Language and Law

A resource book for students

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First published 2016

ISBN: 978-1-138-02558-5 (hbk)
ISBN: 978-1-138-02557-8 (pbk)
ISBN: 978-1-315-43625-8 (ebk)

Chapter A9

Forensic Evidence

DOI: 10.4324/9781315436258-10

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

Language and freedom of expression

The concept of free speech or freedom of expression is, in the end, a political or philosophical topic more than a linguistic one (for a short introduction, see Warburton 2009). That topic, however, is central to understanding how language functions – and what its value is – in modern democratic societies. Where the boundaries lie between protected and unprotected speech depends on analyses that depend on linguistic assessments, whether the distinctions made are formulated in terms familiar in linguistics or in an alternative, separately developed legal **metalanguage**.

Freedom of expression has become particularly controversial over the last two decades, not only because of obvious political examples of its curtailment. The concept is crucial in understanding new forms of language behaviour on the Internet, especially given widespread misapprehension that language use online is not regulated in the way that face-to-face interaction, print publication, broadcasting or film exhibition all are. Online verbal communication poses major challenges to regulation, including at least the following:

- New kinds of **speech event** are being created, blending formats of one-to-one dialogue, centre–periphery publication, variable participant and overhearer groupings (McQuail and Windahl 1993).
- Current and archived discourse are accessible together to an unprecedented degree, flattening different historical contexts into a continuous present.
- Communicators and recipients may have vastly different belief systems and background knowledge, challenging face-to-face notions of mutual background knowledge.
- Communicators and recipients are often located in different legal systems, with sometimes very different norms and restrictions regarding what can and cannot, or should or should not, be communicated.

A9 FORENSIC EVIDENCE

This unit describes how linguistic knowledge can in some circumstances contribute to the functioning of law through an applied channel: that of forensic linguistics. There are two main ways this happens. First, linguistic evidence is sometimes presented in particular cases, assisting the police, courts and regulatory bodies. Second, analysis of language use in the legal system and insights that follow from it can help to improve **access to justice**. In this unit, we illustrate the variety of linguistic work that takes place under the heading **forensic linguistics**. In Unit B9, we exemplify techniques involved in forensic linguistic analysis in several fields. Our overall aim is to show how expertise has been brought to bear by forensic linguists on evidential questions. In doing so, we also note difficulties associated with use of specialist linguistic evidence in law.

DOI: 10.4324/9781315436258-9

What is linguistic evidence?

Most work in forensic linguistics is concerned with linguistic evidence. But in order to understand the significance of this statement, we need first to clarify what we mean by **linguistic evidence**, as there are different ways of understanding this phrase.

Several senses come together in relation to the phrase forensic linguistics. There is *linguistic evidence* meaning language data: text messages, letters, product warnings, trademark signs, etc. associated with a crime or dispute. These are evidence in the sense that such data – in principle equivalent in potential to footprints, blood samples or ballistics – will be interpreted, embedded in a legal argument, and later submitted as evidence in a legal case. But there is also a second sense of *linguistic evidence*, meaning the informed interpretation of such data (i.e. of the other kind of 'linguistic evidence') by an expert linguist. Such linguistic analysis may take the form either of a written report or spoken courtroom testimony; and it may have a direct impact on the outcome of a case. A third sense of *linguistic evidence* should also be noted: that of cumulative, published or publicly stated knowledge gathered through linguistic research regarding how language works (or sometimes fails to work). When this kind of evidence is brought to bear on problems in law, it can contribute to reform of legal institutions and procedures by informing public policy (e.g. by improving arrangements designed to assist protagonists who are not native speakers of the language used in a court system).

Forensic linguistics can be understood as a combination or layering of these notions of evidence. It brings expert analysis of language use, based on linguistic research, to bear within the legal system on questions that involve contested material consisting of utterances, texts or some other manifestation of language behaviour.

Four functions of forensic linguistic analysis

We have shown how forensic linguistics consists of different kinds of work. Those kinds of work are undertaken across different fields of language. So in order to illustrate the scope of forensic linguistics, we need to outline both dimensions of difference, which we do here by describing four main professional areas.

Assisting in police investigation

Language evidence that assists criminal investigation or is presented in court as oral testimony by an expert witness is the popular image of forensic linguistics. This perception is shaped by media imagery of other, different kinds of forensic science. But we can still usefully start with this image. Consider two hypothetical situations that might benefit from linguistic expertise:

(A) Police investigators propose to assume a fake online identity to hunt for a paedophile. How should a 40-year-old policeman talk online so he sounds like a teenage girl?	(B) The police have an audio recording of a bank robbery. Is it possible to tell from the speech attributes of the bank robbers in the recording whether they were using their first or a second language, or where they come from?

