



## The Multiplicity of Self of Capital Trial Lawyers\*

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### ABSTRACT

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Underpinned by Goffman's concept of footing (1981), this study focuses on deconstructing the kinds of performance in which capital trial lawyers are engaged, when persuading the jurors to kill or spare the defendant on trial. Indexical cues are identified that instantiate the shifts into different speaking roles. The findings suggest that this genre is in fact highly complex and encompasses three layered speaking selves: storyteller, interlocutor, and animator, each of which is foregrounded at different relevant points. In effect, lawyers can emphasize favorable "facts" while silencing others through selective storytelling, fill in evidentiary gaps with inferences, guide the jurors' interpretation as their active interlocutor, and endorse or invalidate an argument through quotations.

### KEYWORDS

alignment, capital trial, footing, speaking role, performance

## 1. Introduction

Recent discourse-pragmatic research is firmly grounded in the concept of self and situations as multifaceted, complex and dynamic. In this view, interlocutors negotiate meanings, establish relationships and construct identities as the interaction unfolds. Participants adapt the ways they participate in talk to the issue being presented and to anticipated reactions from the audience. This constant, moment-by-moment maneuvering of interaction is described as “footing” by Goffman (1981: 173, my own emphasis), which involves “the multiple senses in which the *self* of the speaker can appear, that is, the multiple *self*-implicated projections discoverable in what is said and done”. Simply put, in discursive interaction, an individual selectively makes use of various speaking capacities to frame the interaction.

Trial talk is one such case where speakers relentlessly attempt to shape and negotiate their speaking positions and display multiple senses of the self. In this institutional setting, participants are engaged in representing and reconstructing what “really” happened and its significance for the benefit of the ratified overhearing audience, typically the jury or judge. There exists considerable evidence that lawyers marshal different footings at their disposal. Hobbs (2008: 231, emphasis mine) argues that “lawyers do not just speak, they *perform*, constructing displays of style and competence that command the attention of their audience and imbue their arguments with persuasive force”, and that “evaluations of courtroom speech are dependent upon *speaker roles*” (232). Examining a *pro se* defendant, the researcher observes that while the speaker could successfully reproduce the form of a well-crafted opening statement, he failed to reproduce the “legal voice”. As a result, the presentation was not well received by the jurors. Similarly, Cotterill (2003) notes that in the O.J. Simpson trial, closing summations have “an undeniably theatrical quality”, while Rosulek (2010: 190) reveals how lawyers add a “level of performance to the narrative” to make it “more lifelike” by re-creating different voices. Fuller (1993) and Hobbs (2003) demonstrate how lawyers can codeswitch from Standard American English to a different variety (African American English) and exploit features such as double negation (a well-known characteristic of that variety) or an African-American oratorical style to imply things that they are otherwise not allowed to say directly and to establish affiliation with the audience from the same ethnic background. Matoesian (1999) examines how a defendant, who was a physician before he was accused of a sexual assault, shifted his speaking position to that of a medical expert while being interrogated in the courtroom, using medical jargon, epistemic modality, and counterfactuals.

Despite valuable insights into the dynamic nature of courtroom communication, previous research comes with limitations. First, while these studies acknowledge speaker roles and discursive performance, it is not clear what speaking roles, and how many, lawyers can manipulate. Second, while previous studies examine linguistic cues such as medical jargon, double negation or African American oratorical style that index a footing shift, those are not options for the majority of lawyers and juries, not to mention that they are marked features, associated with particular language varieties. Questions, thus, remain as to other common indexical cues that signal footing shifts in the courtroom. Third, previous research tends to focus on a single trial. While a focus on one case can bring to light what the lawyer *can* do, common patterns and generalizations are missing from the overall picture, which can be obtained by examining a corpus of data.

The present paper attempts to address the above limitations. Taking as a point of departure Goffman’s concept of Footing (1981), it will deconstruct different performative roles lawyers can assume when persuading the jurors to kill or spare the defendant, and examine indexical cues that instantiate such shifts. This study attends to the monologic genre of the opening speech in capital trials. Not only is this the first opportunity for lawyers to position the defendant as worth sparing or killing, thereby creating strong mental images that will endure throughout the

trial (Powell 2001), but it arguably exerts influence over the jurors' decision very early on (Pennington and Hastie 1991, Spiecker and Worthington 2003). As will be shown, its monologicity is in fact highly complex and encompasses three major selves: storyteller, interlocutor, and animator, each of which is foregrounded at different relevant points. In effect, lawyers can emphasize favorable "facts" while silencing others through selective storytelling, fill in evidentiary gaps with inferences and guiding the jurors' interpretation as their active interlocutor, and endorse or invalidate an argument through quotations.

