06. Framing Discourse as Argument in Appellate Courtrooms: Three Cases on Same-Sex Marriage

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A line of research has examined the use of argument concepts as metadiscursive framing devices in practical discourse. Studying student-led discussions in college critical thinking classes, Craig (1997) found that students occasionally (not frequently) used argumentation terms such as "issue," "conclusion," "reason," and "hypothetical situation," and that the use of such words had interpersonal, as well as logical, functions: depersonalizing expressions of strong disagreement while also helping students to grapple intellectually with issues and arguments.

Later papers focused specifically on "the issue" as a metadiscursive device. Craig (1999, 2000) determined that "the issue" was used to manage the topical focus of student discussions by assessing the relevance of particular contributions and that students distinguished pragmatically among several kinds of issues. In a comparative study, Craig and Tracy (2005) observed that "the issue" was used in student discussions to invoke an argument frame that sharpened points of controversy, whereas in public participation segments of local school board meetings, "issues" more often were presented as vague, yet indisputable problems in need of solution (a problem-solving frame) rather than as matters of controversy (an argument frame).[1]

The present study takes a broader look at the pragmatic use of argument metalanguage and extends the research to a new range of sites. In this report, we examine the discourse of oral arguments in three appellate court cases and testimony in a legislative hearing, all on the question of same-sex marriage. We note that argument metalanguage is used with relatively high frequency and serves important pragmatic functions in the appellate courtroom.

Discourse in Appellate Court Oral Arguments

The state appellate cases that are the focus of our analysis include: (1) *Hernandez v. Robles* (2006) in New York, (2) *Lewis v. Harris* (2006) in New Jersey, and (3) *Anderson v. King County* (2006) in Washington State. Our primary data consist of transcribed audio or video recordings of oral arguments in the three cases. For purposes of comparison with the appellate oral hearings, we examine a transcribed audio recording of a contemporaneous public event related to same-sex marriage, the New Jersey Assembly Judiciary Committee hearings on the Civil Unions Act, held December 7, 2006.

All audio or video recordings are available as online webcasts.[2] The transcripts use a simplified version of the Jefferson system, recording all words, repairs, and instances of overlapped speech, but do not include information about prosody or utterance timing. For background, we have also examined the written texts generated by the courts announcing and justifying their decisions, as well as the accompanying concurring and dissenting opinions.

In each of the cases, same-sex couples had gone to their local courthouse seeking marriage licenses. When the parties were denied licenses, the couples became plaintiffs in civil trials against various state agencies (the defending parties) charging the agencies with unfairly denying them the right to marry. In the New Jersey case, the appellant was the set of state agencies that a lower court had ruled had acted illegally in denying the same-sex couples a marriage license; in the other two cases, the plaintiffs were the appealing parties. As appellants, they were challenging the constitutionality of the lower courts' actions upholding the state law restricting marriage to opposite-sex couples. The three court cases ranged from 65 to 138 minutes in length, with each involving six to nine judges hearing and questioning the arguments advanced by two to seven attorneys representing parties to the cases.

In *Lewis v. Harris,* the New Jersey Supreme Court's October 2006 ruling gave the state legislature 180 days either to amend the marriage laws to include same-sex couples or to create another statutory framework with the same rights as marriage. As part the legislature's deliberations, the six-member Assembly Judiciary Committee held a hearing on December 7, 2006 to receive public comment on a proposed Civil Union Act that would extend to same-sex couples all the legal rights of marriage but under the name "civil union." The public hearing lasted a little over three hours. Of the 54 people who testified, 41 could be described as "pro-gay" and 13 as "anti-gay" even though most speakers on both sides opposed the civil union bill under consideration by the committee, with the "pro-gay" speakers' generally favoring same-sex marriage by that name and the "anti-gay" speakers' opposing any legal recognition of same-sex unions. At the conclusion of the hearing the committee voted four to two to move the bill to the Assembly floor. The Civil Union Act was subsequently passed by the legislature and signed into law by the governor in February of 2007. Over 800 couples became "civil-unioned" in New Jersey in the next couple of months.

