

38 Discourse Analysis in the Legal Context

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One of the defining characteristics of discourse analysis is that it is capable of being applied to a wide variety of settings and contexts. Because law depends so heavily on language, its continuous spoken or written text provides a broad opportunity for discourse analysts. Law is comprised of written discourse, where care is taken to record in print all oral interactions that occur in court and all electronically recorded spoken language used as evidence. Entire law cases are preserved in written form to serve as the basis for later legal reviews and decisions. Law libraries house immense collections of both written text such as statutes, motions, briefs, counterclaims, and judges' opinions, but they also contain spoken language that has been transcribed in written form of trials, hearings, and arguments made possible by the continuous development of electronic communication technology.

Because of the advent of electronic voice recordings and their written transcriptions of concurrent spoken language evidence used at trials, the opportunity for discourse analysis has blossomed. Law enforcement agencies sometimes record events such as undercover stings, police interviews, and legal hearings, while businesses frequently tape important meetings, conference calls, emails, and other types of communication that become evidence in civil cases. The field of law, therefore, is a fertile field for discourse analysts because it provides mountains of data for linguistic analysis in both civil and criminal cases.

1 A Brief Background of Linguistics and Law

Work in language and law is a somewhat recently recognized subfield of applied linguistics, which in the past quarter century has spawned its own academic organizations and journals. Documentation is sparse about the ways linguists have assisted in

law cases before the second half of the twentieth century, but recent publications indicate that a flurry of activity began to take place in the 1980s in Germany (Kniffa 2007), England (Coulthard 2004), and the US (Shuy 1993b). Literature in this field began to flower in the early 1990s with important general collections of articles on language and law (Gibbons 1994, 2003; Levi and Walker 1990; Rieber and Stewart 1990), with books and articles on the language of the courtroom (O'Barr 1982; Philips 1985, 1998; Solan 1993; Stygall 1994), with bilingualism in the courtroom (Berk-Seligson 1990, 2009), with aircraft communication breakdowns (Cushing 1994; Shuy 1993a), and with criminal case evidence (Shuy 1993b, 1998a, 2011), sexual crime (Ainsworth 1993; Matoesian 1993, 2001; Shuy 2012), and the language of bureaucracies and business (Shuy 1993b, 1998b). Discourse analysis was beginning to play an important role in these applications, but it was still not the centerpiece of the work.

In the twenty-first century the field has expanded widely to civil cases with works on trademark disputes (Butters 2007, 2008; Shuy 2002), product liability (Shuy 2008; Tiersma 2002), contract disputes (Shuy 2008; Solan 2001, 2004), courtroom language (Conley and O'Barr 1998; Cotterill 2003; Eades 2008, 2010; Heffer 2005; Stygall 1994), authorship analysis (Chaski 2001; Coulthard 2004; Kniffka 2007; McMnamin 1993, 2002), discrimination (Baugh 2007; Shuy 2008), and defamation (Shuy 2010). Linguistic work on criminal cases also increased with focuses on police interrogation (Berk-Seligson 2002, 2009; Heydon 2005; Rock 2007), sexual crimes (Cotterill 2007; Shuy 2012), and perjury (Shuy 2011). Meanwhile, linguists who are also lawyers were also actively analyzing legal language (Dumas 2000; Heffer 2005; Schane 2006; Solan 2010; Solan and Tiersma 2005; Tiersma 1993, 1999, 2010). Meanwhile two extensive handbooks on the relationship of language and law have been published (Coulthard and Johnson 2010; Tiersma and Solan 2012).

Back in the 1970s one impetus for the use of discourse analysis in criminal law cases occurred after law enforcement began to use tape recordings of undercover conversations as a way to capture language crimes as they actually were taking place. Thanks to vast improvements in electronics and the passage of new laws related to white-collar and organized crime, the government began to increase its use of both undercover and wire-taped evidence. It is perhaps serendipitous that during this same period, linguistics was expanding its own analytical tools to include the systematic analysis of language beyond the level of the sentence and its study of meaning beyond the level of words and sentences. During this period, such concepts as discourse analysis, pragmatics, framing, speech acts, intentionality, and inferencing, began to find their way into common linguistic practice. These developments made it possible to use discourse analysis to analyze the electronic recordings gathered by law enforcement agencies as evidence against suspects in criminal cases as well as in some civil cases that contain evidentiary written and recorded texts.

In spite of these advances, even up to the present time it is common for lawyers to be concerned primarily with the smaller chunks of language that often stand out as the focus of their criminal and civil cases. For example, criminal indictments are often based on smoking gun passages, while disputes in civil cases also are often based on small units of language, such as sentences, phrases, or words. While such small passages of language capture the lawyers' immediate attention, discourse analysis can demonstrate how the entire language context in which those alleged smoking guns appear may put the matter in a very different light.