This research makes both theoretical and empirical contributions. Theoretically, it identifies what lawyers are "doing" in a major courtroom genre, along with resources or indexical cues that activate such roles. This, in turn, more firmly grounds Goffman's notion of footing on a linguistic basis. To scholarship of discourse studies, it explicates the structural components of this monologic type of display talk – talk that is designed not to further an on-going interaction, but to present a particular perspective on what is said to an unresponsive, silent audience. The study will show how lawyers constantly shift and inhabit different positions to negotiate the reception of their presentation.

Before proceeding further, certain premises this project holds are in order. This study focuses on the linguistic resources, along with socio-cultural presuppositions, which lawyers capitalize on to constitute legal realities in capital trials. I ask how these devices and socio-cultural presuppositions mold "evidence" and "facts" into persuasive displays of legal relevance, which in turn realizes each side's communicative goal – be it for a death sentence or a life-time imprisonment one. Thus, it is held that language is not the mere passive vehicle for the transmission of law but actually plays a role in transforming evidence and facts into relevant objects of legal knowledge, hence the pragmatic functions of legal language. For instance, pronouns have been investigated for their strategic use. Pyykko (2002: 246), among others, argues that "[t]he pronouns do not carry their own concept meaning, they get their meaning from nouns, in whose stead they are used. This makes it easy to hide behind the pronouns and to use "we" as a central political force of influence". Of course, this does not necessarily mean that the speaker tries to deceive the hearer by the use of "we". Rather, it is about how the potential indeterminacy of linguistic items can be used to accomplish particular communicative goals.

In addition, a question may be legitimately raised: what can this analysis tell us about capital trials and capital punishment? I would, however, frame this issue differently: what can language use in this context tell us about how meaning is constructed in capital trials? What can the findings tell us about the microcosmic techniques through which discursive identities are linguistically realized in context and thrust into interpretative prominence of each side? Thus, this project is not about capital trials *per se*, but about the law in action: law as it occurs in discursive practice. That is, the focus is on how an individual is constructed as an (in)executable subject during the trial process. Finally, I do not intend for this study to convince readers that the death penalty is wrong. Nor do I blame the presenters for what they present, given their institutional roles (i.e., defensive or active in the proceedings). This project does, however, begin from the assumption that capital trials, because they involve the irrevocable taking of someone's life, need to be placed under critical light.

This article begins by first discussing some discursive features of the opening speech in capital trials, and then proceeds to discuss relevant theoretical concepts for speaking roles and footing shift. Finally, the findings are discussed and illustrated in detail.

## 2. Capital Trials and Opening Speech

In the United States, the penalty phase of a capital trial is the second part of a bi-furcated procedure. It is this

phase that differentiates a capital trial from an ordinary criminal trial, which features only the guilt phrase, where jurors engage in fact-finding to determine the defendant's culpability. In capital trials, once the defendant is found guilty, the penalty phase follows, where the same set of jury is entrusted with "both rational fact-finding and subjective considerations" (Conley 2016: 48). That is, jurors must consider the "facts" underlying aggravating factors and mitigating factors, presented by lawyers, before subjectively deciding whether aggravating factors outweigh mitigating ones and rendering a capital sentencing decision accordingly.

Occurring prior to the presentation of aggravating and mitigating circumstances and to the delivery of the verdict, the opening speech is intended to provide an outline of the subsequent presentation and forecast what is to come in the testimony portion, and thus it cannot be argumentative. It is supposed to be a road map by which lawyers from both sides explain to the jury how they will organize the evidence to be presented: they cannot assert personal opinions, comment about the evidence or the credibility of a witness, weigh the competing evidence, or discuss the application of the law to the facts. However, in practice, it is hard to objectively draw a line between what counts as argumentative, and the issue is usually left to the judge's discretion. As this study will show shortly, shifts in footing aid in the bypassing of this legal constraint.

In addition to what can and cannot be legally said, the opening speech has unique discursive constraints that differentiate it from other courtroom genres. First, instead of being a dyadic interactional situation, the opening speech is a monologue delivered with no interruptions by other participants (except when opposing counsel raises objections for possible misconduct). Second, while witness examination is a jointly constructed discourse between the lawyer and the witnesses in the form of questions and answers, the opening manifests the lawyers' complete control over the linguistic choices, thereby exhibiting lawyers' pragmatic awareness of the linguistic choices in relation to the communicative purposes and audience. Third, the opening speech is directed specifically to the (silent) jurors, instead of just performing in their presence. Finally, the narrative presented in the opening is in large part woven into one unified speech, rather than questions and answers. Owing to these discursive constraints, the opening speech is a discursive event that potentially involves the presenter's choreographed efforts to deliver a persuasive performance.