This report examines the oral use of argument metalanguage by judges and attorneys in these three cases and by speakers testifying at the New Jersey Assembly Judiciary Committee hearing. Our analysis of the discourse is informed by our understanding of appellate court oral argument (e.g., Dickens & Schwartz , 1971; Tracy, 2009; Wasby, D'Amato, & Metrailer, 1976); state-level appeals courts (Comparato, 2003); testimony at public hearings (Bora & Hausendorf, 2006; Tracy & Durfy, 2007; West & Fensternmaker, 2002); and research involving the larger public controversy of same-sex marriage (e.g., Axel-Lute, 2007; Hull, 2003; Schaff, 2004). Contrasting the legislative hearing to the three court hearings, we find marked differences in the use of metadiscursive framing devices, such that communication in the courtroom is primarily constituted as argumentative, whereas the primary framework of the legislative hearing centers on self-expression. After looking briefly at some general pragmatic uses of argument metalanguage in the court cases, we return in the conclusion to consider the significance of the use of argument language to frame the courtroom situation as one in which advancing, clarifying, and criticizing arguments (rather than, say, dialogue or self-

expression, as in the legislative hearing) constitutes the primary business at hand.

Comparing Appellate Courts with a Legislative Hearing

Although the court cases and the legislative hearing all are concerned with the topic of same-sex marriage and feature arguments supporting or opposing same-sex marriage, the communicative "flavor" of the two kinds of speech events is quite different. The difference arises, in part, from the use of different metadiscursive framing vocabularies. To summarize our overall impression of the difference, courtroom discourse is typically framed as argumentation, whereas the legislative hearing discourse is typically framed as self-expression even though speakers in both types of situations do, in fact, make arguments. The difference can be illustrated in overview by computing frequencies and rates of occurrence per 1000 words in each transcript of four relevant clusters of metadiscursive devices argument terms, logical connectives, self-expression terms, and first person pronouns.

Argument terms frame a contextual stretch of discourse as consisting of arguments or functional aspects of argumentation. The argument cluster included the following terms: argu*, assert*, assum*, claim*, conced*, conclu*, contend*, evidence, issue, point, points, position, premise*, reason* (an asterisk indicates any word beginning with the preceding string of characters). Argument terms occurred more than three times as often in the court cases (average 11.19 per 1000 words) as in the legislative hearing (3.05 per 1000 words).

Logical connectives are words that metadiscursively perform certain argumentative functions by indicating logical relations among terms or propositions without explicitly naming the functions performed, as argument terms do. The logical connectives cluster included: although, because, either, however, if, or, then, therefore. This is by no means a complete set. Other logical connectives were excluded from the cluster either because they occur so frequently in all discourse (as in the cases of and, but, not) or else so infrequently in our transcripts (for instance, consequently, hence, whereas) that comparison across contexts would not be meaningful. Logical connectives occurred more frequently in the court cases (average 13.71 per 1000 words) than in the legislative hearing (10.51 per 1000 words); however, the difference is less marked than for argument terms. This relatively similar occurrence of logical connectives indicates that speakers in the legislative hearings do, in fact, make arguments, even though they are less likely than courtroom speakers to use argument metalanguage to comment reflexively on the arguments they are making.

Self-expression terms frame a contextual stretch of discourse as a personal expression of the speaker. Whereas argument metalanguage depersonalize discourse, constituting arguments as objects to be assessed without regard to the speakers uttering them, self-expression terms constitute utterances as expression of a speaker's subjectivity addressed to the hearer(s). The self-expression cluster included: ask*, believe, express*, feel*, personal*, say*, share*, speak*, tell*, voice*. Self-expression terms occurred markedly more often in the legislative hearing (11.89 per 1000 words) than in the court cases (average 6.77 per 1000 words).

Finally, *first person pronouns* link a stretch of discourse to the person of the speaker or to a group that the speaker represents, thus framing the utterance as an expression of the person speaking or others being spoken for. The first person pronouns

cluster included: I, me, my, myself, mine, we, us, our, ours. These words were used more than twice as frequently in the legislative hearing (67.71 per 1000 words) than in the court cases (average 31.25 per 1000 words).

