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Lies on the Lips: Dying Declarations, Western Legal Bias, and Unreliability as Reported Speech

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Abstract

When one party is killed by another, there are often no witnesses to the murder other than the killer and the victim who is now absent. In some circumstances, the victim has enough life left to utter some final words to an individual who happens to be in the vicinity of the crime. Usually these statements, known in legal terms as dying declarations, relate to the circumstances of the victim's death, including the identity of the perpetrator. If the crime is investigated by law enforcement authorities, the final words of the victim can be reported by the individual who received this last utterance. If the matter goes to trial, this report may be heard in a courtroom by judge and jury who will decide the fate of the accused, which may include loss of liberty or even death.

Lies on the Lips: Dying Declarations, Western Legal Bias, and Unreliability as Reported Speech

Bryan A. Liang and Anita C. Liang

Introduction

When one party is killed by another, there are often no witnesses to the murder other than the killer and the victim who is now absent. In some circumstances, the victim has enough life left to utter some final words to an individual who happens to be in the vicinity of the crime. Usually these statements, known in legal terms as dying declarations, relate to the circumstances of the victim's death, including the identity of the perpetrator. If the crime is investigated by law enforcement authorities, the final words of the victim can be reported by the individual who received this last utterance. If the matter goes to trial, this report may be heard in a courtroom by judge and jury who will decide the fate of the accused, which may include loss of liberty or even death.

The presentation of the victim's words in court is a dramatic example of what in linguistics is referred to as "reported speech." (Tannen 1989: 98) In the case of a criminal trial, this instance of reported speech is considered by the court as "direct" (i.e., a faithful and literal repetition of the victim's utterance) rather than "indirect," where there is some paraphrasing of the victim's words. However, in practice the boundaries between the two are quite blurred. (98)

Under United States law, when one reports the speech of another for the truth of the matter asserted, such as when the recipient of a dying declaration reports it in order to prove the identity of the assailant, that report is treated as hearsay. Hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (FRCP 801(c)) These statements are generally considered to be untrustworthy and highly prejudicial to the accused since the actual speaker of the words is not subject to cross-examination; hence the statements and their "truth" cannot be challenged. Thus, hearsay is generally excluded (FRCP 802) except "under appropriate circumstances ... [that] possess circumstantial guarantees of trustworthiness." (FRCP 803 Note)

The case of dying declaration hearsay, however, constitutes an exception: that is, the recipient's report of the victim's statements is considered to possess the guarantees of trustworthiness ascribed to direct testimony; albeit hearsay, it is admissible into court for the truth of the matter asserted therein. (FRCP 804(b)(2)) Thus, this legal regime presumes that the declarant's statement is reliable, that the reporter of the statement transmits this information completely and accurately, and that the court assesses this information objectively.

This paper aims to critique the underlying assumptions of the dying declaration exception through an approach that draws from discourse analysis and cognitive linguistics. The functioning of legal rules with respect to the dying declaration is examined within the contexts of English and, more broadly, western culture. (Goodrich 1984, 1987; Pether 1999a, 1999b; Hodge & Kress 1993) The analysis demonstrates that the legal treatment of the dying declaration is severely misguided and should be fundamentally reassessed. This conclusion is ever more important because of the invidious nature of how reported speech, including dying declarations, can be misused to the detriment of the accused and those charged with his or her protection.

Traditional Foundation for the Rule

The dying declaration consists, as noted, of the final words made by the victim of a murder. The assumption that the dying declaration itself is inherently trustworthy appears to be based upon an ideal of the person defined by the Western European religious tradition. ¹

Originally, it appears that the dying declaration exception predated the rule itself. As early as the 12th century, dying declarations such as deathbed statements were already "long understood" by western observers such as Wigmore to be somehow imbued with a "special trust." ² (1974:275) Dying

declaration hearsay did not assume its current status in British courts as an exception to the hearsay rule until early in the 18th century. (257) Typical of the "reasoning" which lifted the dying declaration above the bar of general hearsay exclusion was the presumption expressed by the well-worn legal maxim, "No person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips." (*Regina v Osman* 1881) This ideal was not limited to men; Lord Chief Justice Mansfield noted its applicability to women when he admitted the dying declaration of Lady Douglas, for "would she have died... with a lie in her mouth...?" (Smith 1925)

Through centuries of British common law, substantively similar descriptions of this cultural assumption are extant. ³ Crossing time and the Atlantic Ocean, these perspectives have been expressed by United States courts, ⁴ including the United States Supreme Court:

[dying declarations] from time immemorial ... have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility ... The sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath (*Mattox v. United States* 1895)

Further, the Supreme Court has noted "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection'." (*Ohio v. Roberts* 1980)

In addition to western courts, distinguished commentators such as Wigmore have also agreed that dying declarations have the requisite "circumstantial probability of trustworthiness." ⁵ (1974: 253) It seems that these statements should be admitted as evidence because "the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner [i.e., cross-examination]." (253) Indeed, simple "common sense and experience have time to time pointed [to the circumstances when dying declarations are uttered] as practically adequate substitutes for the ordinary [reliability] test" of cross-examination. (253)

Intimately and implicitly related to the psychological compulsion for a dying declarant to tell the unadulterated truth is the declarant's "fear of divine punishment," ⁶ (254) understood as part and parcel of plain Anglo-American "common sense and experience." ⁷ Apparently, the threat of punishment in the hands of an angry god will result in truth uttered by the declarant:

(1) The declarant, being at the point of death, 'must lose the use of all deceit'--in Shakespeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge... (302)

The validity of the dying declaration stems from the threat of retribution from an angry and omniscient western god and the "irresistible" "awe" of impending death. ⁸ Overall, a consistent body of Anglo-American legal thought and analysis has over the centuries operated under the assumption that dying declarations should be considered an unquestionable source of truth to decide the fate of an accused.

Prima Facie Objections

Even assuming that statements made by the author of the dying declaration to the recipient reporter, a transfer of those words from the reporter to the court, and receipt and assessment of the words by the court are accurate as well as value-free, the rule's rationale is readily criticized on its face. First, the seemingly universally accepted notion that these statements are reliable, according to western judges and commentators is specious. (Wigmore 1974: 289) The universality agreement analysis is a logical fallacy; simply because courts and commentators agree across time in a particular western tradition does not prove the tradition's validity and is merely conclusory. ⁹

Second, from a physiological perspective, even if the author of the statement does not intend to misstate, his or her physical condition may in fact result in a misstatement. (Liang 1998) For example, "Pain, catastrophic physical calamity, and anguish may characterize the circumstances under which a declarant makes such statements. Perception, memory, comprehension, and clarity of expression are

likely to be impaired." (Nesson 1985: 1374) In addition, the declarant may have been using drugs, which may have affected cognition and perception, and may have been in a state of great pain which would tend to discredit the trustworthiness and/or accuracy of the declaration. (Note 1961; Liang 1998: 237) In fact, it is more likely that an individual who has just undergone an attack sufficient to consider death and who is experiencing the stress associated with such an experience would *not* be in a physical state that results in a *more* rational and lucid condition and thus *more* reliable statement than otherwise. (Schwab 1992: 676; Liang 1998: 237-8) Beyond these concerns and again assuming good faith and cogency on the part of the dying individual, if the declarant realizes that time is short, he or she may, by necessity, give only an incomplete and one-sided version of events. The circumstances surrounding the declaration alone may result in a less, not more, accurate picture of the declarant's death.

Further, the party who hears the dying declaration may misunderstand or miscomprehend the statement due to the stress of the situation or by simple mistake, since "honest mistakes, to say nothing of passion, prejudice or self-interest might give us a distorted or false statement as to what the dying declaration was." ¹⁰ (Smith 1925: 207) Finally, the listener in this circumstance is unlikely to attempt to seek clarification or qualification of the dying declarant's statements after he or she has uttered the declaration.

Third, the related cultural assumptions that underlie the rule further weaken it. The western ideal of a "threat" of divine punishment and/or imperative to speak the truth may simply not exist for those who do not adhere to the western religious sects or social groups that embrace such cultural ideals. ¹¹ Clearly, with no fear of eternal or other retribution or compunction to speak the truth, the author can with impunity "color" his or her dying statements to falsely incriminate enemies, friends, or anyone he or she disliked at that particular moment. (Note 1961: 376) Similarly, the *listener* may have an agenda and thus falsify the declarant's statement: if no other listeners are present, a dying victim uttering a dying declaration provides a virtually unchecked opportunity for an unscrupulous listener to falsely identify and potentially convict an innocent party.