### 3. Speaking Positions and Footing

To discuss the linguistic construction of self, it is insightful to start with Goffman's concept of footing, which essentially refers to the multiple self-implicated projections, that is, speaking roles that a speaker may assume in a particular interactional setting in order to project his stance towards an utterance both regarding the referential and affective aspects. During an interaction, we rarely just speak as ourselves, but we naturally and quite imperceptibly oscillate between various roles, thereby showing a layered self. In this way, a discursive practice is not a simple affair in which one party monotonously functions as a speaker (and the audience as the listener), but actually consists of different kinds of participants (and, by extension, speaking perspectives) that emerge one after another throughout the interaction. To give but one example, when incorporating another person's words, the speaker can manipulate grammatical forms and deictic items to signal to the interlocutor that he or she is responsible for the validity of the statement, or even that he disagrees with such information. In this case, the person speaking is not simply a speaker, but in fact an "animator" of the reported speech.

In view of this multiplicity of self, Goffman (1981) decomposes the traditional speaker role into more fine-grained identities: principal (who is responsible for the message), author (who originates the content and form of the message), and animator (who utters the message). A lawyer, for instance, may speak as an ordinary person

outside the courtroom, as a representative of the team, or as the client (when reproducing her client's words). While participants' footing can shift in unexpected ways, there are norms as well as constraints specific to a particular speech event, and individuals with sociolinguistic competence can expect appropriate footings in different speech events. The set of footing incarnations in the opening speech of the penalty phrase is precisely what the current study endeavors to tease out.

Goffman's concept of footing has proved useful in studies on legal discourse. Studying witness examination, Matoesian (1999) carefully examines how the defendant in a rape trial, who was a medical student in the final year and who was not tendered as an expert in the eyes of the public, shifted into and departed from an expert medical identity, as he was impeaching the expert witness's technical account of how the victim could have sustained injuries during the alleged rape. Also focusing on the issue of expert witnesses, Chaemsaitong (2012a) argues that while expert witnesses in the courtroom are equipped with social status and educational or professional qualifications, these privileges do not come uncontested in the courtroom. In particular, experts are faced with how they can best explain the analysis and express the derived opinions to an audience of legal and lay professionals. This study explicates the ways in which an expert witness calls upon a range of interactional devices to appropriate the desired footing and labeling category of "expert". Instead of asserting their dominance and expertise over the interlocutors, experts were found to construct and negotiate their identity by aligning with other participants and establishing a relationship with them. Comparing direct- and cross-examination, Chaemsaitong (2012b) finds that shifting into and departing from a particular identity helped the participants to contextualize and frame the local context of a rape trial to substantiate their legal arguments and to offset oppositional arguments. Different footings allow the participants to assume and speak from particular perspectives with respect to the same event at issue.

Goffman's invaluable insights are not without criticism, however. First, it is unclear whether Goffman intended the three roles he proposed to be the only speaking perspectives a storyteller may assume. Second, scholars have noted the methodological challenge of how to operationalize the concept in studying actual discourse. Third, Goffman's role distinctions are made for narratives of personal experience, and as a result, these roles may not be applicable to every genre and speech event. Although Goffman (1981) mentions "cues and markers" indicative of footings, he does not go much further than this general insight: the precise role language plays in speakers' performance of particular footings is not discussed (Levinson 1988, Wortham 1994, 1996). In particular, Levinson (1988) suggests that a rigorous linguistic discussion of "who stands in which when" should be integrated into the analysis of speaking roles (221).

To address the analytical limitations, this study makes use of the following insights to approach the analysis of footing. First, Silverstein (1985) talks of the difference between two deictic points: here-and-now and then-and-there. For each point, speakers employ indexical cues to signal to the interlocutor what the speaking perspective is. In the here-and-now, speakers focus on the interactional or unfolding nature of the discourse and use deictics or shifters (Jakobson 1971), such as *this*, *here* and *now*, along with the present tense. On the other hand, past tense verbs along with *that*, *there* and *then* can signal the then-and-there events. These two deictic points are associated with the narrated event – what speakers are talking about, and the narrating event – the current context of interaction among speakers (Jakobson 1971, Wortham 1996). It is worth pointing out that the term "narrate" here broadly refers to all language use, not necessarily storytelling.