To summarize, speakers in the appellate courtrooms typically frame their discourse in terms of the presentation and critical discussion of arguments, whereas speakers in the legislative hearing, even though they also frequently make arguments as indicated by the use of logical connectives, typically frame their discourse in terms of personal self-expression. The following examples illustrate the fundamentally different "flavors" of communication produced by these metadiscursive frameworks.

Example 1 (Washington, lines 695-699)

> I conflated them because of course we aren't raising any federal claims. Um uh one last thing before I sit down and yield to my um colleague. And that is to answer the question that's been or the issue that's been raised in the briefing uh but not directly yet in the argument and that's the slippery slope argument. Um in particular the argument about polygamy …

Example 2 (New York, lines 852-859)

> Well wa- we are here with the constitutional arguments it's true that society is ah changes and the changes of roles have been in no small part led us to this point. Ah I I eh would be inaccurate to say that they haven't. But we are here on the constitutional issue. And we believe that u:m there is a discrimination here based on sex because it is a straight but for argument. But for for the fact that ah ah someone ah a woman who's otherwise qualified, a lesbian who's otherwise qualified ahhhh cannot uh marry ah it is but for her sex that she cannot marry …

Example 3 (New Jersey, lines 39-48)

> For the equality claim, it is undisputed on the record before this court that the plaintiff's interests are the same as those of heterosexuals who would seek to choose to marry. There's really no difference. And there is no dispute that the same sex couples and different-sex couples have the same interests. So it's as if when the court raised the plaintiffs' interests for the purpose of the equality claim, that the court has before it different-sex couples who are seeking to exercise that right. The interests are no different, the weight is the same. The other point that seems to be helpful to make at the outset is that the equality claim stands whether or not there is a fundamental right.

Examples 1-3 give something of the typical flavor of discourse in the appellate courts. Note that Examples 1 and 2 include several first person pronouns, and Example 2 includes some framing in terms of self-expression ("I would be inaccurate to say"; "We believe that"); yet the argument framework is primary in all cases. The attorneys primarily refer not to expressing themselves but rather to advancing claims, addressing issues, and evaluating arguments. They metadiscursively constitute claims, issues, and arguments as objects for mutual orientation by the participants. Examples 4 and 5 illustrate the contrasting flavor of the legislative hearing testimony.

Example 4 (New Jersey Judiciary Committee Hearing, lines 83-92)

It's not something I really talk about, but for those of you who wanna know why I personally am so driven for marriage equality and what my drive is. We all have a story. And it's time you knew mine. My partner Daniel and I live in fear every day. That because we don't have the word marriage, should something happen to my parents, some court, some insensitive government official will say we don't care that you're civil unioned, you're not married. And should something happen to me, rather than go to my partner Daniel, my brother, who calls my partner Daniel "Broth," short for brother, will become a ward of the state. To all of you, this is an issue that's political. To me this is my life.

Example 5 (New Jersey Judiciary Committee Hearing, lines 1869-1880)

And uh I agree actually with Mr. Highland, again who's an attorney I believe for the uh, other side. Uh, from me today. But he says that religious and moral arguments are not important in the public square. Actually I think as a pastor I think religious arguments are enormously important. But I would actually agree with Mr. Highland at that point. That I don't think in a pluralistic culture we can make decisions based on this verse or that verse from whatever holy book. I do think that we need to have a reasonable dis- 10 seconds? Alright. But I would say though is given enormous diversity in this room about gender issues, about marriage issues and so forth. I think where we unite as one person is- we don't like this bill, and we don't want it fast. And what I would say is let the people talk about it. Thank you.

Both speakers advance arguments, and the second speaker makes considerably more use of argument metalanguage than most other legislative hearing participants do. In both excerpts, however, the discourse is framed primarily in terms of self-expression—representations of personal or group experiences, thoughts, needs, and wants. Both speakers mention "issues" but, rather than specifying issues to which arguments are addressed as in the appellate courts, these "issues" are vaguely controversial (or not) in the way that Craig & Tracy (2005) discovered "issues" to be in the metadiscourse of public meetings.

