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Abstract

This paper argues that social identities, discursively speaking, consist of ‘positions’ that are individuated by distinctive linguistic features. These include distinctive patterns of representation indicated by clause structure and type, a set of priorities for attending to what is important indicated by thematic structure, and an orientation to the represented world and to self as indicated by modality, propositional attitudes and tense. A social identity comprises an array of these often contradictory ‘positions’ associated with a social or professional role. A person’s identity is constituted dynamically by the way they ‘reconcile’ the various positions that make up the social identity, and also, as Archer and Ivanic argue, by the way they reconcile a social with a personal or autobiographical identity. It is argued that this process of reconciliation gives clues about identity formation in the traces it leaves in grammatical texture.

This paper uses a simulated letter of advice to a client written by a group of first year law students to explore the discursive construction of social or professional identity. This letter is poorly written and full of grammatical mistakes and infelicities. It is argued that the mistakes provide a linguistic trace of the students’ struggle to reconcile the conflicting roles and positions they occupy as authors of the letter. In particular the students’ problems result from a struggle to reconcile their multiple positions as: students writing for assessment by a tutor about a legal problem, as a simulated firm of solicitors advising to a client, and as potential litigators anticipating the future course of events in their simulated moot court appearance.

Introduction

Identities are an important feature of the social world. A social identity as a teacher, lawyer, criminal or drunkard offers a sense of belonging and commitment, a set of actions and goals, and a way of fulfilling personal needs (Archer 2000). However assuming a new social identity can be a challenging process. Young students find learning to be a lawyer particularly difficult, for example, due to the incommensurability between legal values and practices and those of the lay community (Guinier, Fine & Balin 1997; Mertz 1996; 2000). Hence legal education offers a potential site for intervention by those seeking to reshape its practices in more inclusive and equitable ways. Because lawyers are agents of power (Butler 1997) legal education has a strong ideological significance and is hence a prime candidate for critical discourse study.

The usefulness of critical discourse analysis (CDA) for this purpose depends on its ability to deliver insights into the way language shapes social identities that are not available to other social scientists. CDA has promised more than it delivers. Despite important work on social identity by Fairclough (1995), Ivanic (1998), O’Connor (2002), Wetherell’s (1997) critique of theories of identity and subject positions in CDA still is largely justified.

Fairclough’s (2003) recent appropriation of Archer’s (2000) work on social identities, however, offers a future direction, and an aim of this paper is to outline one way in which CDA can address issues of social identity within Fairclough’s framework. To that end the writing of a group of first year law students is explored as they come to terms with a social identity as a lawyer. These students, like most first year law students, struggle to write and speak the language of the law. Using as data a simulated letter of advice written by a group of first year students (Text 1), this paper argues that the students’ writing difficulties are not due (entirely) to a lack of writing skill but to problems in coming to terms with a professional legal identity.

In order to establish this claim, I show how problems in coming to terms with a legal identity leave their traces in the texture of the letter of advice. The analysis distinguishes between a
social identity as a broad attribute of an individual or group established using a range of texts and semiotic resources, and a writing position associated with a single written text or part of a written text. The relationship between social identities and writing positions is an reciprocal one: occupation of a writing position reflects a person’s social identity, but at the same time control of the linguistic resources associated with a writing position is one of the tools a person uses to establish a social identity.

My argument is that a writing position is a written language analogue of a participation framework in speech. A participation framework is a relationship between speakers, listeners and those spoken about structured by an activity or social occasion (Duranti 1997; Goodwin 1990). For example court proceedings can be seen as a framework that defines roles for participants such as counsel, a judge, a defendant and plaintiff, and instructing solicitors. A written text such as a legal letter is similarly produced in an activity context that defines participant roles for author and reader. In this activity context, writing positions are individuated by three major factors: the actions performed through the text, the use of the ‘telling’ of text to represent the writer and reader, and the characteristic stance or position the writer occupies in relation to what is being written about.