Second, Bakhtin's notion of voice (1981), which refers to the property of a text being full of snatches of other texts, suggests that one can speak from the perspective of other people or sources by quoting their words. Chaemsaitong and Kim (2018) shows how lawyers in opening and closing portions mobilize invoke other people's utterances. Lawyers are found to (re)animate the voices of witnesses, their own, or the opposite side. In

this speaking role, deictics no longer point to the reporting event, but are specific to the characters involved in reported event.

Other indexical cues that index a footing shift include evaluation and modals (Labov 1997); personal pronouns (Wortham 1996), moods (interrogatives, directives or hortatives) (Levinson 1988: 184–192), and reported speech (Wortham and Locher 1994). These devices mostly function affectively or evaluatively, rather than referentially, thereby evaluating information that is being presented and providing a sense of how the interlocutor should be interpreting the referential information in the present context.

#### 4. Data and Methodology

The data for this study is based on the official transcripts of five capital trials (see Appendix for the list). The entire corpus consists of approximately 100,000 words. As the transcripts were transcribed by court clerks, conversational features are not entirely included, such as silence and its length, although certain traits can be found such as repair and false starts. However, since this study focuses on the use of grammatical cues, the absence of paralinguistic information should not affect the analysis of footing.

All the cases involve multiple killings. These openings are from different courtroom settings and were delivered by different lawyers, thereby ensuring that the patterns found are not the linguistic idiosyncrasies of certain lawyers. The trials occurred within a relatively contemporary time frame, from the year 2000 to the present, during which there have been no significant changes in the legislature or positions of the Supreme Court regarding death penalty, which otherwise might affect the linguistic patterns.

Methodologically, the transcripts were analyzed using as guidelines deictic references, as discussed above. The distinction was first made between the then-and-there and here-and-now positions, along with other shifters such as mood, personal pronouns, or evaluation. Commonly found linguistic features were grouped under the same speaking role. Subsequently, the functions of each speaking role were determined by considering the topics presented in each voice. In case of incorporated voices, the types of voice and their functions were identified.

#### 5. Findings

The capital lawyers under study, both the prosecution and the defense, switch between three roles: storyteller, interlocutor, and animator. Below I explicate how linguistic resources are mobilized to inhabit these footings as well as their characteristic functions. Due to space limitations, one representative example that shows a particular pragmatic function will be selected and discussed from either the prosecution's or defense's discourse (indicated at the end of each quoted example). Only when the two sides differ in the pragmatic strategies will contrastive examples be shown and discussed.

##### 5.1 The Storyteller

The first major role a lawyer relies on is a storyteller, where he speaks about the “then-and-there”, that is, a narrated event. Legal scholar Burt (2009) observes along the same lines that in a capital trial that the defense lawyer relies on “creative storytelling” that stresses the humanity of the defendant and brings to the fore the trauma witnessed by and inflicted upon the defendant throughout his life. At the same time, good deeds and positive

attributes are also chronicled.

Much more interesting is the fact this speaking role is actually used in much more capacities than Burt (2009) suggests. The first capacity is when lawyers present a narrative of the crime. However, it is not the case that lawyers simply narrate what happened during the crime. Instead, prosecutors shift the focus from the crime itself to “satellite” events, which have no eventuality and merely amplify the core events they accompany (Chatman 1978). As (1) shows, in addition to presenting a list of the deceased, the prosecutor makes sure to include the minute details of the conversation between an officer who lost his life during the crime and his wife at 8:45 a.m., thereby transforming the impact of the crime from an individual to a group phenomenon. The inclusion of indirect victims (i.e., those who are not first-hand victims) potentially inflates risk perception and exaggerates the dangerousness of the defendant.

- (1) The third Secret Service agent who died was Alan Whicher. Alan had a distinguished career with Secret Service. He had provided security and protection to presidents, to Margaret Thatcher, to Prince Charles, even to the Pope. He and his wife, Pam, lived in the Oklahoma City area. And at 8:45 that morning, after he had arrived at work, he called his wife, Pam, to tell her he was thinking about her and to let her know that he wished her well because she had to make a presentation to a Bible study group later that morning. He knew she was nervous, and he wanted to show his support for her. 17 minutes later, the roar of the bomb ripped through her house. Her wait began. Friends, neighbors, relatives poured into her home to provide support and to help her while she waited. (Case 1, Prosecution)

Prosecutors also stand in this role to present the defendant’s previous crimes, which go beyond the legal scope of the current trial, as illustrated in (2). This strategy is aimed at establishing a track record of dangerousness and incorrigibility for the person on trial, for which death penalty is argued to be the only choice.