Lawyers who focus primarily on the smoking gun passages don't always realize how important it is to contextualize the smaller language units of syntax, lexicon, and morphemes that are nested within the larger language units of the participants' speech events, schemas, agendas, speech acts, and conversational strategies. And when issues of language variation and nonverbal behavior are evident, these also come into play at their appropriate sequential levels. Therefore, discourse analysts who work with legal evidence argue that it is optimal to contextualize such smoking gun passages within the contexts of the larger language units before making any final judgments about them.

2 Identifying the Speech Event

The first large place to start is with the speech event itself because it strongly influences the understandings of text that is contained within it. The notion of speech events appears to have begun with Dell Hymes's (1972) proposals made in reaction to Noam Chomsky's (1965) bold proclamation that the proper role of linguistics was to find the internalized rules of language and not, as descriptive linguists had held, on linguistic performance. In contrast, Hymes argued that communicative competence is found in the way speakers and writers use language in real-life contexts.

Central to Hymes's communicative competence rules is the speech event (1972). Speech events are identifiable human activities in which speech plays a central role in defining what that speech event is. In fact, such events cannot take place effectively without the language that defines them (van Dijk 1985: 201). Hymes's insights about the context, culture, and history of speech events had had a profound effect on analysts of spoken and written discourse as well as on studies of the ethnography of communication.

Following Hymes's model, Gumperz pointed out that speech events are recurring occasions that have "tacitly understood rules of preference, unspoken conventions as to what counts as valid and what information may or may not be introduced" (1990: 9). This means that in order to appreciate the work done by the sounds, morphemes, words, and sentences of a text, we have to see how they fit into the larger patterned language structures. The first and largest of these larger patterned structures is the speech event in which the language takes place. The speech event not only influences the parameters of what can be said by the participants (what counts as valid, in Gumperz's definition) but also the orderly sequence in which things can be said during that speech event. In many such speech events there is also an element of asymmetrical power that predicts these parameters. Commonly, one participant enjoys a superordinate position (doctor, judge, therapist, boss, buyer, teacher) while the other participant holds a more subordinate role (patient, witness, client, worker, seller, student). Their individual contributions to such speech events are influenced by this asymmetrical power relationship.

In *The Language of Perjury Cases* (Shuy 2011) I described several perjury cases in which the defendants found themselves in a speech event that they had never experienced before – the courtroom trial speech event Solan and Tiersma 2005 – where power obviously is held by the prosecutor. But even when defendants are familiar with this speech event, they can run into serious problems. One perceptive defendant, in spite of his

powerlessness in this speech event, knew and understood that the tacitly understood rules of preference of the courtroom trial speech event restricted his testimony to only that for which he had verifiable knowledge (“the whole truth and nothing but the truth”). Defendant Reilly, vice president of the company that chartered the oceangoing vessel, *Khian Sea*, was indicted for perjury when, during his appearance before a grand jury, he denied having any knowledge about how the captain of that ship had illegally discharged 15,000 tons of incinerator ash somewhere into the ocean, which was a violation of international law.

The *Khian Sea* had wandered around the world unsuccessfully for two years trying to find a port that would accept its cargo of incinerator ash that was destined to be used as infill for low-lying areas. After the first year, Reilly’s charter expired and the ship was sold to another company. He had no contact with the ship’s captain after the ship illegally sailed from many ports in Latin America and Africa with its cargo of ash still aboard. All Reilly knew was what he read in the newspapers. He had, however, a clear and accurate schema about the speech event of a court appearance. He knew that he could testify only about that which he could verify, not about that which he might have to guess or infer. In contrast, the prosecutor was willing to violate the requirements of the trial speech event because he was sure that Reilly actually knew what happened and was lying.

A battle between their different notions about the requirements of that speech event then took place in the courtroom. But when the prosecutor at this grand jury hearing asked Reilly to speculate, he politely refused to do so:

- Prosecutor: Do you have any knowledge as to what happened to the ash on board the vessel?
- Reilly: No, sir.
- Prosecutor: Do you have any knowledge as the means by which it might be ascertained what happened to the residue on board the vessel?
- Reilly: No, sir.
- Prosecutor: You don’t have to be exactly familiar to talk to us. I want to know who you sort of think... I want to take you one step further removed. Who do you think?... We’re going to take a little speculation about this particular question.
- Reilly: Counsel, I respectfully request that I not be forced to speculate in these very important matters.

One might think that it might be easy for witnesses trapped in such an altered speech event to stop and explain that they were confused about what that speech event really was. But most people are not linguistically gifted enough to do this very well. They can request clarification when they don’t understand individual statements or questions by the other person, but clarifying the larger contextual confusion is much more difficult. For one thing, most people, including lawyers and jurors, don’t even know about the language category of a speech event. Defendants like Reilly might be able to object, saying something like, “I’m not supposed to testify about something I don’t know.” But even saying that can be difficult, because it can be taken as a face-threatening statement that could suggest an impolite accusation about the prosecutor’s deliberate trickery. In

the context of the courtroom testimony speech event, the prosecutor has the power, whether right or wrong.

In this case as in many others, the first thing for the linguist to point out to the court, therefore, was the conflict between two different understandings about what this speech event was, what it required, and how their different understandings of it led to the jury's misperception that Reilly committed perjury.