The reliability of a dying statement is suspect. Assuming no difficulty in expression and interpretation between the author and the recipient, an exact and value-free replication of the language, untainted, to the court, and an "objective" analysis of that language by the court, the author's statement may be less than reliable due to the physical stress or the circumstance itself; or, even if the author of the declaration is cogent, realizing it as a last opportunity, he or she may color his or her final statements against an innocent. Finally, the listener may be affected by the stress of the circumstances and/or pusillanimous motive thus resulting in a report that significantly varies from the reality of the circumstance.

Dying Declarations as Reported Speech: An Opening Question

On its face, the reliability of dying declarations seems to be highly questionable. However, these *prima facie* objections were considered under the best of conditions--author statements were assumed to be accurate, the recipient of the statement was assumed to comprehend them correctly, and the recipient was assumed to be able to report the author's statement "objectively" to a "neutral" court comprised of a judge and jury, all of whom would then assess them "neutrally" in order to assess the guilt or innocence of an accused party. But on deeper analysis, even if the author of the declaration is assumed to be cogent and honest, is it possible that reported speech is itself objective, neutral, and formally received that way by the court? The remainder of this paper examines the conditions surrounding the presumed legal validity of the dying declaration hearsay.

Language and the Myth of Objectivity

The ways in which we think, the ways we act, and what we experience as humans are all governed by our conceptual systems. Our concepts are normally unconscious, and they guide our behavior more or less automatically and in identifiable ways. Because linguistic behavior is subject to and part of that same conceptual system, it provides a source of evidence that reveals what some of those concepts are. An examination of linguistic evidence reveals, according to Lakoff and Johnson (1980), that our conceptual systems are largely metaphorical. In other words, our actions, understandings, and thoughts of one type of experiences shape our actions, thoughts, and understandings of other experiences. For

example, consider the concept of "argument" as understood in the terms of the metaphor, "argument is war." Lakoff and Johnson (1980: 4) point out linguistic expressions such as:

- . Your claims are indefensible.
- . He attacked every weak point in my argument.
- . His criticisms were right on target.
- . I demolished his argument.
- . I've never won an argument with him.
- . You disagree? Okay, shoot!
- . If you use that strategy, he'll wipe you out.
- . He shot down all of my arguments.

These metaphors fundamentally reflect the manner in which humans of a particular culture conceptualize arguments. They further note:

It is important to see that we don't just talk about argument in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we can defend our own. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we do in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure of an argument--attack, defense, and counterattack, etc.--reflect this. It is in this sense that the "Argument is war" metaphor is one that we live by in this culture. It structures the actions we perform in arguing. (4)

Metaphors therefore highlight some aspects of our experiences; yet they necessarily hide other aspects of those experiences, making it difficult to conceptualize our experiences in other terms. It is also possible to conceive of an argument not in terms of war but in terms of a cooperative activity designed to achieve an outcome of harmony; but for this culture, the notion of argument as war is so deeply embedded co-operativeness and harmony are ritually precluded.

Another example, and one important for dying declarations, is that of the concept of language and the conceptual metaphor that "language is a conduit" for objective meaning. However, human language is not simply a tool through which communicating individuals transfer one or a set of ideas to another without change. Language is not a simple "conduit" (Reddy 1979: 284, 287), a metaphor which implies thoughts and ideas unique to a speaker can be simply taken out of his or her words and then transferred into the recipient's mind, unaltered. What this conception assumes is a fundamental objectivity of language, completely ignoring the recipient's knowledge, experience, and biases; in short, it takes the human condition out of the communicative process. To ignore these characteristics and assume only a passive role in assessing discourse will also ignore the actual, intended meaning of the speaker.

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Yet, in the context of the dying declarations this metaphor is extended to the reporter's own motives. Statements uttered by the author and then received and reported by the reporter are deemed to transfer the objective, neutral, and unchanged meaning from author to reporter to court, a classic application of the conduit metaphor. In addition, when the individual reports the speech to the court, the reliability of the communication that is attributed to the author of the speech is transferred to the reporting party. The United States legal system assumes that because there is a circumstantial and religiously-based belief that the victim has no incentive and/or a disincentive to lie, the *reporter also* possesses these incentives. Thus, on an initial level, the faulty assumption that language is simply a conduit to transfer personal thoughts and ideas "neutrally" and "objectively" from one to another has been applied by the legal system to the reporter's language. But in addition to *language* being a conduit, western courts have applied the conduit metaphor to the *reporter* him or herself as an attachment to the language, so that the cultural reliability bases are attributed to the reporter simply on the basis of his or her use of the author's language. Indeed, the conduit fixes the language's meaning and psychosocial motivations of the author and renders transparent the reporter reporting it.

Even beyond an attempted faithful reproduction of the author's speech and the legal system's potential misconstrual of it and the reporter, when a reporter engages in a "direct," and thus presumably "objective," report of speech, what results is not a simple transfer of the author's meaning but rather a

"constructed dialogue,' that is, [dialogue which is] primarily the creation of the *speaker* rather than the party quoted." (Tannen 1989: 99, emphasis added) This is not to say that the original language of the author is irrelevant; indeed, "every utterance derives from and echoes prior text'." (Tannen 1989: 99; Becker 1984, 1988) However, the concept here is that the words of the author, once stated, are no longer primarily the "property" of the author; they have been acquired by the reporter for his or her own design and purpose. This acquisition places the words in a context which is by definition different from its original utterance as well as with altered intonation, audience, and construction which may alter its originally intended meaning. Thus, the human communicative condition, even when the reporter utilizes direct reported speech, precludes language, or an individual, from being a simply conduit of information in the service of the original author alone.¹³

The myth of objectivity regarding language appears to find its basis in western folk wisdom. "[Americans] assume that when quotations are attributed to others, the words thus reported represent more or less what was said, the speaker in question being a neutral conduit of objectively real information." (Tannen 1989: 108) But, as we have seen, "there is no such thing"; the reporter is *crucial* in making the meaning of the words and reporting speech "*fundamentally* transforms the nature of the utterance... in contrast to the [United States] folk wisdom by which the concept of 'reported speech' is taken literally." (Tannen 1989: 105, emphasis supplied) So it appears that this folk wisdom is in fact the foundational "common sense and experience" upon which the United States dying declaration exception rests in the law.

Thus, the critical distinction between language as objective, neutral, and transferable *versus* language as a representative "echo" of a whole experience of past human reality affected by individual party characteristics appears lost upon those who have established and promulgated the current rule. The legal and cultural folk wisdom of the United States does not recognize that language is a "sign"; it does not merely maintain itself in some sterile objective form but rather shows the shading and complexity of the individual who utilizes it. (Volosinov 1973: 10) Words as signs are "subject to the criteria of ideological evaluation (i.e, whether it is true, false, correct, fair, good, etc.)." (10)

The implication is that reported speech is laden with the goals, objectives, and desires, in sum, the ideology of the person who reports it. These utterances as acts allow the reporter (or any human) to accomplish and obtain specific goals within his or her social group; this includes, perhaps, a wish to obtain justice for an individual wrong; or a desire to play an important role within the social group; or generally to bring "justice" or a perceived order to a chaotic world.¹⁴ Therefore, the use of language as a tool to obtain personal goals is an expected endeavor in a world "that is not naturally disposed to serve our interests." (Herrnstein-Smith 1978: 85) Yet, by recognizing this conception, "we must regard with some suspicion the common view that the basic function or purpose of speech for the speaker is to communicate information to the listener; for, in the absence of further qualification, that view implicitly attributes to our verbal actions a uniquely altruistic set of motives." (Herrnstein-Smith 1978: 85) This is clearly an important lesson for jurists who participate in deciding the fate of an accused on the basis of reported speech such as dying declarations reported by third parties.