- (2) Christopher Powell, that is the name of an inmate who was at Everglades Correctional Institute in Miami. The defendant in this case tied his hands, and once his hands were tied and his neck was tied, he proceeded to stab him about 22 times. He survived. He was charged and convicted of attempted first degree murder and was sentenced to a life sentence. (Case 5, Prosecution)

Unlike prosecutors, defenders do not reference any previous crimes. Instead, all the defenders examined narrate how the person on trial suffers from an abusive familial background, thereby offering a more nuanced contextualization of why the crime was committed, which in turn constitutes a mitigating factor. In (3), after a narrative of how the defendant became alcoholic in the first place, the lawyer evaluates the defendant’s father, assigning the responsibility and blame to him for the abusive relationship. This implicit evaluation is performed externally (i.e., Labov’s external evaluation 1997) in the last clause: “That’s how his dad thought he should take care of the problem,” and is signaled by the contrast between what a father should normatively do and what the defendant’s father does in this case.

- (3) Now, when he came home, he was like many other kids; running around, yelling, having a good time, playing, but hyperactive. And he was on Ritalin for some period of time, but his dad saw a better way to quell that hyperactivity, so at the age of four he started giving Billy shots and sips of whiskey, so that by the time he was 11 he was a full-blown alcoholic already. And when he was 12, his teacher caught him on the bus drunk, and he ended up getting treatment for alcohol abuse. That’s how his dad thought he should take care of the problem. (Case 5, Defense)

Defense lawyers may go so far as to recount historical events that are temporally and physically distant from those of the local context. In (4), the defense lawyer introduces Chechnya, where the defendant, Jahar, grew up. This is to refuse the prosecutor's claim that the defendant's turn to terrorism is related to his Chechen identity as well as Chechen separatism and triggered by his traumatized experience as a Chechen in Kyrgyzstan before migrating to the USA. As with the previous example, the significance of this narrative is explicitly spelled out at the end, in the form of external evaluation.

(4) I told you that Jahar was born in Kyrgyzstan, which is a country almost to China. It used to be part of the Soviet Union, very, very far from Chechnya, very far from the North Caucasus. The historical reason for that is that the entire Chechen people were loaded onto cattle cars and deported en masse, in the third week of February 1944, in the middle of World War II, by Joseph Stalin, and dumped in Central Asia, 2,200, 2,400 miles away, a third to a half of the Chechen people died during that, what was one of the great crimes of the 20th Century, something that very few people know anything about. I mention that only because it explains why Jahar, in a Chechen family, grew up thousands of miles from Chechnya and has never set foot there. (Case 4, Defense)

## 5.2 Interlocutor Role

In this role, a lawyer endeavors to interact with the jurors by bringing them into the narrating event as active participants and projecting their perceptions, interests and processing needs. Notable linguistic cues that activate this role shift include audience-oriented pronouns and questions.

To begin with, second person pronouns are used to construct the jurors as experiencers. The pronouns tend to occur with mental or sensory verbs (such as *hear, think, learn*), as shown in (5). In reality, however, the lawyers do not actually possess knowledge pertaining to the jurors' mental states. Anticipating and responding to a doubt that the jurors may have, this strategy positions the jurors as agents that willingly accept the lawyers' statements unquestionably.

(5) After you've heard the evidence, you will be satisfied that the victims in Oklahoma City and their relatives throughout the country were greatly impacted by this crime. Ladies and gentlemen, at the end of this case, after you've heard all of the evidence, we will ask you to return a verdict of death, the only verdict that justly fits this crime. (Case 2, Prosecution)

Second, mostly co-occurring with deontic modality, second-person pronouns specifically direct the jurors to do something. In this capacity, the lawyer metapragmatically spells out the legal norms of the narrating event in this phase of the trial. With "are going to/have to+ verb" that conveys an implicature of issuing instructions or strong warnings, thereby conveying some degree of deontic force (Carretero 2004, Salkie 2010), the defense lawyer in (6) connects the underlying principle of moral decision in capital trials to the consequence of that decision at the individual level, thereby enabling private empathy.

(6) It's a very individual decision. You are going to deliberate as a group. You are going to go back there, all twelve of you are going to talk it through. But it's an extremely individual decision, talking about the power of life and death. This is something you are going to be living with the rest of your life. May see each other briefly on occasion. But it's a decision you have to live with alone. It's a decision you have to think about



alone. It's a very strong individual decision. (Case 3, Defense)

Third, second-person pronouns serve to relate the jurors' personal experience inside the courtroom to their experiences outside of it. In a case where the defendant was a gun enthusiast who reacts to the government's tightening of restrictions on private firearms by bombing a federal building, the defense lawyer in (7) endeavors to establish a common ground between the jurors and the defendant by drawing upon the right to keep and bear arms, which many jurors can identify with.