3 Identifying Schemas

In the legal context, after discourse analysts identify the structure and dynamics of the speech event in which the text occurs, they also need to identify the schemas of the speakers. The first clue about such schemas flows naturally from the speech event that determines the parameters of what the participants can and cannot say. Even then, however, speakers don't testify in the absence of their previous knowledge. They bring to each new encounter the information, attitudes, beliefs, and values that they already have, much as Reilly did in his grand jury hearing. In contrast, when people hear something new, in many cases they can absorb it and relate it, accurately or not, to what they already know.

The process of bringing previous knowledge to new information, labeled "schema" by Frederic Bartlett (1932), since has developed further by other cognitive psychologists. Schemas refer to a person's mental plans that function as guidelines for their actions, words, and thoughts. Schemas are essential to all types of experience, because humans exist in a constant state of change based on new information they encounter. Unfortunately, sometimes their previously held information also can distort the way they receive and then talk about the new information. Even when they come to realize a misperception in a given exchange, however, it's often too late to take back what they have already said based on their previously operating schema. In legal settings, language has an usual type of permanence, especially when it is recorded for later evaluation. Witnesses can't easily take back what they said when they were operating under a different schema. In criminal cases, for example, the schemas that speakers hold during a period when they thought they were in a legal business transaction speech event can be misunderstood as relevant to an agent's sudden and unexpected topic shift into a bribery speech event that the target had not expected or anticipated.

The criminal case of John DeLorean provides an example of this (Shuy 1993). He was building an automobile factory in Ireland when he met an undercover FBI agent posing as a banker, who offered to help him get either a bank loan or to help find investors for his nearly bankrupt company. Linguistic analysis demonstrated that DeLorean's schema that they were discussing potential loans and investors was clearly evident during the 64 undercover tape recordings made by government agents over a period of six months. The government's effort had produced nothing inculpatory until the very last of these conversations, when the agent finally told DeLorean that his bank would not be able to give him a loan after all, but that he could procure the needed finances for DeLorean if he would invest his company's remaining five million dollars in a drug business that the agent had on the side. DeLorean responded neither "yes" nor "no" to the agent's new offer, causing the government to misunderstand this as his agreement

to the illegal drug scheme. But since DeLorean's schema was that even though a bank loan was no longer possible for him, the banker's offer to find investors was still on the table, causing him to ignore the talk about this drug scheme that didn't involve him.

Noteworthy but completely overlooked by the prosecution was that throughout these many conversations, DeLorean consistently had used the word "investment" to refer to those who might invest in his company. In the final conversation, after the agent ambiguously pointed out that investment would be a good thing, DeLorean agreed. The prosecution thought it now had a smoking gun admission that DeLorean was guilty. But the agent used the word, "investment," with no indication of who would be investing in what, undoubtedly intending it to mean that DeLorean would invest in his drug scheme. DeLorean's agreement to "investment," however, was consistent with his schema throughout their many conversations, when his use of "investment" consistently referred to getting businesses to invest in his company. Because linguistic testimony contextualized the "smoking gun" that the government had focused on, the jury understood the discourse evidence of DeLorean's consistent schema and therefore his meaning of "investment" throughout all of their previous 63 conversations, leading to his acquittal on all charges.

4 Identifying Agendas Revealed by Topics and Responses

Discovering a communicator's possible intention is also important in virtually all criminal and civil litigation. For example, lawyers constantly try to discover the intention of a statute, what a contract writer may have intended by the wording in that document, what makers of their last will and testaments intended to leave to their heirs, and what people intended by what they said in tape-recorded conversations. Even though we can see the words that are written and we can hear the words that are spoken, no science can reach into the minds of writers or speaker to know with certainty what they were actually thinking or intending. There is simply nothing like DNA evidence to inform us about intentions, but there are *clues* to intentions that are often present in the discourse evidence, particularly when it is spoken language evidence. These discourse clues are the subject of linguistic discovery and analysis in court cases, because they are the best clues about the speakers' possible intentions.

Language clues lead juries to the next possible steps of understanding a text in the same way that detectives use the clues of fingerprints and tire skid marks to aid their understanding of murders and traffic accidents. Linguists often can find the language clues, contextualize them and, based on the structural rules of language, point out what these clues *can* or *can't* indicate. However, they don't (and shouldn't) claim to know what the speaker *did* mean because this is always the sole task of the triers of the fact. Discovering the language clues about intentions is an important task that most people, including lawyers and triers of the fact, normally cannot accomplish. It is an area where discourse analysis can play a much-needed role in law cases.

Such clues to intentions are, of course, found in the language in evidence. It is not disputed that people generally communicate because they have something that they

want to say. It follows that what they want to say constitutes their conversational agendas as these are revealed in the topics they introduce and by their responses to topics introduced by others. It's true that people are able to say things that they don't want to say, and that they can utter pure falsehoods, but conversation is by necessity a cooperative endeavor. Non-cooperative language is not natural, for it violates the principles of cooperation that underlie everyday communication. Grice (1975) outlined four maxims: people are expected to say as much as necessary and no more, to say that which is true, to be relevant, and to be clear and unambiguous.