It is easy in both cases to see how linguistic expertise might make a contribution. Police officers are not trained to analyse language. When they investigate crimes where some piece of relevant evidence consists of an utterance or text (e.g. a voicemail, an allegedly fraudulent document or suspicious text message), a linguist might provide useful assistance based on research into how language is used. In other scenarios, a linguist might be able to verify the region of origin of asylum seekers by identifying their native language (Eades 2005); or be able to point to a class of likely suspects on the basis of their accent or dialect (Tanner and Tanner 2004); or help decode secretive **disguise language** such as gangster jargon (an example of how a secret language of this kind was decoded can be found in Gibbons 2003: 294–5). A linguist might be able to match someone's way of speaking during a phone call to a type of speaker through analysis of features of voice quality (note, however, that telephone quality may affect recognition accuracy; see Nolan *et al.* 2013); or a linguist might be able to attribute authorship of an anonymous document, using techniques we examine in Unit B9. Because problems related to the language used commonly occur in situations involving crimes and legal disputes, the range of situations in which linguistic expertise can be useful is very wide.

Resolving language crimes

Many legal problems take the form of people's verbal actions, including talking, shouting, writing, making phone calls and sending messages. A surprising number of speech acts, especially performatives, can accordingly become the subject matter of a legal action (see the list in Greenawalt 1989, summarised in Unit A8). In each area identified by Greenawalt (e.g. offering a bribe, extortion, encouraging someone to commit suicide, issuing threats), evidence provided by a linguist as to how an utterance realises conventions of verbal behaviour in the wider system of verbal communication could help clarify whether some particular form of words might fall within the scope of a defined illegal act.

Language crimes, to use the term adopted by Shuy (1993), attach different degrees of importance to the three levels of speech act investigated in linguistics (first distinguished by Austin 1962; see Unit B7): the **locutionary** level (the act of making the utterance); the **illocutionary** level (the force of the utterance); and the **perlocutionary** level (the addressee's uptake as prompted by the utterance). It is the locutionary act, for example, that leads to liability if someone divulges confidential information without permissible grounds. Most crimes, however, are concerned with illocutionary acts. Since such acts are often indirectly performed, and can differ vastly from the direct or canonical version of a given act, proving that an utterance performs a particular illocutionary act may be difficult. This is where linguistic analysis has on many occasions been found by lawyers to assist in presenting a case. For instance, it has been shown to be possible to threaten someone by making a seemingly innocent enquiry, 'How's David?', in the middle of a disagreement (David being the addressee's son, so putting David's well-being in question; Shuy 1993: 109). The flouting of the Gricean maxim of relevance by introducing David's well-being as a topic prompts an implicature that this enquiry is still in some way relevant to the disagreement, and contextually therefore a threat. In cases of defamation, the same author (Shuy 2010) has shown how certain

kinds of illocution (malicious intent or negligence) and perlocution (damage caused) may be illuminated by systematic linguistic analysis.

A different class of legal cases is concerned not with the defendant's verbal behaviour but with how police officers may have distorted the meaning intended by interviewees by fabricating confessions or altering witness statements. Traditionally, no evidence is thought more convincing to a jury than a suspect confessing to having committed the crime. Coulthard's (2002) comparison of the wording of murder accomplice Derek Bentley's confession with a corpus of police language, however, suggested that some features of the confession (e.g. repetition of temporal expressions including 'then' and 'I then') resembled the sociolect of professional police officers far more than they resemble the idiolect of a mentally impaired 19-year-old.

Linguistic evidence in textual disputes

In the examples discussed above, the data examined for alleged illegality are potentially criminal speech behaviour. Many civil cases, on the other hand, are concerned with disagreement about the meaning of a word or phrase in a spoken or more usually written contract, and with breaches of such contracts (whether or not a promise has been broken). Such cases are handled as disputes between parties rather than as crimes. In such actions, linguists can potentially assist in establishing, with greater reliability than other, more informal means of argument, the most likely meaning or effect in a given communicative context of a particular statement, where that meaning or effect forms the crux of a legal dispute.

Similar kinds of linguistic analysis may also be used to clarify obscurity in texts or aspects of a text. In an insurance claim dispute, for instance, an insurance company declined a claim from parents whose child had died of sudden infant death syndrome (SIDS), on the basis that illness or disease was not covered in their accident and life policy. McMenamin (1993), a linguist, distinguished the meanings of *syndrome* and *disease* by researching medical dictionaries and related literature on terminology, as part of a successful submission that SIDS fell within the scope of an 'accident'.

Another area of textual dispute cases is litigation surrounding trademarks. Where such marks are verbal (rather than graphic marks or sounds), these are proprietary marks (names, other verbal devices, sometimes slogans) used as an identifier of the commercial origin of a product or service. Disputes typically surround whether a proposed mark can be legally registered as a trademark: many cannot, if they are held to be non-distinctive, or descriptive (referring to the origin, nature, type, value or quality of the product), or generic (referring to a general class of products). Among other difficulties, to register such marks as trademarks might confuse consumers as to the commercial origin (and quality) of goods and services they are searching for, and could restrict how other companies can market their own, competing products or services. In some cases, a further problem is of a mark potentially disparaging an already registered mark that has built up a reputation in the marketplace. Beyond initial registration proceedings, issues arise regarding whether one company has infringed another's proprietary rights; in such circumstances courts need to establish whether the junior or later mark is similar enough to create consumer confusion, or if the later or junior mark has taken unfair advantage of the senior mark. Businesses invest in

designing and promoting their trademarks, and vigorously protect their proprietary rights in them against competitors. Linguists in some jurisdictions have acted, often alongside market survey researchers, as consultants providing reports and testimony examining similarity between signs in terms of sound, form and meaning. In one US case, for example, Butters (2008) testified that the pharmaceutical names *Aventis* and *Advancis* were similar enough to cause demonstrable confusion; and Shuy (2003) reports evidence he submitted in 10 other US cases.

