Applying linguistics: Questions of language and law."

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1. Introduction

> I do not call myself a forensic linguist. I neither object to the use of the term nor particularly care whether or not I am called one. The fact is, I consider myself a linguist who, in this instance, happens to be carrying out his analysis on data that grows out of a court case. I see no reason to add the word forensic, which is a description of the data and the area in which a language problem resides.[....] in any case, the word forensic conjures up images of morgues, cadavers, and death. (Shuy, 1993:200)

This is how American discourse analyst Roger Shuy begins the concluding chapter ('On Testifying') of his influential book *Language Crimes: the Use and Abuse of Language Evidence in the Courtroom* (1993). Shuy goes on to outline both some of the possibilities and some of the limits surrounding the contribution a linguist can make in the courtroom. He describes the special value of primary data, such as audio tapes, as opposed to merely secondary data such as transcripts or insights into states of mind; he recalls the pressure under which experts are cross-examined; and he describes widespread misunderstanding of the linguist's role. Throughout Shuy's comments, a consistent emphasis is felt: linguistics is Science. An expert linguistic analysis is expert to the extent that it is objective and impartial; it is not adaptable to the more partisan needs of any of the legal protagonists [1].

What is as striking in the passage quoted (and in Shuy's book as a whole) as the author's consistently vivid evocation of forensic linguistics is how readily he isolates linguistic enquiry from further engagement with the discourse environment within which his testifying takes place. In many intellectual contexts, such a separation of disciplinary content from

social contexts of disciplinary application would be unremarkable. But the view Shuy presents is in evident but unstated contrast to other influential paradigms of discourse investigation within linguistic and cultural study. In these contrasting approaches, rather than being an inert backdrop which hardly merits comment, the surrounding 'discourse regime', or frameworks of language use in a given institutional setting, are thought equally to consist of complex discourse events which transact social relations, and to be as a result almost as essential to an analysis as the 'object' discourse itself. Critical linguistics, for instance (stretching from stylistic work in the tradition of Roger Fowler or Gunter Kress (cf. Fowler, Kress, and Trew, 1979) through to approaches to discourse more directly influenced by Althusser, Said, or Foucault) typically claims an intricate web of interrelations between the discourse being analysed and a texture of other, surrounding discourses (in some formulations called an 'interdiscourse' (Pecheux, 1982)). For such 'critical' approaches, engagement often leads to an unpicking or deconstruction of the larger fabric of social discourse and an oppositional, rather than instrumentally 'expert opinion' role. More importantly as regards Shuy's testimony, when discourses are understood as being relational or relative to one another in this way, everywhere part of a continuous social construction of reality, then the analytic discourse itself also becomes part of the field of investigation, rather than outside it. No neutral position from which to judge a given 'object' discourse simply objectively is considered possible.

This chapter is about the distance between two lines of approach to applying linguistics in legal contexts which follow from this contrast, approaches which share a number of topics and techniques while differing fundamentally in terms of philosophy and relation to their object of enquiry. I confine myself to three specific concerns. First, I describe the two approaches: the emergent field of forensic linguistics itself and critical analyses usually known as Critical Discourse Analysis and Critical Legal Studies. Second, I offer a slightly more detailed account of 'meaning' issues in particular, suggesting that how questions of meaning are handled in legal disputes can expose questionable assumptions in our beliefs about linguistic expertise. I conclude with brief comment on why, in a period of rapidly changing communications technologies and industries (as well as changing demands being placed on academic expertise), our notions of professional authority with respect to language

and meaning may need further consideration. The instance of language and law may serve in this way, I hope, to illuminate potential difficulties with the concept of 'application' in what we now call 'applied linguistics' (on the assumption than an earlier, presumed synonymy between Applied Linguistics and ELT no longer holds).

2. Forensic linguistics

Over the last ten or fifteen years, forensic linguistics has emerged as a small, but nevertheless relatively distinct new field. (Fore-runners have been variously identified in evidence given by William Labov and John Gumperz in the United States in the 1960s and 1970s, and, in Britain, in Jan Svartvik's critique of the statement dictated by Timothy Evans to police and presented at his trial for the alleged murder of his wife (see Coulthard, 1994:27).) Whatever uncertainties surround definition of the new field, forensic linguistics is evidently in a period of institutional consolidation. It has, for instance, an international (though still quite small) mailbase, and an international professional association (IAFL), as well as (since 1994) a specialist journal edited by Peter French and Malcolm Coulthard at Birmingham, England: *Forensic Linguistics: the International Journal of Speech, Language and the Law* (for a useful selection of forensic-linguistic writings, see also Gibbons, 1995).

In many jurisdictions, in both criminal and civil cases, expert linguistic opinion is now offered on a regular basis. It is also occasionally presented within complaints procedures to regulatory bodies, such as, in Britain, the Independent Television Commission (ITC), the Press Complaints Commission (PCC), or the Advertising Standards Authority (ASA). No authoritative figures are available as regards how many linguists or cases are involved, though the provenance of many of most prominent forensic linguists reflects how far linguistic evidence is constrained by differences between legal systems. Most well-known exponents, such as Judith Levi, Bethany Dumas, Diana Eades, Georgia Green, or Ellen Prince, work in the United States, where Federal Rules of Evidence make the legal system hospitable to expert evidence which is 'reputable science, comprehensible to a jury, and useful' (Shuy, 1993). Rather smaller numbers of linguists practise forensically in Australia and in Britain, where the work of Malcolm Coulthard and Peter French has gained particular authority and prominence.

2.1 Two definitions

What exactly, though, is meant by 'forensic linguistics', the name to which Shuy seems so indifferent? Two main, provisional definitions currently circulate (and were recently debated, informally, on the forensic linguistics mailbase).