When speakers violate these principles, the conversation is turned on its head. In most cases such violations are noticeable. Speakers can ramble on and on with unnecessary language, make untruthful or unverified statements, be irrelevant, or be unclear. When this happens, they can be challenged about their accuracy or truth, told to stick to the topic, urged to become relevant, or asked to clarify themselves. It is when they are not challenged in these ways that discourse can go awry. People are often reluctant to challenge, since this violates common rules of politeness and sometimes such challenges can be very face threatening. Admitting that they don't understand can point to their own social incompetence about understanding what the other person is talking about. Often they think it's better just to go along and hope that eventually everything will become clear. In some criminal cases, discourse analysis can contextualize seemingly unchallenged statements that on the surface appear to be inculpatory.

Conversational agendas are the best clues to the intentions of speakers or writers. People conventionally think of agendas as written list of topics that are distributed to participants who are about to attend a meeting. If the subsequent discussion rambles away from the list of agenda items, the chairperson can call this to the rambler's attention and move the meeting back to the announced agenda. Other people at the meeting may have different personal agendas, but this doesn't matter because the format is set and the rules are clearly laid out.

In contrast, conversational agendas are often not well planned in advance. We may have an idea about what we want our conversation to accomplish and we may do our best to keep it on track, but there are no strong guides to tell us how this must happen. So how can we tell what the speakers' conversational agendas really are? Ruling out mind reading, of course, there are three other ways. First, because language provides that very useful speech act of requesting clarification, we can ask bluntly what the other person's agenda is, while taking the chance of violating politeness rules. Second, we can choose to assume and infer that we actually understand the other speaker's agenda, blindly responding as though we actually did understand it. This can be dangerous, because our assumptions and inferences can be very wrong. Third, we can analyze whatever language clues we can extract from what they say. Accomplishing this can be very difficult, however, while the conversation is rapidly taking place. This task is usually too difficult for listeners who are already busily immersed in the conversation and have many other things on their minds, including their own different agendas. Although such analysis can't be done on the spot by participants, recorded conversations provide discourse analysts the opportunity to apply their linguistic tools to that language evidence. This third approach provides the most effective and reliable clues to a speaker's intentions. It begins by identifying the topics that speakers introduce and the responses they make to the topics of other speakers in the same conversation or in a series of relevantly connected conversations.

4.1 Identifying the topics

The onset of a new topic usually is marked by a combination of semantic, phonological, and various discourse conventions. Most conversations of any length contain several topics, so it is important to set them off from each other so we don't get confused about what the participants were talking about. Complicating this is the fact that there can be one or more turns of talk that are nested within a single topic. For example, a new topic can be introduced, then amplified, clarified, responded to, or disputed by the participants until one of them introduces the next topic. And that same topic may be recycled at some later point in the conversation, especially after the persons who introduced it do not feel that their agendas have been satisfactorily resolved. Recycling a topic is a strong clue to those persons' intentions.

Semantic signals of a new topic are found when a speaker changes the conversation's content to something meaningfully different from that which had been talked about previously. Often this change is clear but, as noted above, sometimes the new focus is simply an addition, modification or amplification of the current ongoing topic, which means that the original topic is actually being continued. Of the markers of topic change, the semantic shift is usually the clearest signal.

Phonological signals of a new topic include a modification in the stress and loudness of the speaker who introduces it. Another signal is often found when there is a significant pause between turns of talk.

Discourse conventions are also sometimes helpful in marking either the continuation of an existing topic or the start of a new one. For example, when speakers say, "Not to change the subject, but ..." we can be relatively certain that they are indeed changing it. In contrast, when a speaker begins a turn of talk with discourse markers like "well," "so," "I mean," "look," or "and," it often signals a continuation of the preceding topic, while markers such as "y' know," "or," and "but," are trickier because they also can sometimes also serve as markers of a topic change.

One of the early uses of discourse analysis in criminal cases involving tape-recorded evidence was in the case of *Texas v. Davis* in 1979 (Shuy 1982, 2005). T. Cullen Davis was a Fort Worth oil-millionaire who in 1979 was accused of soliciting the murder of his wife. The government used undercover tape recordings of conversations between Davis and one of his employees to try to show that Davis had indeed solicited his wife's murder. But these tapes had some very odd qualities. For one thing, topic analysis showed that Davis never brought up the subject of killing, casting at least some doubt on this as Davis's agenda in those conversations.

The social context of the event also shed some light on Davis's verbal behavior. Davis had just been acquitted in a 1978 trial in which he was accused of breaking into his former home where his separated wife then lived with her new boyfriend. The wife identified Davis as the assailant wearing a ski mask, who wounded her and killed her live-in boyfriend. After Davis was acquitted, he understandably brought divorce proceedings against his wife. During these proceedings, Davis heard, accurately or not, that his wife was having an intimate relationship with the judge in their divorce trial. To obtain evidence of this, Davis asked his one of his employees to spy on his wife and catch her with the judge. Instead, the employee went to the police and told them that Davis had asked him to find someone to kill both his wife and the judge. The police then wired the

employee with a tape recorder and sent him out to get the verbal evidence on Davis. Two brief meetings ensued, in which the Davis and his employee sat in a car and talked.