Listening and Internal Assessments

The *recipients* of the speech, e.g., the reporter, judges, and juries, are crucial as well to meaning and provide another source from which the nature of objectivity and neutrality can be understood. Listening is not a passive process which is error free if the listener simply pays attention. "Hearing and understanding are dialogic acts because they require active interpretation, not passive reception." (Tannen 1989: 100) Indeed, "responsive understanding is a fundamental force, one that participates in the formulation of discourse, and it is moreover an *active* understanding, one that discourse senses as resistance or support, enriching the discourse." (Bakhtin 1981a: 280-81) Reported speech cannot, by its very nature, be objective because the reporter changes the original construct by his or her constructed dialogue, and then the listener further changes the construct through active interpretation.¹⁵

In addition, the paths to a specific interpretation on which the listener's active perception will follow are those deeply etched by his or her experiences. In evaluating the reported speech, the important aspects of that perception are defined by the listener's "inner speech" or "apperceptive background"--the inner thoughts and perspectives of the recipient, respectively. (Volosinov 1973: 118) These draw upon the culture, background, and biases of the recipient to understand and interpret what has been provided it;

"it is here [the recipient's] active orientation takes place." (118) These well established conceptions will have a tendency to limit interpretation to the path of least internal resistance, i.e., that path consistent with the listener's experiential presuppositions of the world. (Bakhtin 1981a: 281)

Mechanistically, the active orientation and perception of speech assesses and integrates the received speech on two levels; first, a factual base of understanding (*factual commentary* in Volosinov's terminology) is created, which is colored by the apperceptive background of the recipient of the reported speech. Thus, at this juncture, objectivity and neutrality are already lost. Second, an *inner retort* is established which is "organically fused" with the factual commentary; this inner retort represents the editorial idealization of the recipient apart and distinct from the factual commentary. The inner retort further distorts the reported speech and concomitantly weakens any remaining objectivity and neutrality. However, in the outward manifestation of reported speech, "both [the factual commentary and inner retort]... find their expression, are objectified, in the 'authorial' context surrounding the reported speech." (Bakhtin 1981a: 281) The reported speech then comes to be believed as an objective manifestation because of the "authorial" context from which it was taken. Again, a transfer of "authority" from one individual to another is made solely on the basis of the acquired language. But of course, the reported speech is weighted with the burdens of factual commentary and inner retort which have by themselves taken away the potential for objectivity or neutrality; in combination with the reporter's use of it as constructed dialogue, the author's meaning is further diluted and at best leaves only an "echo" of the author's reality.

These difficulties are not limited simply to the report of speech to the judge and jury listeners in the courtroom; even assuming the author of the speech is cogent (and honest), it bears remembering that the reporter when receiving the author's speech was, at that time, a listener, and thus subject to the very same process of factual commentary and inner retort. Thus, the subsequent report of the speech to a judge and jurors is even more tenuously related to the author's meaning since it involves more than the apperceptive factual commentary and inner retort of the judge and jury--the reporter him or herself has already put the author's words through an internal processor of interpretation. Hence, as a fundamental matter, these interpretations of interpretations can bring the final assessment of the original language, without more, a significant distance from its intended meaning. At this level, Volosinov's warning is a propos: "regardless of the functional orientation of the given context--whether it is a work of fiction, a polemical article, a defense attorney's summation, or the like--we clearly discern these two tendencies in it: that of commenting and that of retorting... A failure to take these into account makes it impossible to understand any form of reported speech..." (1981: 119)

But beyond these difficulties, determining the meaning of speech for a particular listener requires an analysis of an extensive array of characteristics even assuming similar apperceptive backgrounds, factual commentaries, and inner retorts. The general linguistic conventions--the "regularities or conventions governing the relation between the occurrence of utterances of that form and the conditions under which they characteristically occur"--must also be understood and have been experienced by the listener. (Herrnstein-Smith 1978: 97) This brings cultural norms and biases to the very forefront of understanding of meaning. In conjunction, an understanding and knowledge of the context of the original speech is essential; beyond the physical circumstances of the authorial context, the *social* and thus cultural basis *between the parties* must be understood and known, including the events and circumstances that led up to the author's speech. Finally, there is "everything else." ¹⁶ (97) However, even if each of these bases is known to the greatest degree possible for human beings, "All of the listener's inferences made on these bases ... will be *less* than the total set of conditions that did obtain, and *different* from the inferences made by some other listener whose knowledge was more or less extensive or subtle, and whose interests in [the utterance] [were] different..." (97) Thus, subjective meaning requires at a minimum, assuming similar backgrounds, commentaries, and retorts, a knowledge of the speaker's linguistic conventions, specific physical and social contexts, and all other important factors; yet even this may not be enough to obtain the meaning of the language through a reporter. But in fact when dying declaration reported speech is given as evidence in a courtroom, there is *never* this extensive amount of information requested, provided, and/or analyzed. And it bears emphasizing that these requirements ignore any cultural assessment of apperceptive background, factual commentary, and inner retort as applied to the author, reporter, and courtroom participants who utter and hear the dying declaration, each of which would tend to cast further doubt on the ability to obtain an objective and neutral understanding of the reported speech. ¹⁷ (Tannen 1989: 105-6) The covert and unexpressed nature of these machinations makes ignorance of them dangerous indeed to the process and outcome of law's efforts to determine truth.

Cosmology and Frameworks in Reported Speech

It is important to note that in addition to simply erring in understanding language, an individual who is confronted with, for example, a scenario where an assault and battery of deadly force has occurred with an accompanying dying declaration, may also misinterpret the *circumstance* surrounding the dying declaration, which then leads to a misinterpretation of the meaning of the dying declaration. This is an error of framing.

Any confrontation of a circumstance requires that the confronter set the reality into a framework for presumptive understanding. But a "misframing" through simple incorrect choice of frame on the basis of the individual's cultural apperceptions can result in the "importation of a perspective that is itself radically inapplicable, which will itself establish a set, a whole grammar of expectation, which will not work..." (Goffman 1974: 308-9) This has serious implications for dying declarations. First, this misframing by definition cannot be checked or corrected because only the reporter was present at and is reporting on the event. And second, only the reporter's (mis) conceptions will be provided in court, using the constructed dialogue of the dying declaration; hence it will be the only one provided to the court when the dying declaration is admitted for the truth of the matter asserted. Clearly, this incontrovertible misframing will severely prejudice the accused.

Note that particular misframings may be common within a culture. Indeed, varying potential frameworks may exist, but choice of a single right or wrong one may be common within a social group. Although individuals make up a particular society, a belief that results in a generally common reaction to a particular circumstance may prevail; indeed, one important illustration of this phenomenon is the United States legal and folk wisdom that assumes that reported speech represents an objective and neutral component of communication untainted by the reporter. The set of these primary frameworks, including language, its specific use, and how it is interpreted, together are a fundamental component of a social group's culture.¹⁸ The "framework of frameworks" is the culture's belief system, or its "cosmology." (Goffman 1974: 27)

A social group's cosmology dictates the group's understanding of reality, including the schemes through which the group places occurrences and circumstances as well as the interaction between these schematas, including "the sum total of forces and agents that these interpretive designs acknowledge to be loose in the world." (Goffman 1974: 27) Because cosmologies are premised upon certain basic assumptions of how the world works, changing those assumptions thus exposes different cosmologies even between apparently similar individuals. Important assumptions include "existence of second sight, divine intervention, and the like." (Goffman 1974:27) Thus, for example, a belief in a divine being is a critical determinant in how a particular framework, and thus how a particular cosmology, will interpret social events such as language. Even individuals who appear similar can see, react, and interpret a given circumstance differently. This is an important consideration for all those in roles important in assessing a dying declaration -- reporter, judge, and jury.

But the cosmological differences need not emanate from so dramatic a source to put into relief how interpretation can differ. The same circumstances or social event at which two individuals of a similar apparent cosmology may be assessed quite differently on the basis of mundane differences in preference. For example, consider the following very simple example of this difference:

an individual's role in an undertaking can provide him with a distinctive evaluative assessment of what sort of an instance of the type the particular undertaking was. In that sense, it has been argued, for example, that opposing rooters at a football game do not experience the 'same' game, and that what makes a good one for a participant who is made much of is just what makes it a bad one for a participant who thereby is made little of. (Goffman 1974: 9-10)

This example is directly applicable to the circumstance where an author of a dying declaration utters his or her final words. In this circumstance, both the author and the recipient are physically present at the very activity in question; but it is the *role* of each--the author *versus* the reporter--that makes the evaluation of the event what it will be as well as a potential source to highlight divergent cosmologies. But the presence of this differential cannot, by its nature, expose a generative error in the framing of the event because a measured comparison of the two is impossible--one of the parties is dead.