(7) There is [sic] some folks, I think, who -- and those of you who do have an interest in guns may know this, yourself – feel safer in some way to have guns available, not because you're intent on doing any harm, but because you're intent on protection and defense. And there are other reasons, long-standing political reasons, that many people in this country have for believing in guns that stem from the Second Amendment, and you will hear about that. (Case 2, Defense)

Fourth, second-person pronouns can position the jurors in the situation or event that the lawyer conjures up to induce empathy with such a situation (Siewierska 2004: 212). This strategy is akin to what Kitagawa and Lehrer (1990) call “life drama” use, in which the speaker sets the scene and uses the pronoun to invite the audience to assume a role in such a hypothetical scene. In (8), for example, this second-person pronoun is certainly not in reference to the jurors (i.e., not their personal experience), as the jurors are very unlikely to have such an experience. Note that this life drama use is not replaceable by “one” or “everyone”. Pragmatically speaking, the pronoun engages the jurors as victims of an abusive parent, thereby constructing a mitigating factor through in this involvement.

(8) How do we get from here to here (indicating)? One way is that when you're eight years old your father intentionally and purposely point-blank shoots you in the foot, and he shoots you in the foot because you peed on yourself. (Case 5, Defense)

Finally, second pronouns are used generically to present a statement as a universal one, thereby elevating it to the status of a truth. This use differs from the fourth function, as it is replaceable by “one” or “everyone”. The defense lawyer in (9) uses this generic variant (as in, “turn one's back on one's shoulder and one is no one”) so as to account for how this particular strict socio-cultural norm to which the defendant was subjected influenced him to follow his brother's lead in committing the crime.

(9) Culture is what's bred in the bone. And a family like Jahar's, turn your back on your older brother and you are no one. So Jahar did not defy Tamerlan to his face, not ever. And when Tamerlan made a decision, Jahar's role was to support him. (Case 4, Defense)

In addition to second-person pronouns, first-person plural pronouns also activate various footings. Previous studies of the discourse functions of the pronoun *we* reveal such rhetorical effects as constructing collectivities and group membership (Duszak 2002, Goffman 1981). Using this pronoun, the speaker can align herself and the audience into one group that may not may not exist in the real world (Zupnik 1994). In my corpus, the following footings are observed with the use of *we*. In (10), wishing to explain the defendant's criminal motivation as influenced by his brother, the lawyer creates a homogenous unit that shares such knowledge, so that the jurors do not question this argument.

- (10) We all know that younger brothers tend to look up to older brothers, especially when there is an almost seven-year difference between them. (Case 4, Defense)

First-person plural forms can invoke social members of outside the courtroom and make relevant communally-held social values. The lawyers seek to align themselves and the jurors with this group. In (11), for example, the lawyer encourages the audience to show concern for social injustices and makes the decision not to kill the defendant accordingly. He does so by invoking the socio-cultural belief about the (non-)existence of the biblical king Solomon in the USA, who is known for being the wisest leader.

- (11) Judge Matsch has said to you several times that you are acting as the conscience of the community in making this decision. You are. We have no King Solomon in our time. Indeed we have never had a King Solomon in this country. For more than 200 years, we have relied on each other, on other peers to make the hardest, most difficult decisions to accord justice. (Case 2, Defense)

First-person pronouns may extend the referential scope to all human beings. In this case, the presenter elevates the status of a statement as inescapably applicable to everyone, including the jurors. As (12) shows, the defense lawyer capitalizes on this generic *we* to suggest that it is a natural human proclivity for a young child to be easily influenced by powerful forces around, thereby making the motive of the defendant more understandable to the jurors.

- (12) The impulse, risk-taking parts of our brain mature before the parts that regulate our actions, our judgment, and help us weigh consequences. So adolescence is a time when we're like cars with very powerful engines and faulty brakes. It's a time to be more stirred by powerful emotions, rage at supposed injustice, love for a charismatic older brother, and less by logic and good judgment. (Case 4, Defense)

Another interactive device in the interlocutor role is the use of question-answer sequences. In this monologic discursive event, the use of questions establishes a communicative channel with the reader, as it recognizes the presence of the jurors. In addition, through questions, the speaker can assume a position of authority, as the device implies the right to demand information from the audience. In the data, lawyers employ the following types of questions. The first is expository questions, which function to introduce a topic and providing textual scaffolding for the discourse that follows. The lawyers first pick an issue and turn it into a question, so as to demonstrate their argument. In (13), for instance, the lawyer endeavors to supply the "correct" way to consider what counts as mitigation, which in this version is "what's good about a person". In doing so, the speaker also indirectly deauthorizes the opposing side's view of mitigation. In (14), the lawyer spells out the discursive move in the form of the question. Instead of doing so through declaratives, this kind of question not only generates interest in what follows but also represents the degree to which the speaker wishes to restrict the jurors' selection of alternative interpretations and directions.