The two men held very different perceptions of this speech event. Davis believed it was a speech event of a progress report in which the employee would update him on his progress of getting evidence about his wife and the judge. The employee's notion of the speech event was that he was reporting progress on his effort to find a hit man. These conflicting ideas about this speech event led to their very different schemas about their conversation and, of course, to their different agendas.

The smoking gun evidence that impressed the prosecution was a passage on one of the tapes in which the government's version of the transcript showed the employee reporting to Davis, "I got the judge dead for you." To this, Davis was alleged to have responded, "good," followed by the employee saying, "And I'll get the rest of them dead for you too." Davis's "good" did indeed appear on the tape, but not in response to the employee's statement, as the government's version had reported.

The FBI not only had the employee wear a body mike in the car, but they also videotaped the meeting from a van located across the parking lot. My correlation of the voice tracks of the audio and video-tapes indicated that Davis got out of the car while they were discussing a topic about the employee's boss, a man named Art. While still in the car, Davis had been pointing out that Art complained to him about his employee taking off work so frequently. As he got out of the car, Davis continued to talk about Art while the employee, anxious to get incriminating evidence on tape, at the same time talked about getting the judge and others dead.

At trial, I testified that two separate speech events and simultaneous conversations were taking place here. Using my own transcript of the conversation, which displayed the simultaneous words of the speakers in proper sequence, I asked the jury to read everything that Davis said, beginning with the preceding topic about Art and continuing on the same topic as he moved around the side of the car to the trunk, where he retrieved his sun glasses. They could see where Davis's continuous topic of Art, which contained what the prosecution considered the smoking gun word "good," actually appeared. Davis uttered "good" in an integral and grammatical part of his own discourse topic, which was not at all related to the employee's topic. This demonstrated that Davis's "good" was not in response to the employee's topic at all. Then I had the jury read the employee's continuous discourse at the same point, which began with their mutual topic of Art. Finally I showed the jury how at the moment Davis was out of clear hearing distance, the employee lowered his head to his chest where his mike was concealed and peppered the tape with words that Davis would not be likely to have been able to hear. It was only by sheer coincidence that Davis uttered "good" as he talked about Art at a point where the prosecutor, who did not pay attention to the video tape evidence of his change in physical location, must have heard this as a response to the employees talk about getting the judge killed.

Even when the language evidence is tape recorded, attention at trial is given almost entirely to the written transcript. In this case, the prosecution used their transcript to its ultimate disadvantage, because when the jury compared the prosecution's with what could be heard on the tape, their conclusion was very different from the government's.

This case demonstrates how the speech event and agendas as revealed by topic and response analyses are salient units of analysis for any conversation, but are especially

vital in criminal cases involving tape-recorded evidence. Likewise, this case emphasizes how dialogic discourse requires a participatory addressee in order to have interactional meaning. Tape recordings have only minimal ways to demonstrate that interactants are at different distances from each other when they utter their words. Relative degrees of loudness can help, but the on-topic or off-topic relevance of their discourse also contributes to understanding of physical distancing. The Davis case opened the door for discourse analysis in many other criminal cases that followed.

4.2 Identifying the responses to the topics of other participants

Another clue to the agendas of speakers is found in the ways they respond to the topics introduced by others. They can reply in a number of ways, just as Davis did. They can respond positively, negatively, indifferently, offer a feedback marker such as “uh-huh,” change the subject completely, or say nothing at all. The *type* of response is very important for discovering clues to the intentions of participants.

In the Davis case, response analysis showed that when the topic of murder was ambiguously hinted at by the undercover employee, Davis offered no agreement and, in fact, no recognizable interest in the matter. His response strategies were to front his own agenda (his worries about Art), to say nothing at all, or to offer only feedback marker “uh-huh” responses to the employee’s ambiguous reports of his search. To Davis, the search was to find evidence about the liaison of his wife and the judge. To the employee, the search was for a hit man. One courtroom battle concerned the meaning of Davis’s “uh-huh” responses. The prosecution argued that they were smoking gun signals of Davis’s agreement with the employee’s vague statements. The defense contextualized these “uh-huh” responses into his continuous discourse, which indicated that Davis was only intermittently attentive, but not agreeing with what the employee was saying. His mind was on his own agenda, not the employee’s.

5 Identifying Speech Act

While the macro picture of the language evidence is being contextualized in the speech event, schemas, and agendas, the discourse analyst’s next step is to examine the even smaller language units where the smoking guns usually are thought to reside. To this point we have observed how Delorean, Reilly and Davis thought they were in different speech events, held different schemas, and had very different agendas. These larger language units, including the speech acts used by the participants, contextualize everything else, including the alleged smoking gun passages.

