interview to courtroom and enters the social consciousness via the media. Speech is recorded, either in notes or in official audio-recordings, and this makes it possible for the defendant or a witness’s words to be quoted, requoted and recontextualised across time and space over the course of an investigation and in any subsequent trial or legal proceedings. When the words are used in court they become oral evidence that is heard and judged and selectively passed on to the public by the world’s media. This chapter is concerned with the ways that evidence is made and the ways that that evidence is made social through institutional processes of saying what is being or has been said by witnesses and in quoting their words. No more has this phenomenon been evident than in the recent murder trial of Anders Breivik, in the first half of 2012 in Norway, as Breivik’s words were requoted around the globe by the media representatives who were present in the courtroom, as examples (1), (2) and (3) show.

- (1) Defiant Breivik “would carry out massacre again”  
(<http://www.bbc.co.uk/news/world-europe-17737085> 17 April 2012)
- (2) *Au deuxième jour de son procès, Breivik assure: “Je le ferais de nouveau”.*  
(<http://www.lemonde.fr/> 17 April 2012)  
‘On the second day of his trial, Breivik affirms: “I would do it again”’.
- (3) *Breivik: Jeg ville gjort det igjen.* ([www.dagbladet.no/](http://www.dagbladet.no/) 17 April 2012)  
‘Breivik: I would do it again’.

(1) is a headline, (2) is from the body of a news report, and (3) is a headline accompanying a large photograph of Breivik, from online news in Britain, France and Norway, respectively, for 17<sup>th</sup> April 2012. On this day Breivik made a statement to the court about his actions in Oslo and on the island of Utøya in 2011, which left 77 people dead. Breivik's quoted words became the "soundbite" (Bell 1991: 207) selected by the world's media from all the words that he said in court: "I would do it again". The British report *frames* (Goffman 1974; Bauman 2004: 9) his words with the adjective "defiant", categorising Breivik with a negative criminal identity, while the trial is still in progress and marking, through direct quotation, that this "reportable fact" is selected because it is "particularly incontrovertible" (Bell 1991: 207). In the French report the framing of the quoted words includes an explicit time adverbial: "on the second day of his trial". In each of the reports there is a different way of doing the reporting clause: direct speech but no *verbum dicendi* (1); present tense "affirms" with direct speech (2); and name plus colon to indicate direct speech, but without quotation marks to accompany a photo (3), adding a different "flavour" to the "newsmaker's own words" (Bell 1991: 209). And the BBC's quotation (1) differs from the French and Norwegian media ([2] and [3]) in that it attributes the word "massacre" to Breivik, whereas the other two use the unspecific "it". These examples serve to show that what is said in a legal context is pragmatically important in what it does. Breivik's speech, which in most contexts would be ephemeral and lost to us is preserved for the legal record and, through the principle of open justice and the presence of the media, is made available for society to understand. However, the media reporting of courtroom interaction is highly selective and what the Breivik trial examples show is that selectivity involving quotation is a potent linguistic resource. We are encouraged to view Breivik as both culpable and defiant. Quoting the words of a suspect or a defendant, and indeed important witnesses, has social effects beyond the courtroom or the interview room. The public "hear" the selected soundbites as representative samples of suspects' talk and are made co-present in the courtroom to evaluate criminal responsibility, making jurors of readers. This process is one of the ways in which the legal becomes social.

Since the focus of this chapter is on what is said by suspects in legal settings, we should also briefly note the right to say nothing. In most jurisdictions, and in the Anglo-American and European systems, there is a right of silence. This means a suspect does not have to say anything to the police and does not have to answer questions that might incriminate him or her in court. The English and Welsh right to silence is called "the caution" and it says: "You do not have to say anything. However, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence" (Gov.uk 2012). The wording of this right makes anything that is subsequently said contextually and intertextually dependent on it.

### 1.1 Police interviews and trials as complex genres

Being interviewed by the police in relation to a crime or being a witness in a trial are not everyday occurrences and only a small number of citizens have experienced these "complex" (Heffer 2005: 71) and "hybrid" genres (Hasan 2000: 29). They are complex as they contain genres within genres and hybrid because they are able to blend narrative and argument within questioning. Police interviews with suspects are generally characterized by four phases:

- Opening, including telling the suspect the nature of the offence that they are being interviewed about and cautioning the suspect about the right to silence;

- Recount: inviting the suspect to give an account of the event under investigation in their own words;
- Questioning;
- Closing formulae.

Heydon's (2004, 2005) explanation of the structure of police interviews is tripartite (opening, information gathering, closing). Rock (2007) describes what happens immediately prior to interview, when suspects are brought to the police station on arrest and what they say when cautioned; and Carter (2011) examines interactional details, such as laughter, and how this is deployed in interviews. The English and Welsh criminal jury trial contains many sub-genres or stages, which are sequentially ordered (the Anglo-American adversarial system is very similar, though there are some notable differences as explained by Cotterill 2003):

- jury selection and swearing in
- indictment (reading out the charge[s])
- opening speeches by the barristers (prosecution and defence monologues)
- case for the prosecution: witness appearances (prosecution witnesses are questioned and then cross-examined by the defence)
- case for the defence: witness appearances (defence witnesses are questioned and then cross-examined by the prosecution e.g. Shipman's cross-examination)
- closing speeches by the barristers (prosecution and defence monologues)
- summing-up by the judge and instructions to the jury (monologue e.g. extract 4)
- jury deliberation (privately)
- verdict (by the jury)
- judgment (written by the judge)
- sentencing (by the judge)

Each of these stages may be further classified in terms of parts. For example, for the witness appearance, Gibbons (2003: 134) describes a four or five-part structure (the bracketed stage is optional) that applies for each witness:

- opening: calling in by court officer and swearing in with the oath;
- examination-in-chief by friendly counsel;
- cross-examination by opposing counsel;
- (re-examination by friendly counsel);
- dismissal by the judge.

Legal discourse, then, is defined by special rules of use that derive from the law, such as the police caution (or right to silence) and from specialised legal institutional conventions (asymmetries of power and access to knowledge) and genres, which work according to stages or phases and have their own interactional rules and goals.