Subsequently, only a one-sided context and misframing will be propagated, meaning that only the reporter's cosmology will be represented when the reporter relays his or her description of the event to a court.¹⁹

Of course, even if participants in a social event have the same cosmology and come to the same conclusion regarding that event, that consensus does not make the agreed on evaluation true. The mechanism by which the consensus is established is a key component in assessing whether the proposed cosmological interpretation indeed comports with reality. In making this assessment, a useful distinction to consider is that between natural frameworks and social frameworks. (Goffman 1974: 20-2)

Natural frameworks represent assessments, ideals, and conceptions that are rigid and do not rely upon any emotional or human perspective of choice. These frameworks simply rely on "natural determinants" and thus, "full determinism and determinateness prevail." (Goffman 1974: 22) Examples of such natural frameworks include physical laws such as the conservation of energy or Newton's second law. Thus, the individual who is applying a natural framework to observation of an individual who drops a ball from his or her hand would "know" that the ball will fall to the ground rather than go up. On the other hand, social frameworks are those frameworks which rely effectively upon an individual's apperceptive background and are a function of social circumstances, customs, culture, opinions, and perspectives. As such, these social frameworks vary as the individual's cosmology varies. Human behaviors in this context are assessed as

doings [which] subject the doer to 'standards,' to social appraisal of his action based on its honesty, efficiency, economy, safety, elegance, tactfulness, good taste, and so forth ... Motive and intent are involved, and their imputation helps select which of the various social frameworks of understanding is to be applied. (Goffman 1974: 20-2)

This distinction of frameworks is particularly powerful in explaining the current treatment of dying declarations. Western courts and commentators have apparently confused this very categorization: the "truth" of dying declarations, the conduit metaphor of "objective" transfer of meaning through language and the reporter, and the "neutrality" of the court judge and jury as listener, all have been placed within a natural framework rather than where they appropriately belong--within a social framework, where "social appraisal" and "motive and intent" of all parties are essential to understand the event. This inappropriate placement explains the "authority" with which the court treats the reporter and reported speech.

Indeed, if the conceptualization of a particular circumstance occurs through a description of the details of the event (i.e., through a "symbolic formulation" of the relationship between those details) (Swanson 1965), cosmology provides the foundation for how the descriptions of those details will be composed. However, there is a significant danger of error when attributing one translation of an event to a natural framework such as, for example, describing the action of a party who raises a hand as a neuromuscular process, when that same act is being considered functionally as another cosmological interpretation such as a greeting or show of anxiety--a *social* framework.²⁰ The error is in assuming that because a social event has one viable explanation using a natural framework within a particular cosmology, all explanations within that particular cosmology use natural frameworks. Unfortunately, this illustration is typical of the transparent social-to-natural transformation process through which the court validates the "truth" of an author's dying declaration and the reporter's subsequent report to judge and jury. This faulty transitivity does not recognize how the "events of one order, that is, [description of] behavioral interaction, become events of another order, that is, social interaction" (Swanson 1965); and that in order to effectively assess them, these events should be evaluated on the latter basis, not the former.

Context

Fundamentally, what is required is an understanding of the interface between cosmologies and the implications of interacting social frameworks in an effort to understand meaning.²¹ (Bakhtin 1981a: 293; Swanson 1965) This recognition of course reinforces the notion that to comprehend any social reality one must assess the interaction of information--whether that information stems from language, perception, memory, preexisting knowledge, or anything else, i.e., one must assess context. (Ortony 1979:1)

Volosinov in the 1920's criticized language researchers for "divorcing the reported speech from the reporting context." (1973:119) Volosinov noted that, in fact, the

object of inquiry ought to be precisely the dynamic interrelationship of these two factors, the speech being reported (the other person's speech) and the speech doing the reporting (the author's speech) After all, the two actually do exist, function, and take shape only in their interrelation, and not on their own, the one apart from another. (119)

It would thus appear, then, that contrary to the United States legal and folk wisdom, and consistent with the rejection of the conduit metaphor, the reported speech alone cannot convey the meaning of the author without a detailed consideration of context. However, even further, because expression of the author's speech is accomplished through a tangled web of language of one but expression by another, the actual meaning of the author cannot truly begin to be known unless one somehow teases apart the interactions between the two through a consideration of frameworks and cosmology. This problem, and the problem of unavailable knowledge regarding context, exacerbate the difficulties in relying on dying declarations for the truth of the matter asserted.

But, in fact, beyond any lack of knowledge associated with the context in which the author's speech was uttered, when the reporter reports this speech, it is always in a very different context than the original. Reported speech will "always be subject to certain semantic changes... [and] one may bring about *fundamental* changes [in meaning] even in another's utterance accurately quoted." (Bakhtin 1981a: 340) As such, it is "inevitable" that such speech will be transformed by the reporter through the reporting context. (Tannen 1989: 101) And in relation to the legal and folk wisdom of the United States, once again,

when an utterance is repeated by a current speaker, it exists primarily, if not only, as an element of the reporting context, although its meaning resonates with association with its reporting context ... In the deepest sense, the words have ceased to be those of the speaker to whom they are attributed, having been appropriated by the speaker who is repeating them ... [which] is in contradiction to American folk wisdom applied to the reporting of others' speech... (Tannen 1989: 101)

Thus, the danger here is that the reporting context, a dramatic courtroom setting in a murder trial where there is a strong presumption to "right a wrong," may result in significant contextual distortions of the author's speech which emanated from an altogether different circumstance.²² This setting, with its concomitant error in assuming a conduit conception of the reported speech and natural framework regarding its truth, can also result in the absence of any attention to the reporter's "motive and intent" in reporting the speech, and thus any conscious or unconscious distortion of the author's meaning.²³ (Bakhtin 1981a: 340) Further, no relevant investigation occurs as to context--for example, whether the author's speech was spontaneous, induced, or even provoked, i.e., "constructed in the service of some immediate interactional goal." (Tannen 1989: 105) Overall, the reported speech to the court is simply considered literal truth and, in fact, has an "enhanced reality, the incontestable truth of the overheard."²⁴ (105)

The Creativity and Drama of Reported Speech

The use of another's words by a reporter is a creative act. Words taken from another situation and imported into a current one represent "not a passive act of 'reporting' but rather an active one of creating an entirely new and different speech act, using the 'reported' one as source material."²⁵ (Tannen 1989: 108) Indeed, through the use of another's utterance, the reporter has created a dialogue that is typical of fiction and drama.²⁶ (101) For example, as Hernnstein-Smith (1978: 64) notes, the use of *il miglior fabbro* is not simply a quote with a citation to Dante's *Inferno* when used by Eliot in his dedication of *The Waste Land* to Ezra Pound; Eliot "made it his own" with his own meanings and connotations when he used it--the process of quotation is in fact a "fictive utterance," a created drama, not because the *events* are fiction, but because the very *reporting* of them is. Thus, through a creation of a drama by utilizing another's speech, one can create an evaluation of the utterer's emotions, ideals, concerns, and motivations, but with the apparent objectivity of an outside observer.²⁷ (Tannen 1989: 125)

But in this creative use of another's speech, the substantive meaning of the original can be, or is inevitably, changed. The author's context has not been appreciated; and the reporter's context is certainly different, and, beyond simple location, with his or her chosen "intonation," he or she can show a variety of different functional appearances in distinction to that of the author's; "the impetus for weakening the peripheries of the utterance may originate in the author's context, in which case that context permeates the reported speech with its own intonation--humor, irony, love or hate, enthusiasm, or scorn." (Volosinov 1973: 121) Hence, reporting speech and the creative processes linked with it have resulted in a "decorative" flair, the latter of which is often elevated in importance when assessing the author's meaning more than the actual words of the utterance itself.²⁸ (104-6; Besnier 1993) In addition, other creative acts may be made upon the speech which can result in a statement "more forceful and more active than the authorial context framing it." (Volosinov 1973: 121) Thus, it is the *reporter's* conceptions and creative methods that are the focus when the author's meaning is assessed; in law, this distortion is reinforced by the legal system's cosmology which treats the "objective" report (and reporter) as simply a conduit of the author's truthful statement. But because the meaning of any author's utterance is a function of the reporter and the reporter's creative tendencies to construct the dialogue, the "truth" of the matter asserted will change as the reporter, and his or her "individual style," changes. (Tannen 1989: 132) Indeed, the word cannot be separated from the conceptual nature of its symbolism, and it forms an "internal dialogism" that interacts with the object associated with it. (Bakhtin 1981a: 279)