Speech is not just a matter of making sounds, words, and grammatical connectors. It’s getting things done with language. Even though most people don’t realize it, they get things done in an orderly way by following structured rules they were never directly taught, and probably never even thought about. Most languages enable speakers to effectively and felicitously report things, ask questions, request, agree, deny, claim, confirm, conjecture, apologize, offer, promise, warn, bribe, advise, admit, threaten, warn, regret, praise, accuse, complain, give opinions, and congratulate, among other things.

Sometimes we don't even recognize it when our efforts to get these things done are not accomplished effectively, or not even accomplished at all.

Discourse analysts familiar with speech acts, however, can distinguish one that is made felicitously from one that is not. For example, people may think they are apologizing when they say, "I'm sorry you feel that way," but merely saying "sorry" is a far cry from a felicitous apology and "feeling that way" is a far cry from identifying the alleged offense. Similarly, speakers may believe they are warning or advising someone when what they are saying is actually a speech act of threatening.

After the notion of speech acts was introduced by Austin (1962) and amplified by Searle (1965), linguists have been applying speech act theory to many areas of language use, including the field of law. For instance, the legal issue about whether or not a threat, offer, promise, or agreement was made is very important in many criminal cases. In civil cases, whether or not a felicitous offer was actually made and accepted can be central to cases such as contract disputes. Whether lawyers are advising their clients about their rights or encouraging them to make false insurance claims is important in cases involving suborning perjury. In alleged bribery cases, it is crucial to determine whether or not the bribes were felicitously offered or accepted or, in fact, whether the speech acts of offering, promising, and agreeing were ever even present. Speech acts, such as promising, offering, denying, agreeing, threatening, warning, and apologizing have been well documented as central to conversation used as evidence in criminal cases (Shuy 1993b). Speech acts also provide important clues to the intent and understanding of contracts, warning labels and other written documents in civil cases (Dumas 1990; Shuy 1990, 2008; Tiersma 1987, 1990, 2002).

One example of how speech act analysis was used in civil litigation took place at a car dealership in Texas (Shuy 1994, 1998b). After shopping for a used car, a congenitally deaf man charged the dealership with the infliction of false imprisonment, fraud, emotional distress, and violating the state's deceptive trade practices act and the human resources code that protects the handicapped. Many handwritten exchanges between the customer and the salesperson constituted the evidence for these charges. During the four hours of this event, the customer made it clear that he would not buy a car on that day, but he promised to think about it and come back when he was ready. Ignoring this, the salesperson took the keys to the customer's potential trade-in vehicle and refused to return them. He also solicited, and got, a returnable check from the customer that he alleged he would use to convince his supervisor that the customer was sincerely interested, purportedly to produce a more favorable deal for the customer, which is not uncommon as a used car salesperson's ploy.

After being forced to wait for the supervisor's response alone in a small office for about an hour, the customer finally asked that his check and car keys be returned. By the second hour, he demanded this. By the fourth hour, he was so frustrated that he took matters into his own hands, scooped up all of their written exchanges, rifled the salesperson's desk until he found his check, and then headed for the door, only to be blocked by the salesperson, who smiled as he tauntingly dangled the car keys in his hand. The customer then snatched the keys out of the salesperson's hand and headed straight to an attorney's office.

At trial the defendant car dealership argued that this was a normal car purchasing speech event in which the salesperson did nothing illegal. In contrast, speech act analysis of all of the hundred or so written exchanges made it clear that the customer gave no

indication that he was willing to buy a car on that day. His speech acts included reporting facts about his financial status seven times, requesting information about a newer vehicle six times, promising to return at a later date three times, requesting his check back 12 times, and clearly writing “no” to the salesperson’s offer 11 times. Despite this speech act evidence, the dealership claimed that the customer was, indeed, interested in buying on that day and, even worse, that he had agreed to purchase the vehicle, which they explained as their reason for detaining him there for so long. This rather simple use of speech act analysis complemented other linguistic analyses in this case and contributed to an ultimate trial jury finding for the customer.

Speech act analysis has been especially helpful in cases involving alleged bribery. A classic example, again in Texas, involved the bribery charge that a state legislator, Billy Clayton, had agreed to accept money in exchange for switching the state employee insurance program to a new carrier. The question was whether the speech act of offering a bribe was what the prosecution said it was. First of all, the speech event suddenly switched from a legal business negotiation to the speech event of a campaign contribution of \$100,000 (perfectly legal at that time and in that place). To the campaign contribution offer, Clayton replied, “Let’s get *this* done first, then let’s think about *that*.” Ignoring this, the agent then upped the ante to a bribery speech event saying, “There’s \$600,000 every year . . . for whatever you want to do with it to get the business.” To this, Clayton replied, “Our only position is that we don’t want to do anything that’s illegal or anything to get anybody in trouble and you all don’t either. This [grammatically referencing the insurance plan] is as legitimate as it can be because anytime somebody can show me how we can save the state some money I’m going to bat for it.” This was clearly a speech act of denial, which the prosecution equally clearly totally missed or ignored.