One definition is relatively narrow and specific. It characterises forensic linguistics roughly as follows: 'the use of linguistic techniques to investigate crimes in which language data form part of the evidence'. The focus of this definition is on language as a contested object of legal examination. Under this definition there are two main kinds of evidence: identification evidence (who said or wrote what?) and interpretive evidence (what does a given utterance mean?). Investigative techniques suited to both kinds of question can be applied to various sorts of data, from written documents through to the analysis of cockpit voice recorders. In between, common materials for analysis include legal instruments such as wills, affidavits, and contracts, as well as quasi-legal documents which have specific implications in the legal field of tort. Linguistic identification evidence can also be used to supplement more recognised, instrumental techniques for investigating document authorship, such as ESDA (ESDA = Electro-Static Detection Apparatus, invented 1978), a form of testing widely used in the analysis of contested contemporaneous notes of police interviews (see Davis, 1994).

The second definition of forensic linguistics is broader. It draws in a wide range of procedural aspects of law besides specifically linguistic evidence. Under this definition forensic linguistics is something like 'the application of linguistic principles to the practice of law'. Included under this rubric are most aspects of language in a legal setting, including (as well as the kinds of courtroom evidence listed above) statute drafting and interpretation; court reporting; cross-cultural communication and failed communication in the courtroom; and the examination of law as a rhetorical practice. In this understanding, forensic linguistics might claim a role not only as expert evidence but also in activities as various as the training of lawyers and other courtroom personnel, courtroom interpreting, and the monitoring of legal procedures, including for example how well legal terms are understood by defendants, juries and witnesses (who inevitably bring 'ordinary language' assumptions to the technical discourse of legal professionals).

2.2 Four fields of linguistic expertise

Each of the two definitions above is formulated in terms of a given scope for the application of linguistics within the established field of legal practice. In this respect, both definitions can be thought of as functionally-conceived: they delineate a domain of application (within law) rather than a domain of expertise being drawn on (in linguistics).

It is more common, of course, for linguists themselves to sub-divide their professional activity in terms of linguistic specialism, categorising in effect what each 'expert' would bring to the table rather than what the value or use of that expertise might be in the legal context into which it is exported. If we follow this more familiar classification, we are likely to distinguish four main areas of expertise, roughly as Judith Levi did in her helpful overview in the first issue of *Forensic Linguistics* (Levi, 1994).

2.2.1 Phonetics:

Forensic phoneticians are concerned with sound, usually in recorded form. They may be called on to help with voice or speaker identification, for instance in cases involving telephone threats or telephoned claims of responsibility. In other cases, what may be in question is the accuracy or validity of a conversational transcript, or of inaudible material on a disputed tape. Investigative techniques include use of spectrograms and other instrumental approaches, alongside the phonetician's expert intuitions (methods and problems in forensic phonetics have been extensively written-up in *Forensic Linguistics*).

Perhaps the most frequently called-on group of linguists, phoneticians have organised themselves into a separate association, the IAFP (International Association of Forensic Phonetics). Mostly, their evidence is 'identification' evidence in the sense indicated above: it offers a kind of speaker profiling, sometimes rather recklessly called an 'acoustic fingerprint'. More often than not, such evidence is presented by the defence in criminal actions in an effort to eliminate a particular suspect from an enquiry on the basis of accent, rather than by the prosecution: evidence claiming to exclude someone from a given group membership on the basis of a missing or different cluster of phonetic features is considered more likely to be

compelling than the same evidence presented in order to make a unique, 'positive identification' (Levi, 1994:31).

2.1.2 Syntax and style markers:

Evidence of this kind, especially to do with written documents, is also generally concerned with author identification, sometimes on the basis of a relatively small sample of contested writing such as a witness statement, a letter, or a suicide note.

Drawing on intuitions about style, as well as on data from large corpora (for relative frequency of words and their patterns of co-occurrence or collocation), stylistic evidence is concerned to show the relative likelihood of a sample of written text being written by one or another alleged author (for an overview of corpus approaches, see for example Aijmer and Altenberg, 1991; for forensic applications, see Coulthard, 1994). In the case of possible speakers from different institutional settings - such as a criminal suspect and a police officer, in the case of disputed statement evidence - use can be made of register-specific and user-specific sub-corpora, which indicate specific likelihoods and examples of contested patterns found in the document among language users of the respective professional or social groups.

There is an overlap here, of course, between forensic style-analysis and other applications of the same expertise. In the United States, for instance, the linguist Donald Foster (who has recently acted for the FBI in a number of prominent murder trials) started by searching for stylistic patterns within Shakespearean authorship studies (and has attributed an additional poem to Shakespeare); more recently he identified journalist Joe Klein as the author of the anonymously published *Primary Colors*, before shifting emphasis onto forensic projects.

An interesting example of stylistic opinion can be seen in evidence given by British linguist Malcolm Coulthard in the case of Derek Bentley, a nineteen-year-old hanged in the early 1950s but later given a Royal Pardon (and whose conviction has been overturned in the Court of Appeal this year (1998)). Bentley was illiterate and had an exceptionally low IQ; he accompanied a friend, Chris Craig, on a burglary during which Craig fatally shot a policeman. Although Bentley was already in police custody at the time of the shooting, he was executed

for his role in the murder (Craig himself was under-age for the death penalty). Coulthard's evidence during the appeal against the earlier verdict - two decades after Bentley's execution - included an analysis of Bentley's supposed statement to police, in which the relative frequency of occurrence of certain stylistic patterns (including use of the construction 'Subject [+ Verb] + "then"' supports the defence view that Bentley's statement was at least in key sections likely to have been authored by police interrogators rather than by Bentley himself (Coulthard, 1994: 31-3 & 41-2).

2.2.3 Discourse structure and conversational analysis

The most well-known figure in this field is Roger Shuy himself. Shuy's work has for many years been especially concerned with audio-tape evidence, including evidence from secret recordings, and with the accuracy of transcripts produced by one side or the other in a legal action. While concerned with recorded audio evidence, and so in this respect resembling a forensic phonetician, Shuy's analysis of taped conversations focuses not on vocal features in order to identify the speaker (or a regional or social group to which the speaker belongs), but on what constitutes different speech acts and their uptake within the structured continuum of a discourse event. He examines conversational features such as back-channel behaviour, topic initiation, topic re-cycling, response and interruption strategies, intonation markers, pause lengths and local strategies of ambiguity resolution in order to ascertain what is going on not only at the surface level of discourse (exactly what speech event is taking place?) but also in terms of what is going on at the level of intention and motivation.