However, even if the reporter is vigilant about his or her "objective" report, embellishment or omission is simply unavoidable. (Miller 1979) There is always some need to fit the facts into the form of common communication; reported speech must, by definition, reflect not the relationship between the party who is being quoted and the reporter but the reporter and the audience that is currently present. (Tannen 1989: 109) For example,

the direct, 'Well done! What an achievement!' cannot be registered in indirect discourse as 'He said that well done and what an achievement'. Rather, we expect: 'He said that that had been done *very well* and was a *real* achievement.' Or: 'He said, *delightedly*, that that had been *done well* and was a *real* achievement.' All the various ellipses, omissions, and so on, possible in direct discourse on emotive-affective grounds, are not tolerated by the analyzing tendencies of indirect discourse and can enter indirect discourse only if developed and filled out. (Volosinov 1973:128-9, emphasis added)

But in combination with the reporter's "decoration" and potentially hidden factual commentary and inner retort, the meaning of the original utterance can be changed from the positive and congratulatory perspective to a cynical and insulting one if the reporter simply adopts a sarcastic tone, or even an unenthusiastic one, in an effort to make the utterance appropriate for the current audience.²⁹ (Bakhtin 1981a) Indeed, this "code displacement"³⁰ allows the ideological agenda of the reporter to be expressed "under the guise of a faithful re-enactment of previously spoken material ..." (Alvarez-Caccamo 1996: 42) As Bakhtin (1981b: 68-9) notes, it is the age-old problem of interpretation: "is the author quoting with reverence or on the contrary with irony, with a smirk?"

Thus, the creativity of the reporter, whether by reporting speech with a loss of tone, animation of dialogue, or change in voice quality, results in a distortion of the context of the speech. Recipients of the reported speech without these cues are subject to the significant danger of misinterpreting the author's meaning. (Tannen 1989: 123-4) Hence, "indirect discourse 'hears' a message differently; it actively receives and brings to bear in transmission different factors, different aspects of the message than do the other patterns..."³¹ (Volosinov 1973: 129) By ignoring this aspect of reported speech, the associated value judgments of an utterance from both the author and the reporter are ignored by or lost on the subsequent listeners--the judge and jury who will decide the fate of the accused.

Reported Speech and Construction of Reality

However, assuming that the reporter does wish to convey some sense of reality, there is significant concern regarding how the reality is constructed by the reporter and the court. For example, if a reporter in a court is telling the circumstance from which he or she received the dying declaration, including the words of the dying declaration itself, inevitably he or she will not remember, or have perceived, all the details regarding the context (even if questioned about this, which may not occur). But a specific *image*

is retained in the mind of the reporter and is used when he or she, in a creative sense, reconstructs the scene and utterance again for the court. The reporter has a remembered model based on an image in his or her mind regarding the context and words of the dying declaration but then fills in details which would *seem* to be true; this creation is reported through language to the jury *as precise truth*. (Bartlett 1932) The jury then reverses the process by using this language to reconstruct an image as to what it believes to be the context and meaning of the declaration (i.e., it creates "a *possible world* ... within the confines of negotiated authenticity"). (Alvarez-Caccamo 1996: 34)

So the process, which presumes truth, allows the reporter to "reason out" the details of the context and thus the meaning of the dying declaration, which are then taken as true through the court's cosmological validation. The jury then creates its own reality and details therein utilizing the reporter's language. However, *neither* the reporter *nor* the jurors actually know the truth so there is a propagation of "filling in details" that will distort the true circumstances of the author's dying declaration--its context. Importantly, there will be no opportunity for correction since the reporter and the judge never know how the jury has "reconstructed the reconstruction." This process alone can result in significant distortion, but if there is a misframing by the reporter, the "reconstruction" will truly be a creative exercise of imagination by the jury. And further, it should be noted that there are no other communicatory cues presented by the reporter, so details regarding those are left to be filled in as well by the jury. Hence a broad range of details that are potentially *consistent with* the recreations can be filled in even though they can ultimately be of opposite effect to the actual meaning of the author of the utterance; however, they will not be considered wrong because they fit within the created model. ³²

In addition, when the recreations by the reporter and the jurors are made, they are made with their own factual commentaries and inner retorts consistent with previously known facts, circumstances, and experiences (i.e., their cosmology) Thus, the words and hence images presented by the reporter have a meaning because of the listeners' connection with the familiar; however, those familiar contexts color the meaning of the reporter's speech to those listening. (Tannen 1989 100; Miller 1979: 217) Hence other examples of dramatic dying declarations shown through entertainment modes such as television, novels, newspapers, and movies as well as previous legal proceedings immediately lend themselves to be applied to a current dying declaration utterance. ³³ But it is exactly these associations from general experience that may be significant sources of error when interpreting a current circumstance. (Miller 1979: 4-5)

Indeed, the wide cloak of this associative tendency is not easily shorn. There is no question that the cultural beliefs associated with dying declarations represent a powerful force in consonance with the cosmology of the judicial process. Hence,

dying declarations have every element of dramatic evidence. As the last utterance of a sentient, conscious being, standing on the threshold of eternity, they possess an impressiveness out of all proportion to their evidentiary value. In homicide cases, the elemental passions are at any moment apt to override the judgment. A court may be judicial and impartial, and a jury dispassionate, up to the point where the dying declaration is admitted, and then find its impartiality and self-restraint seriously tried over the recital of the dying declaration. (Wharton 1912: 29)

The strengths of these associations may alone be sufficient to result in conviction, even in the face of contradictory evidence: "the dramatic effect which dying declarations are bound to produce may easily cause a jury to disregard all contradictory testimony as well as the limiting instructions given by the trial court." (Note 1961) But the court's cosmology reinforces and emphasizes allegiance to the culturally biased reconstruction; the prejudicial nature of the resultant associative story is given authority just as the reporter is given the authority of the author of the reported speech. Thus, the danger of the court-attributive truth to the utterance and the connection to culturally known circumstances is the propagation of a powerful venue that maintains a mistaken belief in truth of this reported speech.

The Court and Inertia

Of course, it is understandable why some western courts have made such a leap of faith in accepting all the rather unrealistic assumptions necessary to conclude that dying declarations are reliable. Understanding the differing conceptions of natural versus social frameworks and the difficulties in assessing "the *unity of the social milieu and the unity of the immediate social event of communication*"--

the context and social framework of the author's speech as related to the context and social framework of the reporter's speech--is simply not easy. (Volosinov 1973: 47) Further, an attempted analysis of the appropriate contexts and frameworks does not at the outset result in a limitation of all possible meanings, but, in fact, "an extreme expansion and a further complication of it." (Volosinov 1973: 47) Because context does not just involve what was said, but also "everything else," with some characteristics important, some less so, and some not at all, non-linguistic noise may make the truth-finding process an extremely challenging enterprise. As well, another complication is that language can be indeterminate. The same words utilized appropriately can result in the construction of different images, whereas the use of different words may in fact result in the construction of the same image (Miller 1979: 208); "any current curse word can become a word of praise, any current truth must inevitably sound to many other people as the greatest lie." (Volosinov 1973: 47) Meaning may also vary due to the functional pattern of words on the basis of interplay or use (e.g., metaphorical versus literal). (Goffman 1974: 441)

But it is precisely the province of a court to take on the task of obtaining the truth, however inconvenient or difficult, for "these rules shall be construed to secure fairness... to the end that the truth may be ascertained and the proceedings justly determined." (FRCP 102) Yet, even though formal rules assign this role to the courts, the cosmology of the legal system places barriers that inhibit its accomplishment. As a "field of ideological creativity," the court as processor of law "has its own kind of orientation toward reality and... refracts reality in its own way"; for "within the domain of signs... profound differences exist: it is, after all, the domain of the artistic image, the religious symbol, the scientific formula, and the judicial ruling..." (Volosinov 1973: 10) Hence, there are cosmologically-based constraints upon how reported speech can be provided, assessed, and interpreted which will be unique to the cosmology of the court and consistent with achieving the "special aims" of the legal system. (117) This formulation is reinforced by the presence of jurors; the presence of these third parties results in a heightened importance of the reported speech in that "it strengthens the impact of [these] organized social forces on speech reception." (117)