Analysing legal consequences of communication failure

Given the centrality of language in legal procedures, how effective communication is can be a persistent issue (e.g. whether a participant or group of participants can understand an essential document, spoken question, or request). Communication failure may also occur, as we have seen, when lawyers communicate with non-lawyers because of the technicality (including obscurity) of legal language. Some population groups are particularly vulnerable in their encounters with the justice system, partly as a result of their **language competence**: prime examples are non-native speakers, the deaf or hearing-impaired, and children (related examples can be found in Unit C9).

Some challenges presented in law by communication are more fundamental. Jurors, as we have seen, are laypersons who (in serious criminal and some civil trials in common-law jurisdictions though rarely in civil law systems) decide on the facts found in a case. How much jurors understand of a trial, however, is inevitably affected by social factors, including level of education. Yet any process of jury vetting on the basis of demographics risks betraying the rationale for jury trial as 'trial by peers', since jury trials are not only a means of preventing abuse of power by the state, but also of bringing the justice system closer to the communities being served. Given the division of responsibility between judge and jury in a jury trial, it is essential that jurors understand what decision they are being instructed to make. Despite this, forensic linguistic research on jury instructions – which are sometimes presented in written form to ensure efficiency, consistency and legal accuracy (Heffer 2008) – suggests that they are frequently incomprehensible to the people who need to apply them.

Another site of comprehension problems in the legal system is communication between laypeople and law enforcers. Second-language speakers, juveniles and first-language speakers who have received relatively little education have been found to have difficulty understanding **police warnings**, sometimes with serious or even tragic consequences. Prescribed warnings are often literally that: drafted in advance in formal language, then simply read out. They sometimes contain long, complex grammatical structures and difficult words (Rogers *et al.* 2008), and many people receiving such warnings have been found to have waived their rights without understanding the information they have legally been given.

Another source of communication failure in legal procedures is invisible to most courtroom participants. It arises from how meaning may be lost in **translation**, when speakers of foreign languages interact with a court through interpreters. Research (e.g. by Berk-Seligson, analysing over 100 hours of tape-recorded US trials involving Spanish speakers; Berk-Seligson 2002 [1990]) shows how the quality of interpreters has a significant impact on how witnesses are perceived, and therefore potentially on how

cases are decided. Translation inaccuracies are not only semantic. It has been shown that by inadvertently skewing the tone of testimony, interpreters can make a witness appear less cooperative, less likeable and less credible.

The forensic linguistic contribution

Not all forensic linguistic work is concerned with evidence used in criminal investigation or submitted at trial. Other forensic linguistic contributions examine and may critique the wider conduct or performance of law, and seek to assist in refinement or reform of legal procedures. While investigative and courtroom work is often commissioned as a commercial service by authorities or parties to a case, this broader, second kind of work concerned with reform or enhancement of legal procedures is usually undertaken by linguists who are proactive, socially engaged researchers. This kind of work may still have an effect on a given case (e.g. demonstrating communication failure as a potential ground for appeal); but it is more likely, if it does have an effect, to prompt review of a relevant policy or form part of a campaign for greater public awareness of problems regarding the fitness for purpose of some aspect of the legal system. Where analysis of how language works (and sometimes fails to work) in law is the main aim, forensic linguistic analysis can be found at any meaningful interface between language and law. In such circumstances, the term *forensic linguistics* functions as an alternative term almost interchangeable with the broader expression 'language and law'.

LEGAL ORDER AND LINGUISTIC DIVERSITY A10

This unit introduces a topic implicit throughout the book but not directly addressed in previous units: how legal systems deal with speakers of different languages who come into contact with law, without compromising consistency of legal interpretation or fairness in proceedings. We describe the interaction that takes place between the idea of legal order and linguistic diversity, in arrangements known as legal bilingualism or multilingualism: the organisation of legal systems to function in two or more languages. Complications and challenges associated with such legal-linguistic structures are examined.

Law and multilingualism

Although the exact figure is disputed, it is estimated that there are over 7,000 living languages today (www.ethnologue.com). This number is all the more striking given that there are fewer than 200 independent states in the world (193 of them member states of the United Nations). Although the number of languages is not distributed evenly geographically, **linguistic diversity** is a fundamental human condition that virtually all states have to deal with in one way or another. States manage their linguistic diversity differently, however. Some, such as Belgium and Switzerland, adopt two or

DOI: 10.4324/9781315436258-10