## **2. Approaches to legal discourse**

### **2.1 Forensic linguistics**

Forensic linguistics is a relatively new field of applied discourse analysis, which covers a wide range of research on language in legal settings, but there is already a wide and cross-disciplinary range of scholarly work available for the new researcher to discover across all

the domains of legal talk. Focusing on work produced since the start of the millennium, the following areas have received attention: Miranda rights and cautioning suspects (e.g. Rock 2007; Ainsworth 2008), police interviews (e.g. Ainsworth 1993; Haworth 2006; Komter 2006; Johnson 2008; Jones 2008; Leo 2008) and coerced and false confessions (Drizin and Leo 2004; Berk-Seligson 2009), lawyer consultations (Scheffer 2006), asylum interviewing (Maryns 2004), mediation (Stewart and Maxwell 2010), civil, criminal and historical trials (e.g. Ehrlich 2001; Matoesian 2001; Cotterill 2003; Archer 2005; Heffer 2005; Shuy 2006, 2008) and appeals (Tracy 2011)<sup>1</sup>.

It is clear that the many participants in the legal system also feature importantly. For example a number of researchers have examined the language of judges, such as Tracy and Parks' (2012: 21) analysis of "tough questioning" which examines the ways in which judges in appeal cases subject the parties in the case to questioning. They find that "tougher questioning of one party [...] may cue [...] which position a judge finds more compelling", and Kurzon's (2001) subject is the "politeness" of judges, finding that there are differences between British and American judges in his data. Gray (2010: 599), a judge himself, writes of attempts to improve the giving of expert evidence in Australian courts by dealing with experts in a manner known as the "hot tub", whereby experts are called "at the conclusion of all of the other evidence" and then they are "required to debate directly between themselves the matters on which they are not agreed, so that the judge and the lawyers can observe the debate". This method has been found to have a number of benefits, including "reducing the level of partisanship" and saving time (Gray 2010: 600–601, quoting Justice Heerey 2004).

Apart from research that looks at "language in the legal process" (Coulthard and Johnson 2007: 8), the other main concern of forensic linguists is with "language as evidence" (Coulthard and Johnson 2007: 119–215), where linguistic expertise is called upon by the courts, or by the police or solicitors, in a variety of criminal and civil cases (see for example Shuy 2006, 2008), including: trademarks, threats and blackmail, plagiarism and authorship, document complexity, voice identification, clarity of warning labels.

## 2.2 Pragmatics of questioning in legal interaction

An important theme, apparent in the Tracy and Parks research and Gray (above), and recurring across a wide range of the previously mentioned research, is the role of questioning in legal interaction, since for many of the domains question and answer mode is central. Archer (2005: 16) notes that "powerful participants control and constrain the contributions of non-powerful participants in today's courtrooms through their use of questions" and demonstrates how these practices developed in the historical setting (1640–1760). Like Gibbons (2003: 95), Archer (2005: 197) finds two main kinds of questions: information-seeking and confirmation-seeking. And Jones (2008), following Johnson (2002) and Newbury and Johnson (2006), distinguishes between *so*-prefaced information- and confirmation-seeking questions, in her study which focuses on police interviews with white British and Afro-Caribbean suspects. Eades (2010: 181–2) notes the importance of Jones's findings: police asked the white suspects more information-seeking *so*-prefaced questions, while with the Afro-Caribbean suspects they asked more confirmation-seeking *so*-prefaced questions, providing "less scope for the suspect to present their own version" of events. Heydon (2005: 117–146) too deals with this idea of *versions of events*, showing the ways in which "topic management resources" enable police interviewers "to formulate a suspect's narrative as a police version which excludes contextual information provided by the suspect" (Heydon 2005: 145–6), thereby emphasising culpability and guilt. Harris (2001: 71) points to the power of questions in the courtroom in a similar way, particularly the way questioning "fragments" the narrative and privileges the institutional framing of questions. Coulthard and Johnson (2007: 102) show that much of a narrative can be contained in lawyer questions

rather than in witness answers, through confirmation-seeking questions that require only *yes* or *no* responses. Heffer (2005: 114) provides quantitative results which suggest that “counsel in CHIEF appear to use over three times as many narrative elicitations and over twice as many requests for specification” whereas “counsel in CROSS appear to prefer CONFIRM requests through declaratives and tag questions”, showing that examination-in-chief is more open and cross-examination more restrictive in terms of witness response. When it comes to children in the courtroom, questioning practices become even more salient. Brennan (1994) and Aldridge and Wood (1998) are among a number of researchers who point to the unfair use of complex questioning with child witnesses, both in police interviews and in the courtroom, and Holt and Johnson (2010: 21) discuss the syntactic and pragmatic complexities of a cross-examination question directed to a 15-year-old child. The question in (4) contains multiple embedding (indicated by the bracketing), negative polarity (*incorrect to suggest*), dummy *it*, the subjunctive, and a non-finite verb (*to suggest*), rather than the more direct subject pronoun plus finite verb form *I suggest*.

(4) Courtroom cross-examination question (quoted from Brennan 1994: 216) (my mark-up).

Would it be incorrect [to suggest[ that it was not so much a tripping] [but [because of the state of inebriation of yourself], that you fell over]]?

Holt and Johnson (2010: 22) note that “the complexity and power of cross-examination questions is not in their syntax alone. It is their pragmatic force that makes them powerful. [...] these linguistically tactical questions draw their effect from the fact that the talk is designed to ‘make a witness acquiescent’ and make material significant for the hearer (a jury) in terms of ‘displaying evidence’”. Cotterill (2010: 353) draws our attention to the asymmetrical “interpersonal dynamics of courtroom interaction” through a series of examples which show witnesses challenging the relevance of the question posed by the lawyer. She shows that witnesses who resist aggressive cross-examination questions do so at some cost, categorising the speech act as “rebellion”, since the special conversational maxims (Grice 1975) that apply in court require witnesses to answer questions, not ask them, to answer them truthfully, but without speculating, and to be responsive: they cannot say nothing, unless it is self-incriminatory. In her examples witnesses are frequently rebuked by judges for flouting the maxims, telling them *you have to answer questions that are asked of you* (Cotterill 2010: 366) or *I’m afraid you can’t ask questions like that* (Cotterill 2010: 368). Given this brief survey of questioning, it is clear to see why it has received such widespread attention in the analysis of legal discourse to date. Questions do a lot of important interactional work at the heart of which is institutional dominance and control. None of this work focuses on the act of quoting, and that is what this chapter contributes to the foregoing work.