This unique court cosmology and third party juror presence impacts the course of presentation and interpretation of the reported speech, resulting in two important dynamics: first, the reporter will provide the speech in a fashion consistent with the court's cosmological purpose--to punish the perpetrator of the murder. ³⁴ This will usually take the form of direct, "objective" reported speech. ³⁵ Second, the members of the jury will be constrained in their interpretations of the reported speech through the "strength" of the social framework comprising the reason why they are there. ³⁶ (Bakhtin 1981a: 280) The "social forces," i.e., cosmology of the court, will impose a specific mode of juror attention upon the speech for the "special aim" of trying an individual for murder; but because of the conduit bias of the court, that assessment of speech will assume, indeed, mandate, that the words will be considered the truth of the matter asserted. ³⁷ In combination, a court's cosmology will generate an "objective" statement by a reporter who is attempting to assist the court's cosmological purpose of punishing the perpetrator of murder. The power of this authority is compelling:

The authoritative word demands that we acknowledge it, that we make it our own; it binds us, quite independent of any power it might have to persuade us internally; we encounter it with its authority already fused to it. The authoritative word is located in a distanced zone, organically connected with a past that is held to be hierarchically higher ... It is therefore not a question of choosing it from among other possible discourses that are its equal. It is given (it sounds) in lofty spheres, not those of familiar contact. Its language is a special (as it were, hieratic) language... [it] must not be taken in vain... It demands our unconditional allegiance. (Bakhtin 1981a: 342-3)

From this vantage point it would appear that the result of the legal proceedings are very nearly pre-ordained against the accused.

Indeed, as the reporter exudes more certainty in his or her rendition of the reported speech, i.e., the more "dogmatic" the report, the less leeway jurors will have in interpreting the speech in any other way than that presented by the reporter. (Volosinov 1973: 120) Because of the conduit assumption, jurors will have little discretion and thus no formal power to question the individual reporter's creative bias so as to assess the author's speech on its own merits. And the effect of a reporter's progressively more certain rendition of author's speech is exacerbated by the difficulty that an individual's factual commentary and inner retort have a tendency to blur away when reported speech is involved. (Volosinov 1973: 120-1)

This problem is compounded by the phenomenon of listeners, when interpreting a statement, to "save the interpreter from exposure as someone who presumes competence--cultural as well as linguistic--he does not have." (Goffman 1974: 497) In other words, the reported speech, even in the presence of conflicting details, is interpreted as speech that a "competent" individual in the role of an "objective" reporter of a dying declaration in a murder trial setting would provide--speech providing the "truth" of the matter asserted by the dying declarant.³⁸ There is no desire to challenge the reporter's entitlement to his or her role and competence. As Shuman (1993: 155) notes, "recounting an experience in narrative form fictionalizes the experience and personalizes it. In each telling, the teller or author authorizes a particular version of the experience. Any question of the authorization to take a particular stance [would] challenge entitlement."

But with the rule's difficulties and the important questions that they ultimately pose for the adjudications of accused persons, why has the rule remained so entrenched? It would appear that on the strength of the cosmology, the rule weathers any attempts at change through a combination of deference to the authorities who oversee the cosmology and a transposition of any social framework challenge into a natural framework resolution. By its very nature, the power structure represented by law must only allow conflicts regarding the fundamental nature of a cosmology to be resolved by "specialists" within the social group itself. (Goffman 1974: 536-7) When a challenge arises,

these custodians of our cosmology put things to rest [by] affirming a 'natural' [rather than social] explanation, one that allows us to continue without having to alter any of our primary frameworks or their relationships. Understandably, these guardians of our cognitive order will be subject to a certain amount of deference. And here one can see a connection between everyday events and final, official courts of appeal in law, science, and the arts. These institutions, in short, are not merely concerned with maintaining standards; they are also concerned with maintaining clarity with respect to framing. (Goffman 1974: 536-7)

Thus, the system propagates itself through its very weighty inertia; "maintaining clarity with respect to framing" allows the propagation of an age old rule which preserves the status quo lines of authority; its treatment of language continues through an elevated and aloof genre of professional stratification. "It goes without saying that these [professionally stratified genres, such as the lawyer's] language differ from [others] not only in their vocabularies; they involve specific forms for manifesting intentions, forms for making conceptualization and evaluation concrete." (Bakhtin 1981a: 289) Even when some primary assumptions regarding a framework are appropriately questioned,³⁹ other selective "natural" rationales are obtained to maintain the framework and hence "clarity with respect to framing." Indeed, to maintain the comforting organization of the current cosmology, the "guardians" choose "a corpus of cautionary tales, games, riddles, experiments, newsy stories, and other scenarios which elegantly confirm a [natural] frame-relevant view of the workings of the world." (Goffman 1974: 563) We are therefore left with an imperfect system whose "guardians" stubbornly maintain the cosmology of deeming the dying declarants reported speech as unadulterated truth.

Conclusion

"Everything can be moved from one place to another without being changed, except speech." (Tannen 1989: 101) This Wolof proverb expresses a cultural understanding of speech foreign to western ideals, and importantly, to its legal systems. Western presumptions of human nature, whether they be the perception of death with its concomitant psychological effect which somehow forces the human to speak the truth, or the angry god who will punish the purveyor of lies as he or she feels life ebbing away, appear alone to be insufficient to treat the dying declaration as inherently trustworthy. Such cultural models, in combination with the varying cosmologies and frameworks of the legal system, also do not appear to stand the test of an analysis using theories of language. All in all, the conclusion that dying declarations have a "sufficient guarantee of trustworthiness" and the conduit assumption of objectively transferable meaning through language is a flawed and culturally-biased western ideal. Further, the lack of change or critical examination of the rule appears to be an example of self-interested, cosmological inertia. However, this mandated assumption of truth is not harmless: it pervades the thinking of the courts through its judges and jurors and results in decisions that are seemingly preordained even in the face of contradictory evidence. If the legal system is to follow its maxim that the rules of law "shall be construed to secure fairness... to the end that the *truth may be*

ascertained and proceedings justly determined." (FRCP 102, emphasis added) cultural presuppositions within western legal systems must be exposed and theories of language utilized to evaluate, correct, and improve the assessment of language in law. Only in this way can we avoid the "general appearance of unreason" (Wigmore 1974: 255) that currently pervades the law's treatment of language. It is essential that we do so, for the innocence of the wrongly accused, and their life and liberty, depends upon it.

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Footnotes

1 Note that indeed, these "declarations" need not be statements at all. "Any adequate method of communication, whether by words or by *signs* or *otherwise*, will suffice, provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning..." (Wigmore 1974:306) "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye." *Mockabee v. Commonwealth*, 78 Ky. 380, 382 (1880) However, this assertion is questionable on at least two grounds. First, if no verbal declaration is made by the dying individual, presumably the individual must be responding to questions; a nod, or an affirmative with no explication necessarily requires leading questions--impermissible in specific circumstances under Federal Rules of Evidence (1999) Rule 611(c) while simultaneously "producing a statement more convenient than truthful." (Note 1961) Further, it is well known in the medical profession that leading questions may result in misleading answers and thus are highly ineffective in garnering accurate information (Bates 1983:13; Levinson 1987:128) Second, if the individual is in fact unable to articulate his or her thoughts due to the injury and impending death, can the person's cognitive and higher level cerebral function be considered to be reliable? Liang (1998) analyzes the physiologic and psychological data which call into question the reliability of dying declarations. And, of course, non-verbal communication may be misinterpreted by the individual receiving such "declarations."

2 Wigmore (1974:275 n.1) notes that for murder inquests, "if the neighborhood names any one or suspects any one, or if the dead man himself has accused any one before he died, the sheriff ought to attach him who is accused, if he can find him." (quoting 12th Cent. London Customal, in 1 BATESON, BOROUGH CUSTOMS 13 (1904)) As well, Wigmore quotes cases that indicate similar admissibility as early as 1603 in Sir Walter Raleigh's trial, where the accused argued that "a dying man is ever presumed to speak the truth." 1 *Jardine Crim Tr.*, 435, 275 (1603) These examples indicate that the hearsay rule began to be applied and enforced in the 17th century. Quick (1960:109 n.1) also notes that "it seems always to have been true, in cases of homicide, that the dying declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721."