*Action:* A position or role for the writer is defined by the genre of the text and by the social practices accomplished through the text: as responder, adviser, instructor, commander. At a micro level positioning is determined by the speech acts associated with individual clauses or clause complexes.

*The ‘telling’ of the text:* A spoken text establishes indexically a representation of the speaker and listener through reference to the situation of the telling. Similarly written texts also index a reader and writer. Where there is a direct communication with a particular addressee, as in a letter, written language indexes the situation of the writing in a similar way to spoken language. Written texts addressed to a general readership, on the other hand, are best understood through an extension of narrative theory as discursively constructing an implied reader. Where the author is writing not on behalf or him or herself but in a well-defined professional role the text may also be seen as constructing an implied writer by analogy with the literary notion of the narrator.

*The stance taken by the writer:* Most clause and clause complexes do more than represent states of affairs as true or false. They indicate something about the stance that the writer takes in relation to the content of the clause or the position from which the writer sees the facts expressed by the clause. Frequently this positioning is not idiosyncratic but is related to the role or the social identity occupied by the writer. For example. More generally stances are expressed in a broad range of ways. These include:

- use of citation and intertextuality to frame and take a stance towards the ideas of others (Giltrow 1995)
- use of evaluation to adopt a stance that is formative of an academic discipline (Graham 2003)
- use of mental attitudes such as knowing, believing, desiring expressed by the writer in relation to propositions (Beneveniste 1971)
- use of epistemic modality to express the degree of certainty or uncertainty felt by the writer in relation to a particular proposition
- use of the synoptic grammar of nominalisation to turn clauses into nominal groups, thereby allowing them to be recontextualised in relation to discipline-based or institutional categories and frames of reference (van Leeuwen 1996; Halliday 2004). For example Dias et al. suggest that an explanation of the syntactic complexity of student legal writing lies in the specialised categorisation of experience characteristic of legal analysis, resulting in a ‘more intense interest in the hierarchical interrelationships between propositions: specific propositions are seen in the context of others, and relationships of cause, effect, condition and concession are highlighted’ (Dias et al. 1999, p. 55).
- Taking a stance towards actions. The writer is positioned by the way he or she controls the actions of others: making requests, giving orders, making plans, suggestions or recommendations. Positioning in relation to action is indicated by the
grammatical system of mood and also by deontic modality. The writer may also take a stance towards action through ‘key’ in Goffman’s sense (1974).

Positioning often changes because the writer occupies different positions in different segments of a text. Successful construction of a social identity requires the ability to move seamlessly from one position to another and to reconcile the contradictions between the different writing positions. In learning to write like lawyers students not only have to learn to occupy the writing positions associated with legal texts, they also have to learn to negotiate the conflicting demands of these multiple positions.

A letter of advice

This section examines the first task faced by a group of first year law students in their practical legal skills program, writing a letter of advice to a client. This is the first writing task in which students are required to make a transition from writing about the law to writing within the law, that is, writing in role as a lawyer. The letter requires students to write from a range of positions and therefore provides a good example of the way multiple writing positions leave their traces in linguistic texture. Students have a great deal of trouble with this task and it is noticeable how poorly written the result is.

The letter (Text 1) is written by the Barry ‘firm’ of students. After some early withdrawals from the course, Barry consisted of 14 students completing the first year of either Arts/Law or Science/Law double degrees, 5 male and 9 female. Of these perhaps 11 remained actively involved through the program, although most of the work was done by a smaller group of 5 or 6. All the writing was collaborative. Typically there was a consultation of the whole group where the writing tasks were divided up into shorter subsections completed by small groups.