### 2.3 Saying what is said in legal questioning: an interactional sociolinguistic approach

In this chapter I focus on a particular aspect of legal questioning that has received little attention to date: saying what is said through reporting and quoting a witness’s words as a pragmatic resource within two domains: police interviews and trials.<sup>2</sup> Drawing on what is available in other parts of this handbook, the chapter uses a combination of interactional discourse analysis, conversation analysis and corpus-driven discourse analysis approaches (Part 1, chapters 3, 4 and 8). The analysis here draws on an interactional sociolinguistic approach, in that it sees talk as social action in which there are inter-speaker constraints that produce variation (Finegan and Biber 1994: 316). Police officers and lawyers have

institutionally-derived conversational dominance, which includes macro-level social dominance in terms of role (professional questioner versus lay respondent; differences in the distribution of knowledge) and local and micro-dominance, such as control of topic, or power derived from formal and informal naming of the interviewee in the course of questioning, as in (5) from the trial *David Irving v Penguin Books Ltd and Deborah Lipstadt* (2000), which we examine in section 3. The cross-examining barrister produces two questions (turns 40 and 42). In the second (42) the direct naming produces a threat to “positive face” (Brown and Levinson 1987) in the way that it explicitly points the finger at Irving in a question that exposes his lying (turn 40) and then asks him to explain why he told lies on oath.

- (5) Cross-examination of David Irving by Richard Rampton QC on Day 3 *Irving v. Penguin Books Ltd and Deborah Lipstadt* (2000).  
 40 Q. The answer you gave yesterday was wrong, was it not?  
 41 A. That is correct.  
 42 Q. Why was it wrong, Mr Irving?

From a sociolinguistic perspective, we know that language varies according to two dimensions: the user and the uses to which the language is put (Holmes 2008: 9). This means that who is speaking and what they are doing with that language and why is important, and in the legal context this is particularly salient, along with the where and when components. For example, imagine that you are a person accused of murder and you are in the witness box in a courtroom during your trial. In an adversarial system, such as the Anglo-American system, you will first be questioned by your own side – that is by your defence lawyer. Then you will be cross-examined by the opposition – the prosecution barrister. Who is speaking to you varies and the talk they use varies too. Friendly questions differ greatly from unfriendly questions in cross-examination. That is what is meant by an adversarial system. Apart from variation according to user and use, individual variation encoded in the linguistic choices of style that each user makes – “stylistic variation” (Rickford and Eckert 2001: 2) – needs to be accounted for, alongside the institutional conventions of a particular role. We will see how rhetorical choices in lawyer style affect stance and power in cross-examination.

In all of this, “the context of situation” (Halliday and Hasan 1985: 10) – the who, when and where dimensions of language – is crucial to our understanding of the interactional space of legal discourse. Who is speaking, when they are speaking, and where they are, are by no means simple and straightforward, because of the special features of the institutional context. For example, in relation to who is speaking, Heydon (2004: 29), employing Goffman’s “participation framework” of *principal*, *author*, *animator* and *figure* (Goffman 1981: 226), shows us that in police interview openings and closings the participation framework employed is “one in which the police officer is assigned the role of *animator* but the roles of *principal* and *author* are assigned to the police institution”, because the words are determined by the rules governing what must be said. There is an institutional “script” that must be delivered in order for the officers to fulfil their “institutionally defined goals” (Heydon 2004: 29). The when and where dimensions are also complex, as the temporal and spatial situation of a police interview is multidimensional. Coulthard and Johnson (2007: 63) use an example from a police interview, where an interviewee (IE) is giving his account of an assault (6).

- (6) Police interview with suspect (author's data).  
 IE. I knew [victim's name] was stoned as well as pissed. I knew that she'd drunk quite a fair amount and I knew that she was stoned.  
 IR. You're saying to me that you knew that she was drunk and high on drugs. Is that what you're-  
 IE. -yes.  
 IR. I'm sorry you- everybody must understand exactly what you're saying er ok then.

Coulthard and Johnson (2007) explain that three simultaneous realities exist. First there is the distinction between what Gibbons (2003: 147) calls the "primary reality" of the interview room (*IR: You're saying to me*) and the "secondary reality" of the event in the past that is being talked about (*IE: I knew [victim's name] was stoned*). The third reality is the future reality of the courtroom, where the interview may be heard by the judge and jury, which is invoked when the interviewer (IR) says *everybody must understand exactly what you're saying*. *Everybody* is ambiguous for the interviewee, because he may believe that it relates to the people in the interview room: the two police officers, the suspect and his solicitor, but as Coulthard and Johnson (2007: 63) explain "the interviewer's invocation of a wider audience for the talk, though the use of *everybody*, cues the future and overhearing audience: a judge and jury in a courtroom". The presence of the tape recorder in the room is the only signal to the interviewee of this future audience, apart from the oral caution that he has received.

The multi-temporal nature of courtroom talk is most starkly seen in (7) from the judge's summing up in the Harold Shipman murder trial (2000). Shipman was convicted of the murders of 15 of his patients by injecting them with lethal doses of morphine.

- (7) Harold Shipman trial (2000). Judge's summing-up monologue to the jury, Day 52.  
 In cross-examination Dr. Shipman was reminded of Detective Constable Beard's evidence as to what Dr. Shipman had said on the 14th August 1998 when interviewed by Detective Constable Beard and the Home Office drugs inspector, Mr. Calder. Dr. Shipman told you that so far as he was concerned he had told them the truth.

(7) shows us two temporal events within a third: cross examination, interview and summing-up. Shipman's words in interview, which he was reminded of in cross-examination, are indirectly quoted in the summing-up: *Dr Shipman told you that [...] he had told them the truth*. In the Harold Shipman trial the summing-up took 10 days (Days 43–52) in the 52 day trial. This speech event is addressed by the judge to the jury after they have heard all the evidence and the lawyers' closing speeches and comes immediately before they deliberate on the evidence. Time and place is complex in this example, as is the syntax.