Before returning in conclusion to reflect on the significance of this contrast between argument and self-expression framing, we briefly examine two general pragmatic functions of argument framing in the appellate courtroom: constituting the primary framework and constituting specific arguments as objects of mutual orientation and critical reflection by the participants.

Constituting the Primary Framework

As the official name of the speech event ("oral arguments") suggests, the primary framework for communication in the appellate courts centers on argumentation. This primary framework is constituted and maintained, in part, by the metadiscursive use of argument terms. Although any use of argument metalanguage implicitly refers to the primary framework, more explicit references to what is generally going on as argumentation also occur. For example, the Washington case begins and ends with framing statements by the Chief Justice. The opening statement welcomes participants to "our oral arguments" (line 2) and continues with a series of procedural details, for

instances, that "each side in this case will be- will have 30 minutes to- within which to present their arguments" (lines 7-8). In concluding the event, the Chief Justice again refers to what has been going on in general as "argument" and frames this as a cooperative activity in expressing "appreciation to all of the counsel who presented arguments today" (lines 1166-1167). Attorneys occasionally make general references to argumentation as what they are doing, as when explaining how their case is organized in an opening statement, or as when, in Example 2 above, an attorney states, "we are here with the constitutional arguments."

Constituting Standpoints

More specific pragmatic functions of argument metalanguage have to do not merely with presenting arguments, but also making them clearly visible as objects available to the participants to be defended, questioned, and countered by other arguments, such as "the slippery slope argument" (Example 1), "the constitutional issue" (example 2), or "the equality claim" (Example 3). We can only scratch the surface of this large topic, but the remaining space allows a brief look at one more example, which illustrates the metadiscourse of questioning by judges as it functions to clarify an attorney's argument.

Example 6 (New Jersey, lines 113-121)

Judge 1: Moreover you seem to be arguing that because it's complicated to deal with polygamy that somehow undercuts defining um this as a fundamental right whether it's people of the same sex, different sexes or multiple persons.
Atty: What we're arguing Your [Honor]
Judge 1: [it's about] complexity is it
Judge 2: That's right your argument isn't that it's complicated. Your argument basically is that there are public interests that would undergird ah ah a prohibition against polygamy that are absent in this case.
Atty: That's correct Your Honor …

Conclusion

One reasonable interpretation of the discourse examined in this study is that the appellate courts are committed to a situated normative ideal of dialectical rigor in contrast to a more dialogical ideal reflected in the legislative hearing. Rigorous dialectic requires that the standpoints on the floor and the arguments pro and con be clearly and continuously delineated as objects for critical reflection by the participants. As we have seen, argument metalanguage plays a key role in this process, which explains its ubiquitous presence in courtroom discourse. In contrast, the legislative hearing is chock-full of arguments but lacks a clear dialectical structure. A primary communicative norm in this legislative hearing (not necessarily generalizable to other legislative hearings) is that all speakers should be able to express their views and that all relevant views should heard within a democratic process, the normative basis of human dialogue being a commitment to understand and appreciate subjective differences. If lawyers and argumentation theorists are likely to feel that the legislative hearing falls far short of a

normative ideal of critical discourse, ordinary people are just as likely to see the courtroom as an artificial environment that stifles genuine human communication.

Notes

1. Aside from these studies, little research has been done on the pragmatic use of argument concepts in discourse. Studies of "reasonableness" by Fetzer (2007) and Hicks (2006) are of interest in this regard. For background on framing and frame analysis, see Goffman (1974).
2. *Hernandez v. Robles* (http://www.archive.org/details/org.c-span.192955); *Lewis v. Harris* (http://njlegallib.rutgers.edu/supct/args/A_68_05.php); *Anderson v. King County* (http://www.tvw.org/media/mediaplayer.cfm?evid=2005030003C&TYPE=V&CFID=4959463&CFTOKEN=41611210&bhcp=1); New Jersey Assembly Judiciary Committee (http://www.njleg.state.nj.us/media/archive_audio2.asp?KEY=AJU&SESSION=2006, browse to Thursday, December 7, 2006)

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