Barry’s simulated client (and the defendant in the hypothetical case presented to the students as a basis for their years’ work) was a sculptor, Susan. Susan’s sculpture (Close Encounters of the Worst Kind) had collapsed after being suspended from the ceiling of a lobby of a new building owned by the Victorian Development Corporation (VDC), the commissioners of the work. This collapse destroyed another work by Susan located in the lobby (Angry Penguins), delaying the opening of the building and causing loss. Documentation provided to the students about this case included a narrative of the facts of the case set out in the form of instructions. While the hypothetical case raised a number of issues, the central one was whether Susan had failed to fulfil the terms of her contract with the VDC, was responsible for the fall of the sculpture because the sculpture lacked ‘structural integrity’, and was therefore liable for damages, or alternatively whether the VDC was responsible for the fall of the sculpture through failing to hang the sculpture correctly, and therefore liable to pay Susan for Angry Penguins, the sculpture which had been destroyed in the fall and which had not been paid for. Even if it was found that Susan should be paid for Angry Penguins, a subsidiary issue was whether she should receive the full sum owing, as it had emerged that Angry Penguins was substantially completed not by Susan but by Fred Townsend, the unqualified owner of a foundry and metalworking business used by Susan.

In writing a letter of advice to Susan about her legal position, the students were required to focus not on technical points of law but on the client’s position in terms of obligations, choices to be made, and actions to be undertaken. This need is reflected in the structure of the ‘letter of advice’ genre given to Barry firm by their tutor and discussed by them at their first independent firm meeting:

1. Summary of factual instructions
2. Identify problems
3. Explain the law
4. Draw conclusions
5. What client should do

In Text 1 the summary of the factual instructions has been deleted and only the final four elements of the structure remain. Text 1 begins with a short statement of the problem to be addressed, then it addresses each of the relevant terms of the contract in turn under
subheadings, seeking to both explain the law and to draw conclusions, and finally moves to a statement of the client’s liability.

**Text 1 Student letter of advice**

This text omits the presentation of facts and reproduces only that section which offers advice on the terms of the contract. Original numbering and spelling is retained.

<table>
<thead>
<tr>
<th>‘CLOSE ENCOUNTERS OF THE WORST KIND’</th>
</tr>
</thead>
<tbody>
<tr>
<td>We perceive that the main problem is whether or not you can be held liable for the damages caused by the collapse of ‘Close Encounters’.</td>
</tr>
</tbody>
</table>

**The Contract**

In our opinion, the terms of the contract as stated in the order form are as follows:

1. **You were required to supply and install ‘Close Encounters’**
   
   It is obvious that you supplied ‘Close Encounters’. It is on the question of installation that we believe the Corporation will argue upon. We believe that you have a strong case for installation; the structure was established in place for use, and the word ‘install’ is a very ambiguous term. So we believe the Courts would be more inclined to find in your favour here.

2. **Suspension was to be organised and directed by the VDC engineering office, and they were to supply the suspension apparatus**
   
   This follows on from the issue of installation. However, before we can make any further conclusions regarding your liabilities, we believe it is necessary to acquire a statement from structural engineers clarifying an engineers vocational duty in regards to suspension being organised and directed.

3. **Structural integrity required**
   
   The Corporation may allege that pre-contractual negotiations between yourself and the Corporation representatives constitute a separate term and/or collateral contract. After extensive examination, we believe that your negotiations were neither a term or collateral contract. Instead we feel it is a representation on your behalf. A representation does not give rise to a breach of contractual duties and obligations even if it is false.

   However, the Corporation may try to obtain a remedy under section 52 of the Trade Practices Act (1975). Then it would be necessary for us to try to prove that you didn’t mislead or deceive them in your pre-contractual negotiations. We feel that the pre-contractual negotiations between yourself and the Corporation representatives were vague and ambiguous. For it is unclear whether they intended for you to seek professional advice. Also, the term ‘professional’ can differ in meanings. Thus, in you consulting Fred, it would be necessary for us to decipher whether or not he could be considered a professional.

   Again we are faced with the issue of ambiguity in defining terms. Due to this we see the stronger case here as being in your favour.

   Therefore we feel your case would be sound in relation to abiding by the term of structural integrity.

4. **Property and risk in said items to pass on completion of installation**
   
   Again we are faced with the problem of defining installation. ‘Installation’, as stated earlier, is an ambiguous term of the contract. We would argue that installation occurred when the structure was fixed in place.