3 For example, Lord Mansfield stated: "The principle on which this species of evidence is received is that the mind impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon oath. The *declarations* therefore of a person dying under such circumstances are considered as equivalent to the *evidence* of the living witness upon oath" (Smith 1925) See also *State v. Brunetto*, 13 La. Ann. 45 (1858) ("The

sense of impending dissolution being considered as offering the necessary guarantees that the [dying] declaration is in accordance with the truth."), cited in WIGMORE, *supra* note 7, § 1438, at 290. Echoing this conception, other British courts noted that "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a court of justice." *Woodcock's Case*, Leach Cr. C. 500 (4th ed. 1789)

4 "There are certain guarantees of truth of dying declarations growing out of the time and circumstances under which they are made, which in contemplation of law are supposed to compensate for the fact that they are not sanctioned by an oath and the party against whom they are used has had no opportunity to cross-examine." *Tracey v People*, 97 Ill. 101, 106 (1880)

5 Indeed, they are considered so trustworthy that even when other testimony is available regarding the subject matter within the dying declaration, the dying declaration is still admissible. (Wigmore 1974:284; Schwab 1992:663) However, the ability to assess truth when the victim is the only witness is highly questionable; the psychology literature notes that assessments of adult credibility are extremely difficult and have been shown to be reproducible only under highly stringent, artificial conditions with Strained observers. (Zaparniuk et al. 1995)

6 As a rationale for the declarant's incentive to speak the truth, Wigmore notes that there are three primary legal articulations upon which the dying declaration hearsay exception rests:

"a. Where the circumstances are such that a sincere and accurate statement would be naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other conditions such as the danger of easy detection or the fear of punishment would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected ...

The exception for dying declarations rests entirely on reason b (the fear of divine punishment)."

Thus, although Wigmore quite candidly admits that there is in fact some possibility that there could be a potential "to falsify", the time of reckoning provides an absolute compulsion for the individual to utter the truth. (Wigmore 1974:254)

7 Of course, "experience" may also be found to hold the opposite: "experience shows... that the mind fails with the body." (M'Kechnie 1929:258)

8 Indeed, even commentators who criticize the current rule agree that: "By and large, however, the 'sincerity guaranty' [of the declarant] theory seems the most cogent reason justifying the exception, even though the basis has not been clinically affirmed. Awe of the unknown and the fact that the declarant really has perceived the event may, though there be lingering doubts, be some persuasive reason for admitted the dying declaration of a deceased person." (Quick 1960:112-13)

9 This can be illustrated by noting the lack of reasoning of courts when concluding exactly the opposite findings; on the one hand:

"It is generally felt that the factors which make dying declarations reliable are sufficiently grounded in the experience of the law to sustain a conditional rule of admissibility. Both the substantial absence of motives to falsify and the solemnity of the occasion lend credibility to the familiar statement that 'a dying man is ever presumed to speak the truth.'" (Note 1961:377, citing *People v Gezzo*, 121 NE2d 380,384 (N.Y. 1954)); on the other, even in the same jurisdiction and the same court: "experience shows that dying persons have made self-serving declarations, such as false accusations, in order to destroy their enemies, and false excuses, in order to save their friends." *People v Falletto*, 96 NE 355, 357 (N.Y. 1911)

10 Stewart (1970:11-2) discusses the significant error rate associated with eyewitness perceptions of events under controlled conditions. Of particular note, Stewart discusses a study which found that for every four accurate fact observations, there were approximately five fact errors reported when lay persons were tested, three errors when law students were tested, and slightly more than three errors when police trainees were tested.

11 For example, in *Kidd v State*, 258 So2d 423, 429-30 (Miss 1972), Justice Smith, in a concurring opinion, noted:

"Napoleon is reported to have said that Mohammed was a success because he invented a religion without any hell. Today, considering all of the many, many denominations of the Christian faith alone and their different concepts and teachings, and leaving out consideration entirely the millions who, sadly enough, profess no religious faith whatever, as well as the multiplied millions who adhere to Buddhism, Confucianism and other non-Christian faiths, can it be said that a man who has been wounded and feels that he is dying is by those circumstances alone automatically stripped of all human malice, anger and desire for revenge and is transformed ipso facto into a devout believer in a life after death and in divine punishment? I cannot think so."

However, courts still adhere to the notion of "awe" when death is imminent. In reaffirming the validity of the hearsay rule, the Pennsylvania Supreme court stated, "while many things have changed in our country and throughout the centuries, one constant force has been man's awe and apprehension of death." *Commonwealth v Douglas*, 337 A2d 860 (Pa 1975) Quick notes that even in religious communities, the concept of eternal damnation is far from uniform (Quick 1960:111-2) Thus, "this development deprives the doctrine of validity when applied to dying declarations in a civilized and sophisticated community... The religious guaranty of sincerity may be merely a pious hope rather than a probably fact." (Quick 1960:111)

12 As Bakhtin (1981a:259, 281) notes:

"Linguistics and the philosophy of language acknowledge only a passive understanding of discourse, and moreover this takes place by and large on the level of common language, that is, it is an understanding of an utterance's *neutral significance* and not its *actual meaning*... [But] [a] passive understanding of linguistic meaning is no understanding at all..." Western legal thought should be added to linguistics and philosophy of language as a field which makes this generative error.

13 Note that "even when dialogue could conceivably have been spoken by the person to whom it is attributed (and the narrator was in a position to hear) our understanding of the powers of memory indicate that it probably wasn't." (Tannen 1986:314))

14 Language is used in an attempt to control the communicative process as well as bring order to the context in which the reported speech occurs. Thus, "by manipulating language, reporters/social actors attempt to *order others around* or *impose and order* in the interpretation of the events being retold, that is, to orchestrate people's world view in a common fashion." (Alvarez-Caccamo 1996:56; Mey 1989:336)

15 "'These forms reflect basic and constant tendencies in the active reception of other speaker's speech, and it is this reception, after all, that is fundamental also for dialogue'." (Volosinov 1973:117)

16 Consistent with this perspective, Volosinov (1973:15) notes simply that words alone are simply inadequate to provide a full conception of reality:

"It is ultimately impossible to convey [for example] a musical composition or pictorial image adequately in words. Words cannot wholly substitute for a religious ritual; nor is there any really adequate verbal substitute for even the simplest gesture in human behavior. To deny this would lead to the most banal rationalism and simplification. Thus, the circumstances of an utterance of a dying declaration, the "pictorial image," may not be effectively expressible by words; however, words are inextricably related to these realities." This interrelationship appears to be lost on courts and commentators in the United States.

17 Other cultures have different interpretations of reported speech in contrast to the conduit metaphor on which the United States culture relies. For example, Tannen (1989:105-6) describes the context of reporter who reports speech that criticizes the listener:

"Any anger and hurt felt in response to reported criticism is, for Americans at least, typically directed toward the quoted source rather than the speaker who conveys the criticism. (In contrast, an Arab proverb has it that 'The one who repeats an insult is the one who is insulting you.')

18 Social and ideological perceptions create the language framework, which then act upon the social and ideological perceptions. (Bakhtin 1981a:288)

19 Goffman (1978:310) notes:

"In all these [sustained, generative errors in framing], embarrassment is eminently understandable. If it is the case that there is a structural logic to every activity, involving a fine mesh of [cultural] presuppositions, then, as suggested, any involvement on the basis of a wrong framework or even an error in regard to any particular element in the frame of an activity will lodge the actor in a diffusely inappropriate relationship to events."

20 I owe the idea of this example to Swanson. (1965)

21 Of course, context extends to persons, places, things, occupation, time, etc. Thus, there is no such thing as a "neutral" word, as Bakhtin (1981a: 293) notes:

"Words and forms... can belong to "no one"; ... All words have the 'taste' of a profession, of a genre, a tendency, a party, a particular work, a particular person, a generation, an age group, the day and hour. Each word tastes of the context and contexts in which it has lived its socially charged life; all words and forms are populated by intentions. Contextual overtones (generic, tendentious, individualistic) are inevitable in the word."