It was useful to demonstrate Clayton’s speech acts of agreement in this conversation. He was very willing to participate in the speech event of a business transaction about saving the state money by switching insurance coverage. He also used the speech act of agreeing during the speech event concerning a campaign contribution (which he accepted, adding clearly that he would report it to the election committee). The agent quickly urged Clayton not to report the campaign contribution to which Clayton produced a speech act of denial and eventually reported it anyway. Nevertheless, Clayton was indicted for bribery. At trial, speech act analysis along with speech event analysis demonstrated that there were two separate offers here and that Clayton clearly denied any connection between the two, both by his own words and by his act of reporting it to the state campaign finance committee. With the help of this discourse analysis, Clayton was acquitted.

6 Identifying Conversational Strategies

If the government’s schema and agenda fail to elicit the targets’ self-reported guilt, the strategy becomes trying to get them to say something else that might be inculpatory. Closely related to speech acts are the conversational strategies that people use in conversation. In *Creating Language Crimes*, I used the definition of conversational strategies made by Hansell and Ajitrotutu (1982): “ways of planning and negotiating

the discourse structure (conversational agenda) over long stretches of conversation." In my book I described and illustrated the use of 12 conversational strategies consciously or unconsciously used by law enforcement during several different criminal cases. These strategies were: using ambiguity, blocking the target's words, creating static or otherwise manipulating the tape, interrupting the target at critical points, speaking on behalf of the target, the hit-and-run strategy, contaminating the tape with illegality or profanity, camouflaging the illegality of the venture, isolating targets from information they need, inaccurately representing what the target said, lying to the target about crucial information, and scripting the target about what to say (Shuy 2005: 13–29).

A common conversational strategy is for the undercover agent to say something that sounds vaguely inculpatory, and then change the subject quickly before the targets can respond to it (the hit-and-run strategy). This contaminates the taped record because these inculpatory words are on the tape, even if it was the agent, not the target, who spoke them (the contamination strategy). For example the agent in the DeLorean case peppered their conversation with talk about his own drug scheme and the agent in Clayton's case suggested bribery. Even though neither DeLorean nor Clayton bit on these strategies, the very fact that these topics remained on the tapes for the jurors to hear at trial produced a contaminating effect on the content of the recordings. Discourse analysts can point out these conversational strategies to lawyers and juries.

A variation of this occurs when what a speaker says is totally ignored by the person making the tape in the same way that an overly eager salesperson ignores the customer's "no" and goes right on as though nothing had been said before. Still another variant strategy is for the agent to reinterpret and restate what the target has said, thereby casting it in a very different light. That reinterpretation remains on the tape for the jury to hear, often contaminating what the speaker had actually said.

The agent in the DeLorean case used various conversational strategies during the 64 conversations he recorded. Here I focus on only the last conversation, the alleged smoking gun tape. One example is the agent's ambiguous and self-serving reinterpretation of DeLorean's question about whether the group would provide him with interim financing, as follows:

Agent: We have had delays.
DeLorean: Prior to the interim financing?
Agent: My group has the ability to provide 30 million.

The agent's "delays" does not specify whether they are delays about finding financing for DeLorean's company or delays existing within the agent's own drug operation. Even though DeLorean clearly interpreted it as delays in the "interim financing" of his company from outside investors, the agent ignored this and went right on to recast DeLorean's interpretation as the "interim" that his group experienced in its Columbian dope program. Fortunately, this finally clarified things for DeLorean, who now was beginning to understand what the agent was saying and, having finally reached this understanding, responded with a whopper of a lie, pointing out that he was getting all the money he needed from the IRA (an indirect speech act of denying, which the agent ignored and, like a tricky used car salesperson, he went right on talking about his drug scheme).

The agent used another conversational strategy toward the end of this conversation. By this time another agent monitoring their conversation from an adjacent room mistakenly believed that they now had all they needed to indict DeLorean. He telephoned the agent and told him this. Probably upon the advice in this call, the agent then employed the blocking strategy by switching the subject to Prime Minister Margaret Thatcher, knowing full well that this would divert DeLorean's attention and cause him to talk at length about his anger over her unwillingness to provide the funding that the British government had previously promised. As a result, this topic switch blocked DeLorean from rejecting the agent's drug proposal in a more forceful, direct, and explicit way.

The most commonly used undercover conversational strategy, however, is for agents to present information ambiguously, encouraging the targets misunderstand or wrongly interpret references such as "it," "they," "before," and others. The reverse of this occurs when the agents reinterpret the targets' own ambiguous references as signals of their illegal intention. Much of language, both spoken and written, contains vague or ambiguous passages. The reasons for such ambiguity vary greatly. Speakers may intend to be ambiguous, they may be unintentionally ambiguous because they are operating on totally different schemas and wavelengths, or they simply may be verbally sloppy.