The idea that context is something preformed, static, and unchanging is insufficient, however, for a full theory of the context of talk, and conversational analysts and anthropologists, in particular, have added to our understanding of the importance of context through their analysis of naturally occurring spoken texts. Hanks (1992: 53) talks about context as "dynamic", changing from moment to moment and actively constructed by participants in talk, and Goodwin and Duranti (1992: 31) have a view of context that means that talk is shaped by and also shapes the context in which it is situated. They say, "Instead of viewing context as a set of variables that statically surround strips of talk, context and talk are now argued to stand in a mutually reflexive relationship to each other, with talk, and the interpretive work it generates, shaping context as much as context shapes talk". This means



that the way that participants position each other through their interactional choices and the way that particular sequences of turns at talk change the context from conversational to formal, for example, affect the meanings that are made. To understand legal discourse, then, we need a theory of context that takes account of the macro-social categories of who, what, where, and when, but also of the micro-social elements of talk, constructed through, for example, the choice of constructing a turn with a quotation from a speaker's prior turn, as we will see in the courtroom data in section 3.

## 2.4 Legal data: opportunities, limitations and corpus-based discourse analysis

In the legal domain it is often impossible to get access to audio- or video-recordings. The contemporary courtroom discourse that I refer to and use in examples is from publicly available official transcripts of English trials and there is no audio-recording available. This means that the transcripts have not been made by linguists and therefore do not contain pauses, intonational information or hesitations. However, the police interview data referred to is taken from my own transcriptions of audio- and video-recordings and so a richer transcription can be made, allowing a fuller analysis of linguistic phenomena.

The analysis here is also corpus-driven, since all of the data is electronically held, allowing us to perform corpus-based analyses and understand legal discourse in terms of empirically-based observations. This means, for example, that we can use concordances, such as in Figure 1, to look at all the examples of a particular linguistic form. We can identify patterns of collocation and "collocational frameworks" (Renouf and Sinclair 1991: 128), such as *what X X saying*, which produces: *what you are saying*, *what I am saying*, *what he is saying* and *what it is saying* (figure 1).

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1           I do not know what you are saying about Minsk, but it may not matterD4
2 had been going on in 1942, is that what you are saying? D6
3 Not at slave camps either? Is that what you are saying? D7
4           Do you understand what I am saying? D6
5           What are you saying if you are not saying that? D7
6           but Wolff was in a position, what I am saying is Wolff was close to Hitler D5
7           That is what he is saying, is it not? D6
8 to liquidate ourselves". That is what it is saying, is it not? D6
9           Yes. What it is saying is, we make space for Jews coming D5
10          and what he is saying is this: "Look, leave Galen for the D4
11          I take it what you are saying means that Hitler having addressedD3
12 And that is completely contrary to what you are saying to these Australians, is it not? D4

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*Figure 1.* Concordance of *saying* (12 of 95 lines) in barrister Richard Rampton's cross-examination questions to David Irving. Sorted two to the left, to show the pattern: *what X X saying* (Trial days are shown at the end of the concordance line e.g. D7 for Day 7).

A corpus-driven approach assumes that patterns are observable in large datasets and will emerge from the data (Sinclair 2004: 10) and that these patterns of meaning are not accessible through intuition or from pre-assigned grammatical and structural categories. Small corpora (of 250,000 words) are particularly suited to looking at all the examples of a particular word, whereas this is impossible in large corpora (Lüdelling 2008: 165). When the corpus is restricted to a specific legal domain, it is possible to look at how a verb such as SAY is used, with the assistance of computer programs such as *Wordsmith Tools* (Scott 2010). In addition to concordances, *Wordsmith* can identify frequent clusters in the data. In the *David Irving v. Penguin Books Ltd and Deborah Lipstadt* (2000) trial clusters of SAY with *you* were found: *you say Mr Irving*, *do you say that*, *what you are saying*, *why do you say*, *you say this I*, *you*

*say that you, you are saying what, then you say this, so you say.* We shall examine the frequency, distribution and functions of some of these in legal discourse.

While the corpus-driven approach allows us to find frequent patterns of meaning, a complementary method is to use a discourse analysis or conversational analysis approach, which allows us to look at interactional sequences of talk. It is not sufficient to know, for example, that SAY occurs in clusters with *you*. It is important, too, to examine this use in interaction. This enables us to find that SAY is used cohesively with other verbs of speech reporting (e.g. *told* in example 7 above) and with the “cognitive verbs” (Fetzer 2008: 384) *think* and *know*. In our examination of data extracts, the sections that follow aim to provide a fuller understanding of how saying and quoting in legal discourse is done and how legal institutional meanings are made in the processes of making evidence.

### 3. Making evidence through quoting in police interviews and in trials

Police interviews and trials with suspects, defendants and with other witnesses are characterised by two major categories of participant: the professional institutional participant and the lay speaker, and by inequalities in the distribution of power and control. Lay witnesses are questioned by the police in relation to the alleged offence and what they say in answer then and in court becomes material for repetition, quotation and comment.

#### 3.1 Saying what is said in police interviews: seeking acceptance and doubting

The most frequent verb (after BE, DO and HAVE) in a set of 10 police interviews (in total approximately 90,000 words) is the verb SAY with the forms *said*, *say* and *saying* being the most frequent. Of these three forms *say* is most key<sup>3</sup> (when comparing its frequency against the British National Corpus BNC), followed by *saying*, making the present tense and the present progressive forms interactionally more salient. This preference for what is being said in real time characterises police interview interaction and justifies a close look at the functions of SAY in this discourse type. If we look at all the examples of *say*, *saying*, *to say* and *says* (excluding past tense *said*), we can see something else about this process when we look at the most frequent collocates, as Table 1 shows.