In his book *Language Crimes*, Shuy reports evidence he has contributed to a large number of cases involving disputed promises, threats, and admissions, as well as cases of alleged perjury and bribery. Bribery, in fact, which Shuy describes as 'one of the more common "white-collar" crimes' (Shuy, 1993:20), provides a clear instance of a complex but analysable discourse event: the structure of a 'completed and felicitous' bribe can be described, and a bribery event accordingly analysed into a series of necessary, component phases: problem, proposal, completion, and extension. Each phase, according to Shuy, has typical tasks and roles for the bribe offerer and for the bribe receiver, as well as typical talk realising the relevant phase. By analysing the speech-event structure of bribery, a bribe can be

distinguished from other, cognate (but in legal terms non-equivalent) speech events, such as an offer: 'The difference', Shuy suggests, 'between an offer and a bribe is simply this: in the quid pro quo of a bribe, one of the elements is illegal' (Shuy, 1993:43). With careful assistance or coaching, Shuy argues, a jury can be encouraged to hear in tape evidence presented to it conversational structures which they might otherwise not be aware of, especially out of context. Ignorance of such structures on the other hand might lead members of the jury, the reasoning goes - particularly with encouragement from opposing counsel - to interpret the discourse in a different way.

2.2.4 Meaning (semantics and pragmatics)

Meaning evidence, based either on semantic or pragmatic expertise, tends to be far less common than phonetic or stylistic opinion even in jurisdictions where considerable use is made of linguistic opinion, as Judith Levi has observed in her round-up of forensic linguistic practice (Levi, 1994:10), though Levi does acknowledge that she has taken no account in her estimate of civil actions or of complaints to non-statutory, regulatory bodies. Opinions as to meaning may be more common as background, case preparation than as courtroom evidence, for reasons of admissibility discussed below.

Where it is occurs, meaning evidence is (inevitably) interpretive rather than identificatory. Such evidence is concerned either with the range of plausible meanings a given word or expression is capable of bearing, or else with the meaning most likely to have been ascribed to a given, contested utterance in a precisely specified context: what, for example, must statement X have meant to readers of document Y on day Z?

Evidence as to meaning can be brought to bear in a number of different legal fields, ranging from nationality law (is someone who holds an 'entry visa' justified in feeling they have a right to enter a country? (cf Coulthard, 1994:37) through to explicating or disambiguating terms in insurance policy disputes and contracts (how is an 'upgrade' to be differentiated from routine maintenance and replacement?). Evidence may serve to elucidate technical terms, slang, and sub-cultural idioms; and it can be used in challenges to the capability of complained-of expressions to bear a pleaded meaning in defamation actions (are the

expressions 'scam' or 'economical with the truth', for example, likely to be defamatory in their ordinary signification? (Durant, 1996)). Meaning evidence can form a basis for argument as to the adequacy or otherwise of warnings printed on cigarette packets, or as to the likely effect of allegedly prejudicial, pre-trial coverage of imminent court cases. More generally, meaning evidence can mediate the gap between legal 'terms of art' ('abuse', 'malice', 'recklessness', and so on) and their 'ordinary language' counterparts, or simply offer an evaluation of ways of construing 'ordinary language' terms used in difficult contexts ('dangerous' or 'safe', when used of, say, a medical appliance or food, or the contextually-sensitive meaning of 'enough' or 'favourite'). Perhaps most famously at present, meaning-evidence might be presented glossing 'sexual relations' as part of the enquiry into whether President Clinton's 'I never had sexual relations with that woman', constitutes perjury, given a reasonable understanding of the question the President was being asked.

Further potential for interpretive evidence along these lines is suggested by another aspect, not fully explored at the time, of the Derek Bentley case referred to above. Immediately before the shooting, Bentley allegedly called to Craig 'Let him have it, Chris' (though Bentley himself denied that the words were ever uttered and claimed that they had been invented by the police). It is a celebrated controversy of meaning-based debate whether 'let him have it' in these circumstances meant 'shoot him' or 'hand over the gun' - a divergence of meaning with quite fundamental consequences as regards Bentley's presumed role in the killing.

3. Critical approaches to discourse and law

The sketch I have offered of forensic linguistics so far is, in each of its constituent descriptions, greatly over-simplified. To avoid any doubt, I should perhaps add that I do not believe these snap-shots adequately describe the work of particular approaches or individual scholars. What they do offer, I hope, is a suggestive contrast with two other influential approaches which we should now consider: Critical Discourse Analysis (CDA), and Critical Legal Studies (CLS). Here again, there isn't enough space to review either field adequately; I can only highlight main directions and issues relevant to the comparison with forensic linguistics.

3.1 Critical discourse analysis

Whereas forensic linguistic work starts from the premise that linguistic expertise can help the existing legal system to work better, Critical Discourse Analysis directs its expertise towards revealing shortcomings or political agendas in how discourses and institutions function, especially in terms of misrepresentation, inaccessibility, or bias.

Critical Discourse Analysis adopts this goal for discourse investigation on the basis of a cluster of general insights about language, including at least the following. Language plays an important role in social reproduction, but is at the same time contested within the overall social order. Because of its unsettled but influential position, language can be usefully investigated in terms of its relations to power and ideology. In discourse, power exceeds the exercise of force or rule of law, and is expressed in asymmetries between participants in discourse events, as well as people's unequal capacity to control how texts are produced, distributed, and consumed. Although underpinned at the level of the political economy of communications, much of the power invested in and circulating through discourse functions almost invisibly, by consent.