- (13) What is, exactly, mitigation? Lawyers throw around the term a lot. A lot of times not even correctly. Because it's a very simple phrase, very simple term. Essentially boils to down to what's good about a person. What's good. (Case 3, Defense)

(14) Are we going to cross-examine? I don't think so. We may have a question or two for this witness or that about something unrelated to the grief that they have or the things that they suffered; but somehow it seems to us that to intrude upon the stories that these folks want to tell you by cross-examining them is inappropriate. It doesn't add anything. It doesn't prove anything. There is nothing that we have extra to bring out. If there should be an exception to that, it may just be a question or two. (Case 1, Defense)

Second, focus questions can draw attention to a particular aspect of the discourse. In this case, the lawyers orient the jurors to specific points by telling them to fix their attention on such points. The questions in the examples below essentially constitute the key points that determine whether the defendant should be killed or imprisoned for life. Note, however, that for each side, the focus differs. For the prosecutor in (15), the jury's sentencing deliberation is an objective, straightforward issue, which involves "weighing" the aggravating against mitigating factors, while for the defense in (16), the jurors are asked to consider the individual morality of the defendant. This contradiction likely induces confusion to the lay jury pertaining to the place of subjective consideration in their decisions.

(15) The verdicts don't supply you the answer to the next question that you must answer, but the evidence will assist you. Because now all of the evidence and all of the information will help to assist you in answering one more question. And we phrase the question as this: Why? Why? After weighing all of the aggravating factors and mitigating factors, why is the death penalty the appropriate and just sentence for Dzhokhar Tsarnaev? (Case 4, Prosecution)

(16) Miss Pellegrini said in her opening statement last week that all you need to know about Jahar Tsarnaev is what he did on Boylston Street because, she said, that's who he is. That's his character. Simple as that. You think about it for a moment what that really means, if it were true, is Jahar someone who would have conceived and committed these crimes on his own? And that's the question – there's the question – you'll need to answer. (Case 4, Defense)

Finally, questions may be used to express evaluation, often carrying a strong intimation of distancing the lawyer from the proposition. This type of question does not depend on what it asserts, but what it implies. The speaker presents a proposition as self-evident or common-sense, so that it is up to the reader to supply the obvious answer, which is the opposite of what is asserted. In other words, the purpose here is to make an indirect statement. In (17), through a challenging question, the prosecution presupposes that the defendant Tsarnaev consciously acts on his own, and so his crime is not forgivable. Implicitly, the lawyer refuses the claim by the defense that the defendant is influenced by the brother.

(17) But it's much more than that. Because ask yourselves if there's anything about Tamerlan Tsarnaev or any other person that will explain to you how Dzhokhar Tsarnaev could take a bomb, leave it behind a row of children, walk away, down the street, and detonate it. Is there anything that will explain how he could walk away from that happy and crowded scene, look back over his shoulder, knowing that he just left death there to go off, and he kept on going? (Case 4, Prosecution)

### 5.3 The Animator Role

Instead of solely relying on their own voice at the time of speaking, the lawyers also speak through the voices of others by means of reported speech, expressed in direct and indirect discourse. In my corpus, the lawyers are found to reanimate the following characters.

The first includes the voices of lay witnesses. Since the lawyers are not present in the crime scene, this voice presents a statement from the point of view of a person who is a first-hand witness or who feels a certain way as an indirect witness. In (18), the reported discourse purports to present a direct experience of (unknown) people through evaluative lexical items. The lawyer subsequently moves to explicitly endorse these voices through the affirmative “yes” and the following statement.