*Table 1.* Most frequent left and right hand collocates of SAY (excluding *said*) in police interviews

Left hand collocates (L1 and L2)		Node word, SAY 427	Immediate right hand collocate (R1)
L2	L1	say 267 saying 100 (to) say 42 says 11	R1
did 108	you 128		that 60
what 33	he 58		anything 52
you 21	to 44		to 46
when 16	you're 21		he 28
so 12	she 19		you 26
she 10	didn't 12		[Next turn marker] 15
was 10	were 9		then 11
and 10	I'm 7		no 11

The most frequent immediate left hand word class is the pronoun, with *you*, *he* *she*, *I* occurring in descending order of frequency. We can also see pronouns in the L2 collocates

(that is two to the left of SAY). This pattern shows us that the stative function of SAY is being invoked in real time, as we can see in line one of the concordance in figure 2, where we can also see other patterns with pronouns. The collocates also show us two boundary features. Frequent right hand collocates are the next turn marker and the *no* response, shown also in an example (line 9, figure 2). This reflects the use of SAY in questions which check the state of knowledge so far and attempt to get agreement on that state (line 9). The frequency of *no* as a right hand collocate shows us that interviewees recognise and resist this institutional action.

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1           You say you made a grab for the knife
2   Is that what you're saying?
3           Did he say anything?
4   Is that what you're saying she said?
5           When you say a drink you mean a cup of tea
6           So you say it started about 9 o'clock
7           And you say you don't like him.
8   So is it possible, then, that she was saying to you 'no'?
9   [IR] Is that what we're saying? [IE] No

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Figure 2. Edited concordance of SAY showing L1 and L2 pronoun collocates

In this selection of examples there are four instances of the *you say* collocation, but this does not mean that the same meaning is produced. In line 1 the *you say* formula introduces a repetition of something the suspect has just said, but, as we shall see in courtroom discourse, it produces a meaning that doubts the suspect's position (lines 4 and 8 also produce a pragmatic effect of doubting). In this case the suspect has been arrested for stabbing his girlfriend multiple times and is giving an account of how he got his own injuries (a cut hand) and implies a contrast with what she says or with what the police believe. The *when you say* example (line 5) clarifies the meaning of something that has been said and the *so-* and *and-*prefaced questions (lines 6 and 7) function, as discussed in Johnson (2002), to summarise and resume the narrative with the police officer telling the story in the witness's words and formulating it as a question with assumed confirmation. The examples with *saying* (lines 2, 4 and 8) come in turns where the police officer repeats or summarises the gist (Garfinkel and Sacks 1970; Drew 2003) of what the witness has said and then asks for confirmation of that institutional version in the *is that what you're saying* question, which we have already seen in Figure 1 from the Irving trial cross-examination questions. The penultimate example (line 8) introduces an alternative hypothesis about what a rape complainant was saying. As Heritage and Watson (1979: 2–3) and others point out, these institutional *formulations* often involve “transformation of the syntactic and semantic framework” and these are therefore powerful tools in making the evidence institutional and converting it in status from lay to professional discourse. Power is manifested in the control that allows the institution to preserve some aspects of the original and transform others, making it difficult for the interviewee to dispute the utterance. In relation to line 8, we see, as Tannen tells us, that reported speech does not always involve quotation of something that has been used in prior speech. This is not something the suspect has said; it is “constructed dialogue” (Tannen 2007: 112). We also see the way the *you say* pattern is linked to a second verb in the *you say he/you + Verb* pattern (exemplified in lines 1 and 7). The final example (line 9) is particularly interesting as it uses the inclusive pronoun *we* to further increase the coercion to agree.

What all these examples have in common is a specialised set of legal, rather than lay, meanings produced with SAY. The stative function is formal and made in the high-stakes context of stating on oath, as evidence and for the record, silently invoking the caution (*say anything...given in evidence*). Crucially for the lay participant, this set of meanings is less

### 3.2 Saying what is said in the contemporary courtroom: *David Irving v. Penguin Books Ltd and Deborah Lipstadt* libel trial. Appropriating the voice of the other.

Rampton's questions:	156,921
Irving's answers:	128,879

### 3.2.1 *You say* + quotation

1                   And you say this in the last paragraph: "Now you probably D4  
2   Right at the end, you say this: "My position remains unchanged, that D4  
3       about which you say this. I am reading from the top of the page: "At D7  
4                   You say this: "But just imagine the omelette on their faces" D7  
5                   Then you say this: "I am prepared to accept that local Nazis D6

Figure 3. *you say* + quotation, marked with deictic *this*

As Hanks (2005: 193) tells us, *this* is one of the linguistic expressions that is part of the “deictic field” along with “the positions of communicative agents” such as speaker and addressee and “the positions occupied by objects of reference”. In this case the speaker category is multivoiced, since Rampton is voicing Irving’s words. Irving is also doubly an object in the deictic field, indexed as a person in the *you* deictic and indexed through the use of his diary as a material object in the field. This strategy enables Rampton to ventriloquize (Tannen 2007: 21) and animate the voice of the other: the claimant, on behalf of his clients: the defendants. In this way Rampton uses Irving as his own attacker as he is “thrust into a position” (Hanks 2005: 193) as an object of reference.

### 3.2.2 *You say* + direct quotation + probing question

The *you say* + quotation pattern is only the start of a communicative act and what immediately follows is usually a probing question, extending the pattern to *you say* + direct quotation + probing question. We see this in a discourse sequence from cross-examination (8). The pattern is found in the first lines (in bold in turn 153).

- (8) *You say* + direct quotation + probing question in cross-examination, Day 15.
- 153 Q. I think it should. Then you close the quote from Lord Hailsham and **you say: “Traitor No. 1 to the British cause”. What do you mean by that?**
- 154 A. Lord Hailsham, these were records that were in 1988 just released from the Public Record Office, Cabinet records, and they reveal Lord Hailsham, who later became a Lord Chancellor, I believe, having said at a Cabinet meeting in 1958 in a totally negligent manner that he did not think that immigration into Britain was going to be a problem and that so far only 100,000 had arrived, and he thought it would not go to more than that.
- 155 Q. And why does that make him a traitor, No. 1 traitor?
- 156 A. Because it is the duty of the custodians of government in this country to look ahead and to try to ward off any kind of misfortunes and tragedies that may otherwise befall the country which is put into their guardianship.
- 157 Q. So what you are really saying is they have an overriding obligation to safeguard the racial purity of the mixed bag of mongrels of Anglo Saxons, French, Celts, Irish and goodness knows what all that you call “English”, is that right?
- 158 A. I am not sure that the British or English would be very flattered by the “mongrels” that you have called them. If I were to use language like that, I could be rightly and justifiably accused of vilification, of defamation and possibly even of racism.