While Critical Discourse Analysis is perhaps best known in the form of the work of British linguist Norman Fairclough (Fairclough, 1989, 1995), a range of other, major alternative frameworks also exist, often developed in complex, hybrid forms. Some of these approaches are far less grounded than Fairclough's in concepts (adapted from Gramsci and Althusser) of the state, ideology, and systems of social control. Eminent among such alternatives is the approach, derived ultimately from Habermas, which invokes an ideal of rational communication and critiques 'disorders of discourse' which fall short of that ideal (cf. Wodak, 1996). Perhaps most widely influential at present are approaches drawing on Foucault, concerned with the uneven social dispersal of power through (especially technical) discourses at all social levels, constituting subjectivity as well as social relations (for discussion, see Mills, 1997).

Across its variant forms, Critical Discourse Analysis has in common an engagement with the social operation of language by seeking to show how language is not, as it seems, an invisible

window on the world, but a material practice with a performative capability within the overall formation and reproduction of social institutions through which power, including symbolic power, is unevenly distributed - and also struggled for - across a given society. In particular, language is argued to encode point-of-view, and with it culturally-acquired contextual assumptions which are embedded in the texture of discourse at a level where they are no longer evident. Such assumptions are routinely retrieved by interpreters, however, when triggered as presuppositions or as different sorts of implicature (often as bridging inferences which have to be made by listeners or readers for the sake of the coherence of a piece of discourse, but which in doing so carry specific, ideological assumptions along with them). Because of the differing amounts of symbolic capital different styles or registers of discourse enjoy within the linguistic field, too (Bourdieu, 1991:37-65), even selection of a register or genre can enact power differentials, reflecting the unequal social access of speakers to different parts of an overall, socially available discourse repertoire. While mainstream sociolinguistics investigates variation in the forms and styles of language use, for Critical Discourse Analysis such insights must be linked closely to an analysis of a given political order if they are to be properly understood or challenged.

3.2 Critical legal studies

In one sense, Critical Legal Studies complements within legal studies the oppositional project of Critical Discourse Analysis in linguistics and cultural studies. Similarly influenced by the ideology debates of the 1970s and 1980s, by the discourse theory of writers such as Foucault and Pecheux, by modern revivals of rhetorical studies, and by hermeneutic debates surrounding the writings of Gadamer and others, Critical Legal Studies examines how law acquires its authority and power on the basis of what are viewed as misunderstandings of the functioning of language and discourse.

One way into understanding the concerns of Critical Legal Studies is to consider the phrase, 'rule of law'. 'Rule' simultaneously refers both to a code (or constructed, conventional system) of law, and also to law's regulatory effect or power. The power element of law (its ability to imprison, confiscate, and in many jurisdictions kill) is largely in this context self-explanatory; but 'rule' in the sense of 'code' requires comment. For Critical Legal Studies,

power creates law as system apparently independent of itself, codified and separated from history and circumstances; in this sense law is a formalism required as displacement from the cruder, social realities in which power is exercised, what Stanley Fish has called in a different context, somewhat dismissively, a kind of 'moral algebra' (Fish, 1994:ix).

In dominant perceptions of law, legal values and formulations are believed to be somehow transcendent of history and social interest. In his influential book, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987), as in his earlier and more comprehensive *Reading the Law* (1986), Peter Goodrich describes such discourse as 'a discrete and unitary genre of written authorities constituting a grammar or code, which, if correctly attributed and interpreted, forms a series of necessary truths' (Goodrich, 1987:205). This characterisation is presented by way of contrast with Goodrich's own critique that,

> What has been consistently excluded from the ambit of legal studies has been the possibility of analysing law as a specific stratification or 'register' of an actually existent language system, together with the correlative denial of the heuristic value of analysing legal texts themselves as historical products organised according to rhetorical criteria. (Goodrich, 1987:1)

Arguing that law achieves authority only on the basis of its abstraction from social circumstances or specific history, Critical Legal Studies seeks to unpick legal rhetoric. It investigates especially how, once produced, apparently fixed and timeless rules mesh with and adapt to new and changing social circumstances in which they are applied. Close reading of particular applications of law to circumstances reveals absences and inconsistencies between the principles being promulgated in legal discourse and the 'specific political and ideological motives and affiliations' (Goodrich, 1987:5) which function as driving forces behind its application. As Goodrich puts it,

> In reading the law, it is constantly necessary to remember the compositional, stylistic and semantic mechanisms which allow legal discourse to deny its historical and social genesis. It is necessary to examine the silences, absences and empirical potential of

the legal text, and to dwell upon the means by which it appropriates the meaning of other discourses and of social relations themselves, while specifically denying that it is doing so. (Goodrich, 1987: 204)

Critical Legal Studies suggests that, when implemented or interpreted, legal formalism (the whole edifice of a conventionally-formulated legal code) fails to produce consistent results, so defeating its claims to provide a non-circumstantial, equitable formula for justice. Rather, according to Critical Legal Studies, its decisions turn out to be not so much based on transcendent values as on specific, local considerations and contingencies.

An insightful commentary on Critical Legal Studies (also illustrated with reference to Goodrich's writings) can be found in more recent essays by Stanley Fish, such as those in *There's No Such Thing As Free Speech... And It's A Good Thing Too* (1994). Fish agrees with much in the critique of legal discourse provided by Critical Legal Studies, such as the view that law continuously constructs the principles it is thought to rest on, and, instead of building a set of 'perspicuous and immutable abstractions' as it claims to do, simply rests on a 'self-occluding and perhaps self-deceiving form' (Fish, 1994:179). But Fish goes on to argue that he nevertheless arrives at very different conclusions from those common in Critical Legal Studies, which he characterises as the view that 'the law is a sham or an elitist conspiracy' (Fish, 1994:2).