- (18) Unbearable, indescribable, inexcusable and senseless. All of those words have been used to describe the murders committed by Dzhokhar Tsarnaev. Yes, the deaths of Krystle Campbell, of Lingzi Lu, of Martin Richard and of Officer Sean Collier have been all of those things for their families and for their friends. (Case 4, Prosecution)

Second, lawyers incorporate the voice of authorities, including judges, expert witnesses, and well-known people. This voice is an important tool for the lawyers to amplify the credibility of their crime and investigation narratives. The lawyer capitalizes on Shakespeare’s quote in (19) by re-contextualizing it to deny that the defendant’s abusive family background (metaphoricalized as “not in our stars but in ourselves”) in playing a role behind his crime, thereby calling for a death sentence. In contrast, in (20), the defense lawyer distances himself from the government’s and the jurors’ voices by carefully demarcating these portions as not his own. In doing so, the lawyer sets the agenda of the current presentation and shows respect toward the original speakers.

- (19) So when Shakespeare wrote that “The fault, dear Brutus, is not in our stars but in ourselves,” he was reminding us that we have to look inward. We have to look towards the person in whom the fault lies. No alignment of the heavens will explain or excuse Dzhokhar Tsarnaev. (Case 4, Prosecution)

- (20) The Government has presented to you evidence and has argued to you that it was because of Tim McVeigh’s anger about Waco which grew into, as the Government says, hatred for the federal government. And by your verdict, you have accepted at least a part of that, those facts and a part of that theory. We must accept your verdict in this part of the trial. This is not the time or place to retry guilt or innocence or to quibble about those facts, and that is not what we intend to do. (Case 2, Defense)

In addition to real characters, lawyers also draw upon hypothetical voices. These are non-existent, fictitious characters whose statements are presented as if they were real. This strategy well exemplifies Tannen’s notion of “constructed dialog” (2007). For example, in (21), the prosecutor animates non-existent victims’ thoughts to sensationalize victimhood and personal damages, presenting this as a fact that the subjects will experience emotional pain.

- (21) Things that make you laugh and make you cry at the same time. And even in moments of happiness, sadness will remain. And the thoughts of the future will bring no peace. Every time someone thinks, Oh, he really would have enjoyed that game. Or, Look at that, she would have looked great in that dress. Or, Remember that grandpa was so proud of him?, it will come with a wrenching ache. (Case 1, Defense)

## 6. Conclusion

This study examines the opening discourse of the penalty phase of capital trials, not in terms of the referential aspect, but in terms of the kind of performance that lawyers are engaged in. The opening speech has been revealed to be as much about social interaction and dramatic performance as it is about providing a preview or laying out the structure of the whole presentation.

The findings reveal three major footings that the lawyer can shift into and depart from during his first presentation of the case in the penalty phrase, namely, storyteller, interlocutor, and animator. As we have seen, such speaker roles serve to manage and fine-tune the situated details of verbal performance, with each role contributing to framing the discourse in particular ways. Assuming the role of animator, the lawyers can imply a lack of responsibility for the content, as they are incorporating utterances of other people and authoritative sources. Alternatively, the lawyers may switch to the role of storyteller to signal their own stance and attitudes as they narrate different kinds of incidents through evaluative devices, but at times, they also perform as interlocutors, directly inviting the jurors to share their stance and direct their attention to specific aspects of the narratives. Laminated or embedded within the broad professional label of lawyer, such speaking roles allow the speaking subject to anticipate and respond to the inner reasoning of the jurors while maintaining an appearance of objectivity on the surface, thereby satisfying the legal constraints of non-argumentativeness. Pragmatically, however, these footings enable the presenters to challenge and voice counterarguments to the opposing team, while establishing and negotiating an interpersonal relationship with the ratified, but silent, audience and guiding their interpretation and understanding on certain issues. All in all, the study demonstrates what each side can accomplish with deictic devices that initiate these speaking roles.

On the theoretical side, in contrast to Goffman's less linguistically systematic discussion of footing, this study relies on the specific, formal discursive devices that mediate speaker's verbal performances. This study does not claim that these roles constitute a universal set of participant role categories. Nor does it intend to generalize these roles as existing in other courtroom settings. Although it is highly possible that these roles can be found in other types of trials, further research is needed to confirm whether this is the case. In addition, in different types of courtroom settings, each role may be more dominant and used more frequently than others. As a first attempt of the kind, a set of primary categories has been posited based on the indexical devices commonly found to occur in each category, specific to this linguistic genre. It is through the attention to genre-specific indexical strategies that discourse analysts can determine how legal professionals weave in and out of different speaking positions.

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Examples in: English

Applicable Languages: English

Applicable Level: Tertiary

## **Appendix**

- Case 1: United States v Terry R. Nichols (1997)
- Case 2: United States v Timothy J. McVeigh (1998)
- Case 3: People v Scott L. Peterson (2004)
- Case 4: United States v Dzhokhar A. Tsarnaev (2015)
- Case 5: State of Florida v Byron K. Burch (2015)