Because the less explicit a speaker is, the more opportunity there is for respondents to implicate themselves, ambiguity can be a very effective tool for the government in their efforts to uncover a language crime, at least in the initial stages of an investigation. If ambiguity leads to self-incrimination, the government has done its work effectively. On the other hand, when suspects do not even seek clarification, we may suspect (1) that they understand the drift of the ambiguity and that they may be, indeed, guilty, (2) that their minds are on something else, (3) that they are so fearful of talking about the issue that they retreat to silence, perhaps even suspecting that they are being taped, or (4) that they are so innocent that they do not even catch the drift of the hinted ambiguity. The first three of these interpretations may suggest to the government that it's worth another try at tape recording conversations with the suspect. Responses relevant to the fourth interpretation suggest that any future taping may well continue to yield nothing inculpatory and the investigation might as well stop right there.

In criminal cases, both the government and the defense tend to hear what they want to hear, leading them to interpret ambiguous utterances in a way that best serves their own goals. Neither defense attorneys nor prosecutors are very dispassionate and objective. Their jobs are to advocate for either innocence or guilt; otherwise they would not be doing their lawyerly best. In contrast, the linguist is expected to be objective and scientific. Even then, however, both observational and experimental scientists can become irrationally loyal to a phenomenon called confirmation bias, leading to results that are consistent with the scientists' own theoretical stances. Such bias should always be avoided, of course.

The prosecution often puts the guilty spin on the evidence, interpreting the suspect's ambiguity as an intentional ploy to disguise obvious guilt. The defense often spins the same passage differently as an indication of innocence and that the suspect was thinking of something non-incriminating. The resolution of such lexical ambiguity is a task for an outsider to the trial, an objective and neutral discourse analyst who must ignore both types of spin.

Ambiguity in the use of language is often thought to be the sole province of semantics. Discourse ambiguity, however, is equally productive and useful for both written and spoken language. The sequencing of discourse can create an ambiguity that is not always immediately apparent in the individual words or sentences. Often in cases involving continuous discourse, the participants speak in vague generalities. This makes it difficult both for suspects to understand what agents are getting at and for law enforcement to pinpoint what the suspects were trying to say. When the nature and dimensions of such ambiguity are pointed out, however, convictions can be more difficult for the prosecution to make.

7 Contextualizing the Smaller Smoking Gun Language Units

To this point, my focus has been on the larger chunks of language evidence: the speech event, the schemas of the participants, their agendas (as revealed by topics and responses), schemas, speech acts, and conversational strategies. The speech event is the largest of all, for it frames the context in which all of the other language units exist. Agendas and schemas run throughout the conversation, while speech acts and conversational strategies occur sporadically. These are all larger chunks that inform the meaning and significance of the smaller language units such as sentences, words, morphemes, and sounds. These smaller units often are where the “smoking guns” appear. This is where undercover agents and the prosecutors tend to focus their search for guilt, while overlooking the importance of the larger language units.

An example of this is the smoking gun the prosecutors thought they found when John DeLorean agreed that “investment” would be a good thing. But they failed to take into account the lengthy discourse context (speech event, schema and agenda) in which DeLorean consistently used that word to mean something very different from the government’s interpretation. This case also illustrated the agent’s use of conversational strategies such as reinterpreting what DeLorean actually said, the hit-and-run, blocking what DeLorean tried to say, and the use of ambiguous references.

The Cullen Davis case demonstrates how, despite Davis’s own clearly revealed understanding of the speech event, his own schema, and his own agenda, the prosecution still maintained that his word, “good,” was the smoking gun indicating that he wanted his wife murdered.

It was the discourse context revealed by the schemas, speech acts, topics, and responses of the deaf man in the car dealership that convinced the jury that he didn’t intend to purchase a car and was unreasonably detained against his will.

In the case of Texas legislator Billy Clayton, his use of the purportedly ambiguous referential “this” looked enough like a smoking gun to the prosecutor to justify indicting Clayton for accepting a bribe. But it was the discourse analysis of this shifting speech event, his agenda, and his speech acts that led to Clayton’s acquittal at trial.

The trial of shipping agent Reilly demonstrated how the prosecutor failed to understand how Reilly’s schemas and his understanding of the trial speech event were the causes of his allegedly smoking gun “no sir” response to the question by the

prosecutor, who misinterpreted as perjury Reilly's denial of any knowledge of how and where the Khian Sea's cargo was offloaded.

8 Directions and Future Connections

The legal arena is gradually beginning to take advantage of discourse analysis to help unravel the complexities of litigation. Whether the language evidence is written or spoken, whether the case is criminal or civil, and whether the analysis is done for the defense, the prosecution, or the plaintiff, discourse analysis has a bright future in legal disputes. Disputes in criminal cases that involve intentionality, ambiguity, perjury, defamation, bribery, solicitation, and many other charges are subject to discourse analysis. Similarly, disputes in civil cases usually take place over small language units that can be contextualized through analysis of the entire discourse. There is a vast arena for linguists to explore the uses of these, and other, aspects of discourse analysis. It is up to linguists to respond to this opportunity.

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