5. **Work to be completed in a proper and workmanlike manner**
   
   As the Corporation did not adequately specify what constituted proper and workmanlike manner, there will be a problem arguing against you not acting in this way. If you considered your manner to have complied with the term
specified, the courts are more likely to find in your favour, and in doing so, you cannot be liable for breaching this term.

**Liability**

In short, we think you would have a reasonably sound chance of defending the allegations posed by the Corporation for the damages arising from the collapse of ‘Close Encounters’.

As of yet, we do not have any expert opinions from structural engineers giving their view on the cause of the fall. Obtaining such a document could assist your case, as well as further substantiating reasoning behind our conclusions.

Although one might expect that the letter is merely an artificial exercise, it retains its integrity and resembles the writing of a professional solicitor more than it resembles an academic writing genre. The genre has its own ‘memory’ (Bakhtin 1986). It shapes the students by bringing with it from its primary context in legal practice constraints which remain in force even in an academic setting.

**Writing positions in Text 1**

Writing a letter of advice leads students into an advisor stance. Students are forced to do more than apply the law to ‘the facts of the case’, which is what they are familiar with through the case method of law used in their teaching and assessment. The writing of the letter occurs as part of a textually-mediated adversarial practice (Smith 1990). It is the first of a series of continuing exercises based on a set of simulated case documents (Feinman 1995).

The students are required simultaneously to occupy and to integrate the positions of: offering advice to a client, reasoning about the application of law to facts, and projecting the course of future events in the event of legal action. They have to find the right law, apply it to the facts, project potential consequences in terms of client obligations, actions, liabilities and rights. They then have to present the results in a way that recognises what the client is interested in and needs to know, while deleting technicalities that are of no interest.

These three writing positions correspond to three types of clauses, labelled A, B and C in Table 1 below. A clauses provide advice from solicitor to client: *we feel your case would be sound.* These clauses are usually main rather than subordinate clauses, and usually have ‘we’ as the explicit subject of a propositional attitude (*feel, believe, see, think*). These clauses indicate the giving of advice, that is, they constitute a current interaction between the solicitor and the client. Opinion is also expressed through epistemic modalities embedded in B clauses: *the Corporation may try to obtain, you cannot be liable* (indicated in Table 2 as A/B clauses), or expressed as separate A clauses: *you would have a reasonably good chance*.

Another index of positioning in A clauses is the use of the first person *we*. There are 12 uses of *we* with an opinion or attitude verb in Text 1, emphasising the status of the letter as opinion. This is an exclusive *we* referring to the members of the legal firm but excluding Susan the client.

B clauses project likely future actions as part of legal proceedings: *there will be problem arguing against, the courts are more likely to find in your favour*. They are usually in future tense or contain a modal element. Participants are *you* (Susan, the client) or an inclusive *us* referring to solicitor and client acting jointly. Participants also include the *Corporation* (the VDC) and the *courts*. Verbs are generally legal actions: *argue, allege, obtain a remedy, find, defend, assist your case, prove*. The modalities are deontic, and express suggestions, options or requirements in relation to future actions when Susan is offered advice about what should be done: *it would be necessary for us to try to prove, it is necessary to acquire a statement, necessary for us to decipher*. In B clauses the authors position themselves as concerned to anticipate a range of future options and their likely consequences, that is, as able to manage future risks and benefits. This is evident, for example, in the use of conditional modality and the use of *if* to indicate contingencies: *If you considered your manner to have complied with the term specified*. A writing stance in relation to a future course of action is also implicit in the evaluative nature of the language: *your case would be sound, you have a strong case*.

C clauses relate to past events which include the making and fulfilment of the contract and demands made by the Corporation, for example, *the Corporation did not adequately specify*. 
Tense varies between past and present, depending on whether the focus is on past action or present interpretation. These clauses refer to the contract either intertextually through reproduction of the wording or through nouns such as term. C clauses tend to be presented synoptically as reduced or non-finite clauses: for breaching this term, abiding by the term of structural integrity.

These three clause types are summarised in Table 1.