In extract (8) we see that the probing question is used to provoke Irving, giving him his own racial attitudes in the quotation, in order to try to elicit racist speech as evidence in the courtroom. Irving tries to resist (154), rather than answering the question about what he meant by the words “traitor [...] to the British cause”. Rampton persists (155) by repeating his question. When Irving still replies in what Rampton considers a guarded manner, he provides an even more direct provocational statement, which he attributes to Irving with the *so what you are really saying* frame. He “re-keys” or recasts the conversation, changing the “tenor”

(Tannen 2007: 23) from Irving's guarded prejudice to blatant racism, a tenor which is recognised and named by Irving metalinguistically: *If I were to use language like that, I could be rightly and justifiably accused of vilification, of defamation and possibly even of racism* (turn 158). Johnson and Clifford (2011: 66) discuss this example too, describing Rampton's approach as "doing incredulity with a straight face". In this extract and many others like it, Rampton does his job through the use of the probing questions, after confronting Irving with his own quoted words, and, whether Irving is provoked to produce racist speech or not, the chosen quotation in the initial question does its job of bringing into evidence and into the public arena Irving's racist attitudes.

### 3.2.3 *You said... You say...*

We noted that *said* was a frequent word in the police interviews and it is also frequent in the trial data, though we have so far concentrated on the importance of the present and present progressive forms of SAY, those that situate the quoted speech in the immediate and primary reality of the courtroom. In (9) we see one of the patterns of use with *said* in the cross-examination data: its co-occurrence with *say* in the *you said... you say...* pattern (the two turns are marked with bold). This pattern contrasts the past with the present, bringing two realities into play simultaneously, in order to present Irving as an unreliable witness: a liar, and therefore to strengthen the defence case.

- (9) Rampton's question turns only, Day 3.
- 26 Q. Could you turn, please, to the page numbered 289? It is the top left-hand block on one of the pages.
- 28 Q. I was asking you if you remember why it was that you had translated "Judentransport", a singular word, as Jews in general?
- 30 **Q. You had said, you can see it there, can you not, that it was a silly misreading of the word. You said at line 19: "I admit I made a mistake in the transcription"?**
- 32 Q. This was your sworn evidence on oath yesterday?
- 34 Q. Now would you please turn to the first page of your new bundle?
- 36 Q. The translation you have made for us kindly ----
- 38 Q. --- 23rd January 1974, where you have transcribed it correctly?
- 40 Q. The answer you gave yesterday was wrong, was it not?
- 42 Q. Why was it wrong, Mr Irving?
- [...]
- 54 Q. You realized then ----
- 56 Q. --- that this is one of the points that I was going to make against you, did you not?
- 58 Q. It has been repeatedly made, has it not? Yet, when you come into the witness box to answer questions on oath, you simply pluck an explanation out of the air, do you not?
- 60 Q. What is the truth, Mr Irving? You did not misread it, that is clear.
- 62 Q. No. So yesterday's answer was a false answer.
- 64 **Q. You now say, "Well, I may have mistranslated it, but my translation was, on the face of it, legitimate"?**

In order to make the contrast between the past and the present, Rampton uses two pairs of lexically cohesive words: *said/say* and *there/now* (in turns 30/64 and 30/34 respectively). The "referential indexicals" (Silverstein 1976) *there* and *now* point to two objects in the deictic

field. With the first (*there* turn 30) Rampton is pointing Irving to a transcript of his own words from a previous day of the trial. The second is another material object “the first page of your new bundle”, which is pointed to with the indexical *now* (turn 34). The repetition of SAY in the past and the present through the *said/say* pair, further marked first with the distant spatial *there* and then with the immediate temporal *now*, does the pragmatic work of casting doubt on the veracity of Irving’s testimony, presenting as it does two different versions, only one of which can be true. This allows Rampton to metapragmatically label the testimony as *wrong* (turns 40, 42), *false* (turn 62), and to direct an accusation at him, formed as a tag question: *when you come into the witness box to answer questions on oath, you simply pluck an explanation out of the air, do you not?* (turn 58). The contextual “shifters” (Silverstein 1976) *there* and *now*, which work with the temporal shift between past and present SAY, set up a new context for accusing the witness of lying on oath, a tactic of defence advocacy that benefits the defendants. Marking the opposing realities for the witness, simultaneously marks them for the court, making the unreliable witness maximally visible and available for uptake by reporters.

### 3.2.4 *So you say*

Unreliability is also marked with the fixed expression, *so you say*, used by Rampton in cross-examination, and found 14/372 times in a concordance of *say*. Three of these occurrences are accounted for by one interactional sequence (10), where we see that the pragmatic force of this is: *I am doubting you*. This is another resource of defence advocacy to suggest an untruthful witness in cross-examination. The *so you say* response (though marked in the Q and A format as a question) is in bold (turn 322). This sparks a long discussion about its meaning. (The repetitions of the phrase and the discussion of meaning is also shown in bold).

(10) *So you say*, cross-examination, Day 14.

- 320 Q. When I asked you about this document before, it was ages ago, you denied ever having seen it.
- 321 A. Now I am seeing it for the first time, yes.
- 322 Q. **So you say.**
- 323 A. I beg your pardon. I am on oath and, if I say I am seeing this for the first time, then I am seeing it for the first time.
- 324 Q. Mr Irving, you have said many things on oath which I simply do not accept, so we can get past that childish stage of this interrogation.
- 325 A. **I think this is probably the time to have it out. Where you think I am lying on oath, then you should say so.**
- 326 MR JUSTICE GRAY: **He is saying so.**
- 327 MR RAMPTON: **I am doubting it, Mr Irving.**
- 328 A. [Mr Irving] **My Lord, he is not saying when. He is just alleging in broad terms.**
- 329 MR JUSTICE GRAY: **Mr Irving, that is not right. Let me make it clear to you. [...] I think it is fair to say that every time Mr Rampton is challenging the truth or credibility of what you are saying, he has made that clear in his questions. [...]** If you think that he is not making his case clear at any point, then you are entitled to say, what are you asking me, Mr Rampton? What are you putting to me? But on this particular document, I would like to know whether you do or do not challenge its authenticity.