22 Context is critical in other settings and fundamentally changes interpretations on the highest abstract levels. For example, "Langer finds the origin of metaphorical thinking, not in language but in the nature of perception itself, in abstractive seeing. Her account is in striking agreement with Arnheim's (1969) analysis of visual perception as an abstractive process. Particularly relevant is an experiment by one of Arnheim's students, in which observers were asked to describe their impression of two paintings of quite different style, shown side by side. One painting was then replaced by another and the effects of this new combination on the perception of the remaining picture were then noted. These changes had strong effects, often leading to distortions in the perception of a picture. The experiments were actually 'designed to illustrate the psychological mechanism on which metaphors are based in literature.' There, the pairing of two images throws into relief a common quality and thereby accomplishes a perceptual abstraction without relinquishing the context from which the singled out quality draws its life' (62) The confrontation of the two images 'presses for relation,' which produces changes in the related items--changes in keeping with the structure of the context." (Paivio 1979:156, citing Langer 1942 and Arnheim 1969)

23 Indeed, "any sly and ill-disposed polemicist knows very well which dialogizing backdrop he should bring to bear on the accurately quoted words of his opponent, in order to distort their sense... It is, for instance, very easy to make even the most serious utterance comical." (Bakhtin 1981a:340)

24 Once again, this expresses the notion that "most Americans, at least, also divorce reported speech from the reported context: On hearing that another has spoken ill of one, most people look right through the 'reporter' to encounter the reported source." (Tannen 1989:105)

25 As Tannen (1989:105) emphasizes, "'reported speech' is not reported at all but is creatively constructed by a current speaker in a current situation."

26 "'Reported speech,' 'direct speech,' 'direct discourse,' or 'direct quotation'... should be understood not as a report at all, but as constructed dialogue. It is constructed just as surely as in the dialogue in drama or fiction." (Tannen 1989:110)

27 Indeed, through appropriate use of reported speech, "alliances are established through *implicit evaluation* of other social actors, as code displacement... often carries an evaluative effect upon the subject of narration and the characters involved." (Alvarez-Caccamo 1996:42)

28 It is important to note that this effect in relation to reported speech is also extremely complex in terms of assessing its meaning and is itself only relevant when associated with the context in which it is provided. (Besnier 1993:163-4)

29 The means to "formulate verbally and stylistically another's speech and as a way to provide an interpretive frame, a tool for re-conceptualization and re-accenting -- from direct verbatim quotation in a verbal transmission to malicious and deliberately parodic distortion of another's word, slander -- are highly varied." (Bakhtin 1981a:339) Thus, the reporter has many options at his or her disposal, conscious and unconscious, to change the meaning of the reported speech.

30 Code displacement is defined as "the reporter's attempt to *construct an (ideologized) possible world where the proposition and its implicated meanings may be true*: a world where characters are made to speak in a believable manner..." (Alvarez-Caccamo 1996:55)

31 Further, "it is obvious that the same impossibility of mechanical transposition from direct to indirect discourse also applies to the original form of any compositional or compositional-inflectional means that the speaker being reported used in order to convey his intention. Thus the compositional and inflectional peculiarities of interrogative, exclamatory, and imperative sentences are relinquished in indirect discourse, and their identification depends solely on the content." (Volosinov 1973:129)

32 An excellent example of this process in nonfiction is a consideration of Thoreau's *Walden*; Thoreau describes the site where he is to build his home on Walden Pond but never mentions whether there is snow present. The presence or absence of snow are thus both consistent with his description of the site even though contradictory to each other.

33 Individuals, when exposed to dramatic media descriptions, make unwarranted assumptions, attributing actions, behaviors, and crimes to those described therein on the basis of totally unfounded racial and other prejudice. These actions illustrate the power of the associative tendency on the populace. (Babington 1993) Alas, such individuals will be those deciding the fate of an accused in a court of law. But note that when language is not within the parameters of easily associated circumstances and hence without any presumptions of meaning, such as in novel metaphors, interpretations vary tremendously (Fraser 1979:172, Tannen 1989:133)

34 All of this speech, and the modes by which it is transmitted, will be subordinate to the court's cosmological purpose. "The speaking person and his discourse... is of course treated in the ethical and legal realms only insofar as it contributes to the specific interests of these disciplines. All methods for transmitting, formulating and framing another's discourse are made subordinate to such special interests and orientations." (Bakhtin 1981a:350) Indeed, the frame around the reported speech defines use and interpretation of it; this has been pointed out for reported speech in another "objective" context: journalistic text (Waugh 1995:134) In this "objective" reporting, it would appear that using the direct form of reported speech would guarantee "objectivity," as dying declarations would within a court of law; however, "there may be small, or large, differences between the quoted object and its textual representation ... At the very least, direct speech is lifted out of one textual context and inserted into a very different one, which represents it, frames it, manipulates it and subordinates it to another voice and to different communicative goals; by definition, this decontextualization and recontextualization deform the meaning, whether in small or in large ways..." (Waugh 1995:155)

35 Note, however, that there is the opposite danger as well. If a reporter cannot accommodate his or her cultural communicatory abilities to that acceptable by the court, the testimony may not be accepted. This will be primarily related to the interactional "distance" between the author, reporter, and listener and his or her ideological identity. (Shuman 1993:152)

36 The choice and use of words by the reporter in his or her creative discourse *anticipates* some reaction, some answer; thus, the reported speech will be presented in a manner that fulfills this

expectation. Bakhtin (1981a:280), notes, however, these considerations may have been lost upon language theorists:

"All rhetorical forms, monologic in their compositional structure, are oriented toward the listener and his answer. This orientation toward the listener is usually considered the basic constitutive feature of rhetorical discourse. It is highly significant for rhetoric that this relationship toward the concrete listener, taking him into account, is a relationship that enters into the very internal construction of rhetorical discourse... [However, linguistic theories have been limited to taking] the listener for a person who passively understands but not for one who actively answers and reacts."

37 This western court cosmology can be seen as a limiting generative metaphor. As such, it obtains its power from the cosmologically unique set of values and ideals considered normative on the basis of the culture from which it derives. Through the limiting metaphor, however, "[a] situation may begin by seeming complex, uncertain, and indeterminate. If we can once see it, however, in terms of a normative dualism such as health/disease or nature/artifice, then we shall know in what direction to move... But that which seems obvious to the unreflecting mind may upon reflection seem utterly mistaken." (Schon 1979) This would seem to be the case for dying declarations where the dualism may be lie/truth, god/devil, killer/victim.

38 A possible protection against inappropriate use of dying declarations is through educating the jury under what conditions these statements should be used or relied upon. However, commentators have indicated that realistically this alternative seems to hold little potential:

"To tell a jury that a... dying declaration should be wiped out of their minds if they find it does not meet preliminary conditions, but if it does the evidence against admissibility may be used to evaluate its worth, is to pose a psychological impossibility. It is like the use of the old child-like conundrum where one offers a sum of money to a person if he will 'not think of pink elephants for five minutes.' In any event to expect a jury of laymen, a cross section of the community, to be able to understand or apply to the same evidence the differing standards of competency and credibility is to attribute to it a rarely if ever attained level of intellectual and psychological sophistication." (Quick 1960:129-30) Similar criticism has been leveled against relying on the use of limiting jury instructions by learned judges. *See, e.g., Nash v United States*, 54 F2d 1006, 1007 (2d Cir 1932) (finding by Judge Learned Hand indicating that limiting instructions are a "recommendation to the jury [to perform] a mental gymnastic which is beyond, not only their powers, but anybody else[s].") Indeed, these jury instructions appear to result in juries weighting the evidence *more* heavily rather than less. (Broeder 1959:754)

39 For example, the framers of the Federal Rules of Evidence have acknowledged that perhaps not all individuals adhere to a belief in a supreme being to whom they must reckon; however, the Advisory Committee still subscribes to a trustworthiness belief: "while the original religious justification for the exception may have lost its conviction for some persons over the years, it can *scarcely be doubted* that powerful psychological pressure [for stating truth] are present." ([Federal Rules of Evidence. 1999: Rule 804\(b\)](#) advisory committee's note 1999, emphasis added)