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# THE JUDGE AS LINGUIST

*Peter Meijes Tiersma\**

## I. INTRODUCTION

Language is a quintessential human characteristic. Absent developmental deprivation or disability, every human being can speak and understand at least one language. Without language it is impossible to conceive of the building of pyramids, the development of science, or the creation of states. Law is also made possible by language. In contrast to custom, which can often be transmitted simply by observing the adherence of a community to an unspoken norm, law virtually by definition is articulated in speech or writing. Words may *describe* habit or custom, but they *constitute* the law. Thus, for the legal profession and particularly for judges, language is not merely a means of communication, but an object of analysis.

Perhaps it is because language and law are so intimately intertwined that judges and lawyers have only recently begun to consider that relationship in any detail.<sup>1</sup> Furthermore, linguistics—the scientific study of language—is a relatively young discipline that in many ways did not come into its own until the latter half of this century.<sup>2</sup> Still, the fact that judges and linguists frequently engage in the same professional activity—

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I thank Lawrence Solan for comments on an earlier draft. The title of this Essay turned out to be the same as a chapter in his book, *The Language of Judges*. While I did not consciously expropriate it, I may have subconsciously remembered it from reading his book. Unfortunately, I can think of no better title.

1. One clear exception to this is Professor Mellinkoff's exhaustive and highly illuminating study of the language of the legal profession. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963). Of course, some lawyers have long been concerned with simplifying legal language. Perhaps the best example is provided by Richard C. Wydick. See, e.g., RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (2d ed. 1985); Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727 (1978).

It is not the purpose of this Essay to review the growing field of language and law. For some general overviews of the research, see Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445 (1980); Judith N. Levi, *The Study of Language in the Judicial Process*, in LANGUAGE IN THE JUDICIAL PROCESS 3 (Judith N. Levi & Anne G. Walker eds., 1990); William O'Barr, *The Language of the Law*, in LANGUAGE IN THE U.S.A. 386 (Charles A. Ferguson & Shirley B. Heath eds., 1981); and Peter M. Tiersma, *Linguistic Issues in the Law*, 69 LANGUAGE 113 (1993).

2. See FREDERICK J. NEWMAYER, *LINGUISTIC THEORY IN AMERICA: THE FIRST QUARTER-CENTURY OF TRANSFORMATIONAL GENERATIVE GRAMMAR* 12 (1980).

analyzing language—strongly suggests that each can learn from the other. In this Essay I explore some of the situations in which judges are called upon to analyze language, and what they might learn by applying linguistic research to that task.

## II. CRIMINAL LAW

There are several crimes that may be committed by means of language, or in which the words of the accused play a critical role. These include bribery, conspiracy, perjury, threat, and solicitation. In many such cases, a judge or a jury must decide what an accused meant by words that allegedly prove one of the elements of the crime.<sup>3</sup>

Often, in an investigation, the government covertly records an individual's conversations and then, in levying charges, ascribes to them a literalness that is not justified linguistically. Consider the following conversation from a case in which *D*, an organized crime figure, was accused of conspiracy to murder *X*:

*T*: And then we killed that [*X*].

*D*: Yeah.<sup>4</sup>

Although the government argued that this exchange proved that *D* participated in killing *X*, linguist Ellen Prince has pointed out that it is really quite ambiguous.<sup>5</sup> For one thing, the word "yeah" does not necessarily signal agreement. Sometimes it merely indicates that the hearer has processed the preceding statement; by saying "yeah" or "right," the hearer indicates to her interlocutor that he can continue. In other words, by saying "yeah" *D* may simply have indicated to *T* that she understood what *T* said and that *T* could continue. This is hardly an admission that *D* participated in the murder.

A more important ambiguity occurs in the word "we." Linguists distinguish between an inclusive and exclusive use of this pronoun; in fact, some languages have separate pronouns for each. Inclusive "we" refers to the speaker and the hearer ("We should stop meeting like this"),

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3. For an extensive discussion of some of these linguistic crimes, see ROGER W. SHUY, *LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM* (1993). See also Georgia M. Green, *Linguistic Analysis of Conversation as Evidence Regarding the Interpretation of Speech Events*, in *LANGUAGE IN THE JUDICIAL PROCESS*, *supra* note 1, at 247 (describing linguistic analysis of conversation that qualifies as proper subject of expert testimony); Peter M. Tiersma, *The Language of Perjury: "Literal Truth," Ambiguity and the False Statement Requirement*, 63 S. CAL. L. REV. 373 (1990) (analyzing requirement of perjury law that defendant have made false statement).