- 336 A. [Mr Irving] I think for the purpose of today I will accept that it is genuine, but it has these blemishes to which I may refer later on. **But to suggest that I have seen this document before is inaccurate and untrue.**
- 337 MR RAMPTON: **I have not said that yet, Mr Irving.**
- 338 A. **You said “so you say” and the record shows that.**
- 339 Q. **I do say “so you say” because I doubt your answer, and I will tell you precisely now why I doubt it, as I always do, because I am not allowed to make that suggestion unless I have a basis for doing so.** It has been in Gerald Fleming's book “Hitler und die endlosung” ever since 1982.
- 340 A. I have not read that book.
- 341 Q. You have not read that book?
- 342 A. It has been sent to me twice by Gerald Fleming, once in English and once in German, and I have not read that book.

The conversation between the judge and Irving (turns 328–336) makes clear to Irving that the phrase means that his words are doubted and underlines the power of the Court, which Philips (1998: 87) describes as “the ideological framework of courtroom control” emanating from the judge. Rampton returns to the examination (turn 336) and the metatalk between Irving and Rampton (turns 336–339) completes the work of doubting, started by the *so you say* (turn 322) by, as Rampton says, giving *a basis for doing so* (turn 339). This particular meaning of SAY is surprisingly absent from the *Oxford English Dictionary's* long entry on SAY as a verb, though *says you* and *sez you* are there with the meaning “used in the present tense to convey doubt about, or contempt for, the remark of a previous speaker” (*OED* online). In the legal context it is used for particular effect in cross-examination and this analysis illustrates the range of previously undocumented meanings that SAY can have and the specialised uses to which it can be put.

### 3.2.5 What X said was... Constructing authority

In 3.2.3 we looked at the past tense form in combination with the present. Although, as in the police interviews, the preference is for the present tense, present progressive and non-finite forms (*say, says, saying, to say*), the past tense form, *said*, does important work, particularly in combination with other forms of SAY, as we see in example 11 below. In Rampton's cross-examination questions to Irving, some of the most frequent left hand collocates of *said* are: *you, I, he*, and *Hitler* (Table 2)

Table 2. Pronoun collocates to the left of *said* in cross-examination

L1 collocates of <i>said</i>	Occurrences and %	Referring to	Example
<i>you</i>	78/313 25%	Irving	<b><i>You said:</i></b> “ <i>I find the whole Holocaust story utterly boring</i> ” D14
<i>I</i>	36/313 11%	Self*	<b><i>I said</i></b> <i>it is a letter from Greiser to Himmler.</i> D5
<i>He</i>	29/313 9%	Sources and experts	“ <i>Jews must be treated like tuberculosis bacilli, he said, using his favourite analogy. Was that so cruel when one considered that even innocent creatures like hare and deer to be put down</i> ” ( <i>the German word was getturtit</i> )[sic] <sup>4</sup> . D12



Hitler	26/313 8%	Hitler as a specific source	<i>Mr Irving, come on. This is not the playground. My expert has given the correct account chronologically. He describes how on 16th, Horthy said, "But surely I cannot murder them?" and <b>Hitler said</b>, "There is no need for that. As with the Slovaks, they can be put in concentration camps". D12</i>
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However, in the use of *I*, Rampton does not always refer to self. 20% of these uses are in quotation where Rampton is re-enacting a dialogue between Irving and an interviewer or from his diary. Here Rampton is therefore performing the *I* of Irving, rather than the self. And many of the uses of *he* refer cohesively to Hitler (as in the example in Table 2), adding to the importance of quoting that particular speaker. Hitler's speech is quoted to Irving in order to try to provoke him, since one of the defences to the libel by the defendants is that Irving is a Hitler apologist and that that is part of his anti-Semitism. In addition, an analysis of a concordance of *said* in Rampton's cross examination finds that 61 of the 313 occurrences are accounted for by the collocational frame (Renouf and Sinclair 1991) *what X said (was)*. This collocational frame does the work of constructing authority through what expert witnesses say. In our final extended sequence (example [11]) we see the words of an expert witness for the defence contrasted with the words of the complainant, Irving. In this way the two sides are brought head to head, with the defence constructing themselves as superior through the authority of the expert with the result that the claimant is positioned as weak.

- (11) Day 29 (end of cross-examination and defence case).
- 1323 Q. This is the date, is it not, Mr Irving, on which in effect Hitler, having declared war on the United States and thus having brought about a world war, declares war on the Jews?
- 1324 A. No.
- 1325 Q. **He says to them**, does he not: "Right, mates, you brought about the first war, I told you that you would be for it if there was a second war. Now this is it. Face the music".
- 1326 A. Actually, the declaration of war was the next day.
- [...]
- 1340 Q. It is quite an important point so, if your Lordship does not mind, we will find out, on the best authority, when it was declared.
- 1341 A. I think it is a "Who wants to be a millionaire" question, is it not?
- 1342 Q. Not really, I think.
- 1346 MR RAMPTON: Perhaps we can bypass the good Dr Goebbels, my Lord, because this is Professor Irving writing his Goring book in 1989ish, I think, page 337. "It is probably only now that he", that is probably Hitler, might be Goring, "learned that the Japanese had attacked Pearl Harbour. At the Reichstag session on December 11th Hitler declared war on the United States".
- 1347 A. I found it at the same time, yes.
- 1348 Q. **Well, who is right? You or you?**
- 1349 A. This time you are right.
- 1350 Q. OK, the 11th.
- 1351 A. Luckily I am not a betting man.
- 1352 Q. Lucky you have not lost a million quid, yet.
- 1353 A. I would have phoned a friend if I had one.
- 1354 Q. **Mr Irving, this was a very important speech, was it not?**

1355 A. No.

**1356 Q. The day after the declaration of war on the United States?**

1357 A. It was the usual Adolf Hitler pep talk. He did not often see the Gauleiters. He did not like the Gauleiters. **He said** to Martin Bormann after Rudolf Hess went, “Keep the Gauleiters off my back”.

1358 Q. **What he said was:** “You Jews, I threatened you, I promised you, you have got it coming to you, and now it is here because the world war has begun”.