Instead, Fish suggests that doing law and analysing law are essentially different enterprises: 'doing' law is a practical process of making decisions and exercising power (cf. Fish, 1994:177), in which legal discourse serves as what might be called a screen (in several senses of the word) usefully placed between the contingency of everyday life and the equally contingent character of law's own historically-produced structures. Fish transforms the common-place perception that 'the law is social, not propositional' into an argument oblique to the core insights of Critical Legal Studies. He claims that legal language functions as persuasion, without secure philosophical foundation, precisely *in order to* assist social arbitration and compromises in ever-changing social circumstances. In doing so, law is for Fish one among a number of institutions by means of which 'we negotiate the differences that

would, if they were given full sway, prevent us from living together in what we are pleased to call civilization' (Fish 1994:179).

4. 'Applying' linguistics to law

Forensic linguistics and different strands within critical cultural studies, then, each seek engagement between language and law, but in radically different ways. Whereas Forensic Linguistics presents itself as a sort of service industry, selling expertise to legal practice without commenting on the overall structure of the legal process itself, Critical Legal Studies (and less directly Critical Discourse Analysis) claims a sort of meta-commentary and polemical leverage, on both the procedures and theoretical foundations of the prevailing legal order.

Bringing together the different dimensions of applying linguistics to law which have been outlined above (scope of application; field of existing linguistic expertise; purpose of the application), we can now say that, whether called 'forensic' or not, the linguist can *engage with* the field of law - rather than writing theoretically or imaginatively about it - in any one of four principal modalities:

1.   In an established jurisprudential view, legal language is not so much ordinary language selectively drawn on as a distinct formalism, marked off from ordinary language by careful procedures of definition and construction. Such definition and construction are performed by lawyers for their own professional purposes, and legal discourse is to be understood on lawyers' terms even where a vocabulary is used which overlaps with common usage. Constrained or tamed in this way, language functions to specifically legal principles, supported by a reported history of judgements and precedents rather than by everyday conventions of idiom or usage. Occasionally lawyers may wish to call on linguists to advise them on metalingual issues, employing linguists as extras in legal-hermeneutic practice. The technical character of legal language, however, ensures that it remains securely a field in which lawyers, rather than linguists, have expertise and authority. Almost irrespective of expertise about 'ordinary' language, therefore, the linguist is *excluded from* authority

in this demarcated domain of usage (in a manner somewhat analogous to separations between natural language and other constructed, language-like codes such as computer languages or the language of logic).

2. In a virtually opposite account, law can be viewed as an institution made up of discourse, both in its rhetorical procedures of pleas and writs, injunctions and acquittals, as well as in its reliance on textual exegesis. Since to this extent legal procedures depend on rhetoric, law as a whole is susceptible to theoretical critique and to examination (including critical examination) of its rhetorical form and strategies. In this view, methods for analysing language offer a means of deconstructing legal discourse, exposing its apparently autonomous, technical language as a product of the social conditions, affiliations and purposes surrounding its construction. For linguists within this framework, engagement with law is in effect the inverse of the first type: a kind of oppositional, politicised legal hermeneutics. Such engagement takes place mostly educationally, outside legal practice, with linguistic authority setting itself up *in opposition to* legal authority.

3. Sometimes in criminal cases, the speaker of a recorded utterance or the author of a written document needs to be identified; sometimes a transcript needs to be judged for accuracy. Sometimes, in media law, a publication is alleged by a plaintiff to bear a particular, offensive meaning. In such circumstances, non-legal, social discourse ('ordinary language') comes before the courts. In cases of this kind, lawyers and judges decide the significance or meaning not of their own, technical legal language (as in legal hermeneutics) but of usage as they imagine it functions in the world beyond the courts. Engagement for linguists within this framework involves adding 'expert opinion' to a judge's view or jury's intuitions. In this view the linguist *supplements* legal authority.

4. Finally, in any discussion which is directly about discourse, a vocabulary has to be found, as a sort of metalanguage (or language-about-language, to delineate concepts which deal specifically with the operation of discourse). Some of this vocabulary will

be specific to linguistics ('is this segment velarised?'); other parts of the vocabulary may overlap with terms in common circulation ('who is the audience for this text?', 'How do irony, innuendo or pastiche work?', 'How far are interpretations affected by genre expectations?' etc). Where metalingual terms in technical use by linguists overlap with everyday metalanguage, they may sometimes be co-opted into legal debate; but in this context the linguist is considered superfluous or *irrelevant to* legal process.

It is implications of this final, fourth category which I consider in more detail below. Before doing that, however, I should acknowledge that there is an obvious difficulty with my four-way classification: the amount (and implications) of overlap between categories. An expression of expert opinion about a contested discourse, for instance (my 'type three') inevitably involves elements of 'type four' (metalanguage, including more general assumptions about how features of language are best described). Moreover, if the way a linguist believes irony or pastiche or genre affects interpretation (a 'type four' insight) cannot be reconciled with the lawyer's own, inherently 'type one' view (that is, if 'type four' investigations find themselves at odds with 'type one' hermeneutics), then the linguist's professional duty appears to require less an expert, service role than a critical or oppositional stance ('type two').

Interaction and overlap between my four categories of this kind is important because it warns of a possible crisis of identity for forensic linguistics as an emergent field, if mismatches between the categories turn out to be widespread and inevitable rather than merely local and contingent. How far should the linguist simply unpack her or his specialist tool-kit on demand, leaving broader issues of legal context and procedure to the different professional expertise of lawyers (as is implicit in the opening quotation from *Language Crimes*)? Or how far should linguists endeavour to contribute their own, sometimes different (on some issues, critical or polemical) insights regarding the social circulation of language and meaning, even if that means renegotiating underlying terms of dialogue and engagement between respective fields?

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5. Contesting meaning

The previous section ends by suggesting, in effect, that there may exist aspects of language use which, although essential to legal discussion, are not reducible to current paradigms of forensic-linguistic evidence. In this section, I explore this possibility further, by considering meaning in civil actions (mainly in media law). I suggest that legal deliberations over meaning can present problems to our prevailing notions of linguistic expertise and authority. First, however, we need to establish how legal disputes arise over the meaning of 'ordinary discourse', that is, about utterances from outside the legal sphere whose meaning comes to be contested at law.