Table 1: Linguistic correlates of writing positions in Text 1

<table>
<thead>
<tr>
<th>Clause type A</th>
<th>Clause type B</th>
<th>Clause type C</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Action/Role</strong>&lt;br&gt;(linguistic realisation: speech acts, lexis)</td>
<td>Giving advice</td>
<td>Arguing before courts/legal process</td>
</tr>
<tr>
<td><strong>Participants as writer and reader</strong>&lt;br&gt;(linguistic realisation: pronouns)</td>
<td>We (the firm)/you the client</td>
<td>‘You’ (the defendant)/‘the corporation’ (the plaintiff)/the courts</td>
</tr>
<tr>
<td><strong>Stance taken by writer</strong>&lt;br&gt;Linguistic realisation: propositional attitudes ‘we believe’, epistemic modality</td>
<td>Advice and opinion&lt;br&gt;Linguistic realisation: present tense</td>
<td>Recommending action&lt;br&gt;Linguistic realisation: Deontic modality ‘it is necessary’, conditionals ‘in doing so’, evaluation ‘would be sound’</td>
</tr>
</tbody>
</table>

The complexity and poor expression of Text 1

What is problematic in Text 1 is not just the range of writing positions that students have to occupy, it is also the need to move from one position to another and to combine the positions within clause complexes. This results in long and cumbersome clause complexes containing many levels of embedding or hypotaxis. For example, in the sentence (Extract 5 in Table 2): If you considered your manner to have complied with the term specified, the courts are more likely to find in your favour, and in doing so, you cannot be liable for breaching this term, the student authors move from past tense reference to the original fulfilment of the contract if you considered, to present tense reference to current liabilities you cannot be liable, to future reference to the likely actions of the courts the courts are more likely to find in your favour.

They also move between a focus on the terms of the contract and a client-focussed concern with actions and liabilities. Similar examples of clumsy and highly embedded clause complexes extracted from Text 1 are presented below as Table 2.
Table 2 Clause complexes extracted from Text 1

Table 2 includes both finite clauses and reduced clauses. Indentations indicate hypotactic clause relations while aligned clauses are paratactically related. Numerals indicate clause position in Text 1.

| Extract 1 | 14  | A  | However, before we can make any further conclusions regarding your liabilities, |
| Extract 1 | 15  | C  | we believe |
| Extract 1 | 16  | A  | it is necessary |
| Extract 1 | 17  | B  | to acquire a statement from structural engineers |
| Extract 1 | 18  | B  | clarifying an engineers vocational duty in regards to suspension being organised and directed. |
| Extract 2 | 29  | A  | However, the Corporation may try to obtain a remedy under section 52 of the Trade Practices Act (1975). |
| Extract 2 | 30  | B  | Then it would be necessary for us |
| Extract 2 | 31  | B  | to try to prove that you didn’t mislead or deceive them in your pre-contractual negotiations. |
| Extract 3 | 39  | C  | Thus in you consulting Fred |
| Extract 3 | 40  | B  | it would be necessary for us |
| Extract 3 | 41  | B  | to decipher |
| Extract 3 | 42  | C  | whether or not he could be considered a professional. |
| Extract 4 | 47  | A  | Therefore we feel |
| Extract 4 | 48  | B  | your case would be sound in relation to |
| Extract 4 | 49  | C  | abiding by the term of structural integrity. |
| Extract 5 | 61  | C  | If you considered |
| Extract 5 | 62  | C  | your manner to have complied with the specified term, |
| Extract 5 | 63  | A  | the courts are more likely |
| Extract 5 | 64  | B  | to find in your favour |
| Extract 5 | 65  | B  | And in doing so |
| Extract 5 | 66  | A  | you cannot be liable |
| Extract 5 | 67  | B  | for breaching this term. |
| Extract 6 | 68  | A  | We think |
| Extract 6 | 69  | A  | you would have a reasonably sound chance |
| Extract 6 | 70  | B  | of defending the allegations |
| Extract 6 | 71  | C  | posed by the Corporation for the damages |
| Extract 6 | 72  | C  | arising from the collapse of ‘Close Encounters’. |
A feature of the Extracts 1-6 in Table 2 is the attempt to combine A, B and C clauses in the one clause complex. In reasoning about the advice to give Susan the students have had to move between anticipating Susan’s needs so as to give her advice, interpreting the law as it applies to the case of Close Encounters, and anticipating legal processes as the case unfolds. Reflecting the students’ inexperience, the language of the letter is far too explicit. It includes reference to all these roles in almost every sentence. The challenge of embedding types of clauses with such different linguistic features within a single clause complex is more than the students find manageable.