Coming, as it does, at the end of Rampton’s cross-examination and at the end of the defence case, the use of this collocational frame (turn 1358), to construct authority, by correctly quoting Hitler’s threat to the Jews at the start of World War Two, is particularly powerful. It marks the end of the case and the defence signs off whilst in a superior position, at the culmination of a cross-examination which has, as we have seen, caught Irving out on many occasions. The rhetoric of the turn: *Well, who is right, you or you?* (turn 1348), cannot but have occasioned humour for the audience, in the seemingly impossible reality of two *yous*. Behind this clever question is a duplicitous witness, who has to concede: *This time you are right* (turn 1349).

#### 4. Conclusion

We have seen that saying what is or what has been said is a key activity in legal talk. This is evidenced in the frequency and keyness of the forms of SAY and the work it does in a wide range of activities in the interview room and the courtroom. There are a range of collocational patterns, frames, and fixed expressions, including *you say* + quotation, *what X said*, and *so you say*, which are used to do pragmatic work, such as provoking, providing authority, and doubting. We have seen how interviewing and cross-examination has a preference for present tense, present progressive and non-finite forms of SAY and this makes the focus of saying what is said rooted in the primary reality of the questioning activity, rather than in the past. SAY is used by institutional speakers, police interviewers and cross-examining barristers for arguing and stance making and some of the patterns allow the lawyer to ventriloquize and animate the voice of the other side making it present and, with the help of deictic markers, time shifting. Actions of seeking acceptance and doubting are performed across the two discourse types and quoted speech is framed, transformed, performed and ventriloquized. Deictic marking, repetition and stylistic choices produce rhetorical power. Micro-social linguistic and pragmatic choices link to macro-social actions:

- professional activities of marking place, time and speaker: where/when/who and of seeking acceptance of a version of events and doubting another;
- appropriating the voice of the other to favour the own side’s case, producing a reversal of power as another’s words come under other side or judicial control;
- creating a materiality of speech through quotation, making the ephemeral “real”, present and tangible and “truthful”.
- contrasting what was said with what is said *now* and *here* to construct truth and lies and to construct evidence within a defence case;
- shifting and fixing states of knowledge against legal and moral discourses of the time.

There are a number of larger-scale socio-legal implications of the uses of quotation in questioning in police interviews and courtroom discourse that this chapter helps us to understand. First (as we saw in 3.1) quotation selects lay words and preserves, but also transforms, them in professional police interview talk, privileging the particular function the professional quoter chooses. By having their words taken into the professional domain, the suspect loses control of their own voice, as it is appropriated for evidential meaning-making. The courtroom is truly polyphonic, containing multiple voices that the barrister can interpret. Most powerful, perhaps, is in cross-examination, when barristers voice the witness they are questioning. When they assume the *I* in direct quotation, they make the witness listen to themselves and question their own words, as they hear them ventriloquated in the mouth of another. Without a recording to listen to, we can only guess at the intonational transformations that make them more unpalatable. Not only are the words appropriated and transformed but also an identity is de- or reconstructed, and in cross-examination this is always to the detriment of the witness and for the benefit of the party being represented. In quotation the professional can also put selected speech head-to-head (sections 3.2.3 and 3.2.4), to present opposing realities as simultaneous. In the *you said/you say* formula, where the witness said one thing in the past and is saying another thing in the present, only one reality can be true in the legal context and the witness is therefore presented as unreliable. The simultaneous presentation of conflicting versions of a witness's testimony exposes their identity legally and socially as a liar. Another head-to-head construction is the witness versus the expert in the *what X said* formula, which constructs authority in the expert witness, either to oppose (using an expert from the opposing side) or to provoke (using a voice with which the witness sympathises). Both mechanisms employ contrast as a strategy of defence advocacy, marking the unreliability and duplicity of the witness for the court. In doing so, these pragmatic effects are made visible and available to the public for social disapproval and approbation, making the public evaluators and jurors of the evidence. Quotation itself is a marked resource as it marks a context-shift that is controlled, in the cases here, by the institutional speaker. Along with the quotation mechanism (the SAY verb and direct or indirect speech reporting), the professional can make the speech present tense or shift from past to present to make what was said in the past co-present for the audience, whether or not the quoted person still holds that view (3.2.1). This strategy moves the quoted material from the private sphere (in Irving's case from his most private of materials, his diaries) to the public one, making his written diaries "speak" in the present, no longer to self, but now to the world. All these shifts (shifts of sayer, from written to spoken, and of time and place, or from private to public) thrust the quoted material into a different sphere of reception and make it first legal and then social property for evaluation. Stylistic marking, using proximal deictics and referential indexicals (*this*, *now*) is employed for emphasis and to make speech more vivid adding to the "theatricals" (Maryns 2013) of advocacy, techniques that are part of the professional narcissism and overt display that seeks notice both in the public arena of the courtroom and beyond. Quotation takes the personal and makes it professional and legal; then the legal becomes social, as it is available for social and moral adjudication.

## Notes

1. Reference is restricted here to work on spoken legal language, although there is a similarly rich literature on written legal texts such as statutes, wills, contracts, judicial opinions etc. For example, see Johnson and Coulthard 2010 for a summary. Solan and Tiersma's (2005) book: *Speaking of Crime. The Language of Criminal Justice*, considers the role of language across the whole judicial system, as does Cotterill's (2002) collection.

2. See, though, Galatolo (2007: 195–220) on “active voicing” in courtroom interaction, Holt and Johnson (2010: 30–33) on reported speech in legal talk, and Matoesian (2000: 879) on “intertextual authority in reported speech” in a rape trial. See also work on formulation in conversation analysis, defined by Garfinkel and Sacks (1970: 350) as where “a member may treat some part of the conversation as an occasion to [...] summarize, or furnish the gist of it”, such as by Drew (2003) and Komter (2006).
3. Key-ness is defined by Scott (2010: 165) as when a word’s “frequency in the text when compared with its frequency in a reference corpus is such that the statistical probability as computed by an appropriate procedure is smaller than or equal to a  $p$  value specified by the user”. The *appropriate procedure* is the one done automatically by *Wordsmith* (Scott 2010) and the  $p$  value is the program’s default of 0.000001.
4. In the trial transcript the German word is mis-transcribed as *getturtit*. The correct spelling is *getötet* (meaning ‘killed’).

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