In a public sphere in which representations are produced and circulate in such forms as books, films, and radio and television programmes - as well as, increasingly, along the information super-highways - there is always potential for misrepresentation, misunderstanding and offence. Particular occasions on which interpretations of a discourse in the public domain are contested I like to characterise as 'meaning trouble-spots'. Disputes at such trouble-spots - where a sort of interpretive gridlock occurs, with apparently no movement or flexibility possible in any direction - typically involve competing, alternative interpretations of some disputed word, phrase or passage. Interpretive disagreement in such contexts is not about the 'meaning of meaning', in an abstract sense, but gives verbal form to other kinds of social difference and conflict. Significantly, there is rarely, if ever, a *shortage* of perceived meaning. Rather, what is usually contested is a crux, or point at which alternative meanings are presented, and between which arbitration is needed. Everyone believes their own interpretation is clear, even when locked in heated controversy with others who take a fundamentally different view.

But if everyone is convinced they understand exactly what utterances mean, why should a linguist ever become involved? Perhaps such disputes are not about 'meaning', precisely, but rather about the underlying, extra-linguistic circumstances, such as events, histories and attitudes? In any case, meaning is in an important sense whatever people with native-speaker competence take utterances to say; if discrepancies arise, these may be the result of ongoing meaning change, or of inadequacies in reporting nuance and effect in semantics and

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lexicography. On what authority can someone's sense of the meaning of an utterance in their own language be queried or discredited?

The very fact of disagreement or dispute over interpretations suggests that meaning in its broad, social senses is not something about which people share uniform intuitions, in the way that (to some extent) they can be said to about grammaticality or contradiction. Meaning is multi-dimensional; it involves and intersects with a range of cognitive effects, from referring and sense-relations through to connotation, memory and general beliefs. For virtually any utterance considered in the context of a given social interaction, there is therefore likely to be some degree of interpretive variation or divergence, either because of local linguistic obstacles (e.g. with slang or technical terms, or on account of ambiguity and processing difficulty), or simply because multiple, variant meanings are prompted by combining linguistic utterances with background knowledge or beliefs held by some, but not all, members of any given audience group (what a lawyer, in a manner which makes the condition seem marginal and pathological, might refer to as 'innuendo meanings').

So far so good. But at this point, debate over the interpretation of contested utterances in legal cases needs to go off in two different (though ultimately related) directions. The first concerns the underlying model of meaning on which the law relies for its tests and adjudication. The second concerns how, in practice, authority is conferred on particular, pleaded interpretations. Each of these questions is considered separately.

5.1 Meaning models

Where does responsibility for meaning lie (and so also accountability for the social effects of producing or representing meanings in discourse)? It is difficult to see how regulation of discourse can proceed without some answer to this question. But finding an answer is anything but straightforward.

If you believe, for instance, that ascribed effect is the proper test of meaning (as someone committed to audience ethnography, reception theory, or ethnomethodology might), then in a civil legal action the plaintiff should always succeed. Whenever an effect is reported (such as

feeling offended, aggrieved, outraged, or misrepresented), it has been precipitated by a reading which has, for whatever reason (leaving aside occasional cases of deliberate misrepresentation) been actually experienced. Effects prove themselves simply by being experienced and reported; and it makes little sense to say that a Muslim who claims to have been offended on reading *The Satanic Verses* has in fact not been offended, only (for the sake of argument here) that they had no good grounds to be, perhaps because being offended may be an effect of the novel but not part of its meaning. On the other hand, if you believe that speaker-intention or authorial intention provides the best authority for meaning, then the defendant in an action should always succeed (at least whenever rebuttal is on grounds that the effect was not what was intended (or in that sense 'meant'), even if the construction to be put on the words in order to produce such a reading sounds rather like Humpty Dumpty's approach to meaning in *Alice Through the Looking Glass*). You may reject both of these possibilities, insisting instead that it is the form of the utterance itself which prescribes how the utterance is to be interpreted. But it is then difficult to see why anyone should mis-interpret at all, except in marginal respects where specific features of the form are misunderstood. It is also difficult to see why there should be interpretive disputes, as opposed to disputes exclusively about the contents of discourse, in the first place.

These idiosyncratic consequences of trying to allocate responsibility for meaning to specified agents or agencies within a communicative event are produced to some extent by simplistic presentation of each model. That presentation could be refined, of course; and richer, 'combination' models can be identified[2]. But the odd implications of the different models of meaning are also a result of something else: a mismatch between conceiving enquiry into meaning as a search for a singular, interpretive truth, and conceiving enquiry into meaning, within an adversarial system of justice, as a struggle over discrepant understandings in which plaintiffs accentuate as far as possible whichever interpretation is most consistent with their statement of claim, while defendants stretch the meaning they represent as far as possible in another (or the other) direction in order precisely to undermine that claim.

Faced with this difficulty, legal formulations have responded to the obvious need for tests of meaning to be separated from the viewpoints of the immediate protagonists, while remaining

anchored as closely as possible in the circumstances of the particular communication event (for a comprehensive account, see Robertson and Nichol, 1992). The meaning-question asked instead is accordingly: how far is a pleaded interpretation reasonable or warranted? And should the utterance be deemed the cause of the claimed, injurious effect? Put another way, law is concerned with how 'legitimate' an interpretation is, where the political concept of 'legitimacy', carried over into communication, relies on a notion of public recognition - with public recognition, in turn (to gloss the 'man on the Clapham omnibus') based on something like the scale or likelihood of interpretive uptake coupled with some commonly-held standard of reason used in deriving the interpretation.