Some particular problems can be highlighted. The students need to be specific about agency because who did what is an important question for the law. This requirement for specificity is in conflict with the taking of a decontextualised, synoptic stance because the nominalised clauses that reflect this stance have no subject. The authors frequently (in 25 of the 80 clauses in Text 1) opt for a compromise between a synoptic and a dynamic representation of events through use of non-finite or participial versions of the verb, for example: to decipher, to acquire, clarifying, to have complied, for breaching. These allow some level of agency to be represented because, although there is no explicit grammatical subject, a subject can often be inferred (van Leeuwen 1996). This need to preserve agency, however, frequently results in constructions that are only marginally grammatically acceptable: in you consulting Fred, and in doing so, your manner to have complied.

Another reason for the clause complexity is the nesting of attitudes and opinions. The student in the position of interpreter only has to worry about her own interpretation of a case. In the position of practitioner she has to be concerned with the perspectives of other participants such as the client, the opponents, experts, and possibly the courts, as well as with the dynamic interplay between these perspectives in the course of legal action. In seeking to negotiate between the positions and perspectives of different participants and different positions, the letter presents opinions about opinions about opinions. Thus for example Extract 5 in Table 2 deals not only with the opinions of the letter’s authors as expressed by the modals likely and cannot, it also deals with Susan’s beliefs (if you considered) and with the rulings of the court (the courts are more likely to find in your favour). The students have to negotiate the grammar needed to capture these relationships between different perspectives on, or representations of, events within the one clause complex.

Extract 6 shows a similar pattern of nested attitudes. The student firm’s opinion (we think), the client’s response (defending the allegations), and the Corporation’s actions (allegations posed by the Corporation) are all nested within each other. These hypotactic relationships of modality and projection reflect the complex way in which participants in, and interpreters of, the simulated case read and respond to the interpretations, judgments, attitudes and understandings by the four different parties: the corporation the corporation did not specify, the solicitors (who are the source of the judgment that the Corporation’s specification is not adequate), the client (if you considered), and the courts (the courts are more likely to find). The representation of these relationships in the grammar constitutes a trace of the complex processes the students go through in sorting out the interrelationships of the various participants.

A final point needs to be made about positioning in the Text 1. Although this leaves no direct traces in the language of the text the letter is written in two keys (Goffman 1974). It is written both for the simulated audience of the client Susan, and for the real audience of the students’ university tutor. These two audiences have different needs. Despite the attention paid by the course designers to the construction of an extensive simulation, in practice when the tutor came to read and assess the letter she looked not at the quality of advice to a client but at the merit of the students’ legal interpretation of the facts of the case. The genre of the letter was treated as a ‘red herring’. It could be argued that the students’ confusion was due to the unresolved tension between these two audiences.

**Conclusion**

Using the example of a letter of advice written by law students to a simulated client, this paper illustrates how multiple writing positions leave traces in linguistic texture. This point has practical important as a demonstration of one potential source of difficulty and confusion in student writing. It also has theoretical importance as a demonstration of the way in which
critical discourse analysis can throw light on the formation of social identities. Its theoretical claim is that social identities are not directly realized by written texts. Rather there is an intermediate level of structure I have called a writing position associated with clauses or clause complexes in a text. Writing positions stand in a reciprocal relationship to social identities. A person's social identity is reflected in the writing positions that he or she takes; at the same time writing positions are a resource for the formation of social identities.

References


London, pp. 32-70.