At present, accordingly, each public arena in which meaning is contested has its own standard for the legitimacy of an interpretation, varying slightly according to that field's own institutional history and founding assumptions. In defamation, there is the test of the 'ordinary and natural signification' of an expression, and with it 'the ordinary reader' and 'right-thinking persons'. In obscenity law, there is 'outrage to public decency' and the controversial 'tendency to deprave and corrupt'. In advertising, the doctrine exists of 'truthful, honest, decent, fair', with related tests in trade descriptions. In copyright law there is the test of 'derogatory' treatment as regards moral rights. Such tests, with their recurrent vocabulary of 'unjust and unfair', 'likely to incite...', 'likely to cause grave or widespread offence', function within the larger framework of legal concepts, mirroring in their own handling of intention, for instance, a more general standard of intentionality: that what you intend is whatever the natural and probable consequences of your action happen to be.

At this point, however, we must pick up a distinction passed over without comment above (introduced in relation to offence being given by reading *The Satanic Verses*): the distinction between 'meaning' and 'effect'. Legal tests typically speak more of what we think of as social effects, rather than 'meanings' (in, say, the sense of mental representations or affective states). Legally words, in fact, convey meaning only to the extent that they serve as instruments of definable actions, such as imputing misconduct, inciting specified behaviour, or causing offence, loss of esteem, or pecuniary loss. Where effects, rather than meanings, are ruled on, meanings can only be in question to the extent that they form part of a causal

chain between discourse and effect.

Although the detail of such a causal chain is rarely spelled out, linkage along these lines *is* commonly assumed, though it is best seen in reverse, from perceived effect back to claimed discourse origin. The social control or regulation which laws are designed to achieve is premised on a belief that certain classes of effect associated with a discourse (primarily encouragement towards specified forms of behaviour) should be curtailed. The alleged capability of a disputed text to produce or cause those effects follows in turn from a perception of the contested discourse coupled with a judgement that such a perception is warranted by the text (that is, a reasonable interpretation rather than an act of whimsy on the part of an audience). What would usually be called a text's meaning is as such a representation of the discourse linked in two directions: in one direction, linked back to the text, both by linguistic convention (of words and grammatical structures) and by derivation (inferential procedures which combine linguistic representations with background knowledge); in the other direction, linked to effect, on the basis of further suppositions about how mental representations prompt or justify social behaviour. So while it may appear to be effects rather than meanings which are being regulated, in order to hold discourses accountable for effects which allegedly follow from them an intermediate, distinct (and so disputable) category of meanings is difficult to avoid: interpretation rather than use of the contested discourse, to borrow a distinction well-made in Eco's essay, '*Intentio lectoris*: the state of the art' (Eco, 1994:44-63).

5.2 Representing meanings in debate

It might be said that issues about how meanings are produced by discourse and in turn produce effects are academic, in all the negative senses of that word. Barristers and others presenting legal cases, it might be thought, deal already with the relevant complexities of language and meaning, only in a more user-friendly and elegant discourse.

This is partly true, and should not be understated. But while legal advocacy presents an undoubtedly rich and sophisticated view of utterance interpretation, it does so more by effective persuasion than by analysis. Arguably claims and counter-claims are made about

contested utterances in legal debate on the basis of sometimes quite casual engagement with the specific practice or mechanisms of interpretation. Where questions arise, for instance, about figurative language (including irony), about how particular speech acts are recognised, about what you could expect from a meaning-preserving paraphrase, or about expectations specific to a given idiom or genre, they are mostly dealt with by means of straightforward, broad-brush appeals to a jury's intuitions and empathy, either with the speaker or with an aggrieved reader (depending on which side of the argument counsel is on). Lawyers defend this approach by saying that to depart from appeals to common sense and emotion in their dealings with juries on these issues misses the point of trial by jury, and is in any case counter-productive.

In English law, discussions as to meaning dispense with interpretive complications as far as possible. They replace such difficulties with the reassuring sense of a judge and jury readily knowing how discourse works and what any given discourse means. In these circumstances, little room remains for the linguist. The judge's authority combines with the jury's intuitions to constitute a legitimising image of the speech community. While intuitions of the protagonists themselves are discounted on the basis that they have a special interest in nudging interpretation towards a specific, self-serving meaning, the intuitions of a jury are sacrosanct. Only rarely (for instance in cases of slang or technical terms, or where specific local assumptions need to be filled in, to explicate an innuendo meaning in defamation) can such intuitions be directly challenged or corrected. Suitably informed, the jury is right, whatever judgement it arrives at about meaning (though it is worth noting that the judgement on meaning is in any case then rolled up in a verdict on an overall case, in which meaning issues play only a subsidiary part).

Given the primacy of a jury's intuitions about meaning, then, is there anything extra the linguist can offer? Certainly not a somehow better, more insightful, or more authoritative reading; in the circumstances, an exemplary reading is only 'exemplary' in the sense of being illustrative, never authoritative. Background information about the history and patterns of usage of expressions may be helpful; but the only authority a linguist might convincingly bring is that of a skilled presenter who is not only accustomed to articulating interpretations,

but also experienced in assisting others with the process of explicating, comparing and evaluating them (though for insightful discussion of complications surrounding the professional status of linguists, see Hutton, 1996).

In practical terms, the linguist might give substance to this role in difficult cases by assisting a legal team in any one (or some combination) of four main ways:

1) By comparing a given usage with other uses of the same expression. This can be done easily and accessibly by using electronic concordance data; such a procedure allows parallel uses of a contested expression to be looked at in their relevant linguistic contexts (from which a great deal of additional information about sense-relations and about an expression's attitudinal or affective properties can be inferred). Such evidence is easily caricatured, however, as 'super-dictionary' work, reflecting current legal reluctance, at least in Britain, to invoke dictionaries rather than jury intuitions as a basis for word or idiom meaning. Appealing to dictionaries and concordances is believed to distract too far from the particular case in hand in the direction of 'general capability to mean' (away, that is, from the contested utterance in its given context towards merely the sentence or sentences which make up the linguistic form of the utterance).

2) By manipulating the disputed utterance or text in controlled ways, substituting into the utterance near-synonyms, cognate terms, opposites, or other patterned alternatives at key points, inviting gradually contrasting intuitions. If extended very far, this procedure is likely to take on the negative associations of pedantry and abstraction which may well characterise 'semantics' in the jury's minds, as well as displacing discussion too far from the specific circumstances of the utterance (as above).

3) By presenting background information about the history, and regional and social distribution, of an expression or given meaning. Such information may be useful as regards slang, or sub-cultural, or technical vocabulary, or to help with allusions involved in alleged innuendo meanings in defamation. Evidence about the likely

social distribution of meanings or interpretations may be particularly relevant when linked with evidence - especially contradictory evidence - about probable readership or audience.

4)   By presenting empirical evidence about interpreters other than the judge and jury themselves, in the form of survey and questionnaire data. Such data can be informative about trends in varying public intuitions as to degrees or scales within a series of abusive or potentially defamatory terms, or accepted or potential paraphrases for contested utterances. It can also report patterns of social knowledge which are highly relevant in dealing with cultural allusions, especially allusions to fast-moving popular culture. Such evidence is also easily caricatured, however, this time as 'opinion poll justice', in which informants appear to vote for meanings which the court is then expected to endorse. The sting of this caricature is again that the authority of judge and jury (as representatives of the speech community in the court, as well as symbolic figures for the authority of the law) may be undermined by a cruder, sociological appeal to popular opinion.

6. Conclusion

One conclusion about forensic linguistics seems unavoidable: there is not one, but many different varieties of forensic linguistics, with very different institutional possibilities. The field can only appear coherent and unified in its search for increased public recognition if a number of fairly fundamental questions about applying linguistics to law are elided or ignored.

Divergence between different strands is manifest not least in terms of admissibility of evidence. While there is undoubtedly forensic expertise in bloodstains and firearms, courts see themselves (and with arguments for doing so) as expert on language. Insofar as linguistic evidence is recognised at all, there is an implicit scale of relative authority: phonetics is considered to offer firmest and most scientific evidence; stylistic evidence is widely viewed as speculative, though the fresh scientificity of electronic corpus approaches may make stylistic evidence more reputable, if suitably presented; meaning evidence is regarded with

considerable scepticism, as being least stable and most difficult to establish.

This scale of respectability of linguistic evidence correlates inversely with another scale: that of relative accessibility of public intuitions about usage. Phonetic evidence is valued most, because least in conflict with accessible (and expressible) speaker intuitions, which it easily illuminates and extends. Stylistic evidence highlights textual details or patterns which, again, are not readily perceived; aided by corpus searches, it can put numbers and tendencies to perceivable textual features. In the area of meaning, however, everyone has intuitions, which glide effortlessly between perceptions about usage and related beliefs, thoughts and prejudices; expert evidence in this domain is therefore more likely to come into conflict with self-confident judgements made by speakers about what their own language means.

The poor prospects for meaning evidence are not helped by the fact that not all linguists, and hardly any lawyers, believe such evidence is beneficial. Some semanticists themselves argue that semantics is in general too contradictory and undeveloped a field to allow rigorous evidence or clear insights (Goddard, 1996). And legal practitioners typically maintain that little scope exists for semantic evidence for two further reasons. First, legal adjudications are based, as has been indicated above, on highly specialised notions of what meaning is 'for the purpose of the law'; so much of what a linguist thinks of as meaning is, from a legal point of view, completely irrelevant. Second, meaning evidence tends to be perceived as an affront to the authority invested in judges, regulatory committees, and - begging fundamental questions about legal process - a jury's prerogative of reaching decisions unencumbered by prejudicial 'expert' evidence. The sense conveyed by linguistic evidence that the meanings of utterances may be complex - and sometimes difficult to establish - can make such evidence seem merely perverse, and especially unappealing to English law and lawyers.

However this may be, meaning investigations may become more complicated rather than less. In a rapidly expanding and diversifying media environment, serving increasingly heterogeneous, multicultural populations, the challenge presented by potentially divergent, niche or minority interpretations arrived at by specific regional or sub-cultural audiences is likely to become greater. Certainly, the complex demographic structuring of audiences

presents problems to accepted ideas of reception based on single or uniform moral principles, or social standards of conduct of the kind which underpin legal notions of 'reasonableness' or the 'right-thinking person'. What is 'reasonable' needs to be established for a specified social group, rather than simply presumed as a sub-stratum of a culture as a whole. Sheer diversity of interpretive opinion seems likely to put increased pressure on the interpretive dimensions of English law, and the technology of the Clapham omnibus may need to be upgraded accordingly.

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NOTES

(1)   It is possible that Shuy protests too much on the issue of 'science'. The sort of discourse analysis he carries out, while undoubtedly impressive at a descriptive level, is often considered *less* scientific than many other areas of linguistic work. For a classic, sympathetic description of the general approach and method, however, see the final chapter of Stephen Levinson, *Pragmatics* (1983).

(2)   Strands in modern hermeneutics offer sophisticated understandings of intention in communication, for instance; and defences of the centrality of form in interpretation are the stock-in-trade of stylistics. For audience ethnography, see Morley (1992), or many of the essays collected in Hay, Grossberg and Wartella (1996). Richer models proposing relations or combinations between ostensive intention and inferential work carried out by the hearer can be found everywhere in linguistic pragmatics, from early insights of Paul Grice (cf Grice, 1989) through to Sperber and Wilson's Relevance Theory (Sperber and Wilson, 1986). In literary and cultural study, the first four, theoretical essays in Umberto Eco's *The Limits of Interpretation* (Eco, 1994) are highly persuasive on the respective roles of writer and reader. David Bordwell's *Making Meaning: Inference and Rhetoric in the Interpretation of Cinema* (Bordwell, 1989) convincingly explores comprehension and interpretation in film studies. A powerful attempt to extend insights of speech act theory into cultural analysis is John Searle, *The Construction of Social Reality* (Searle, 1995). Suggestive arguments presenting Relevance Theory as the core of an approach to cultural analysis which might be called an 'epidemiology of representations' can be found in Dan Sperber, *Explaining Culture: A Naturalistic Approach* (Sperber, 1996).

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