4. Taken from Ellen F. Prince, *On the Use of Social Conversation as Evidence in a Court of Law*, in *LANGUAGE IN THE JUDICIAL PROCESS*, *supra* note 1, at 279, 283.

5. *Id.* at 284.

while exclusive "we" refers to the speaker and a third party ("We hope you'll come to our party tonight"). Thus, even if *D* is held to have agreed with *T*'s statement by saying "yeah," it is unclear what exactly she agreed with because *T*'s statement is ambiguous. It can be paraphrased either as "then you and I killed *X*," or as "then I and someone else killed *X*."<sup>6</sup>

Unfortunately, judges have often been reluctant to admit linguistic testimony on the meaning of conversations of this kind.<sup>7</sup> Of course, judges and juries can certainly understand ordinary conversation. But they are not always conscious of the particular problems of analyzing speech that have been covertly recorded by government informers. Discussions about murdering someone are not, one hopes, the sort of ordinary conversation with which judges and juries are familiar. At least in some situations, linguists can contribute to a better understanding of what happened.

### III. TORTS

Like crimes, torts may be committed by language. The most evident example is defamation, which normally involves spoken or written communication. As Geoffrey Pullum has pointed out, the law of defamation is difficult to rationalize from a linguistic standpoint.<sup>8</sup> While it is possible to formulate a linguistic approach to defamatory language,<sup>9</sup> it seems likely that the arcane common-law rules of libel and slander will continue to hold sway for the foreseeable future.

Judges and juries may also have to analyze language in quite a different area of tort law: product liability. Specifically, many products that have the potential to injure are reasonably safe if consumers use them according to directions. In such cases, however, manufacturers must adequately warn users how to avoid any potential risks.

Unfortunately, warnings are not always as linguistically effective as they could be. A particularly good (or bad!) example is the label on a bottle of rubbing alcohol that I recently purchased, which advises users:

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6. See *id.* Additional ambiguity with the pronoun "we" is pointed out in SHUY, *supra* note 3, at 46.

7. See Note, *The Admissibility of Expert Testimony on the Discourse Analysis of Recorded Conversations*, 38 U. FLA. L. REV. 69 (1986).

8. Geoffrey K. Pullum, *The Linguistics of Defamation*, in THE GREAT ESKIMO VOCABULARY HOAX AND OTHER IRREVERENT ESSAYS ON THE STUDY OF LANGUAGE 92 (Geoffrey K. Pullum ed., 1991).

9. See, e.g., Peter M. Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303 (1987) (advocating view that defamatory language involves speech act of accusing).

## FOR EXTERNAL USE ONLY

Will produce serious gastric disturbances if taken internally

.....

In case of accidental ingestion, seek professional assistance.<sup>10</sup>

Would a person of little education, or a recently arrived immigrant with limited English competence, understand this warning? Does "for external use" mean that you should only drink it outside the house? What are "gastric disturbances," and what does it mean that such disturbances will result from "taking" the rubbing alcohol "internally"? For example, does this mean that you will suffer gastric disturbances if you inject it directly into a vein, but perhaps not if you drink it? And if a consumer accidentally "ingests" it, and actually understands what that means, should he go directly to a lawyer for "professional assistance"? Perhaps so.

Clearly, linguists and researchers in related fields could conduct experiments regarding the degree of comprehension of warnings like the above, and advise judges and juries regarding their effectiveness.<sup>11</sup> Even without sophisticated research, however, it is easy to understand that something like the following would be far more effective than the present warning:

**DO NOT DRINK!**

Rubbing alcohol is very different from the alcohol in beer, wine, or hard liquor.

If you drink this, you may become very sick. Go to a doctor or get other medical help immediately!

## IV. CONTRACTS AND WILLS

Contracts, wills, and similar private agreements, such as those relating to partnership and agency, are interesting linguistically because they are generally created by particular types of speech acts. For example, contracts involve the speech acts of offer, acceptance, and promise. Promise, in particular, has received a great deal of attention in the literature, both in general terms and in how it relates to the law of contracts.<sup>12</sup>

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10. Taken from a label for Isopropyl Rubbing Alcohol distributed by Thrifty Drug and Discount Stores.

11. See, e.g., Bethany K. Dumas, *Adequacy of Cigarette Package Warnings: An Analysis of the Adequacy of Federally Mandated Cigarette Package Warnings*, in *LANGUAGE IN THE JUDICIAL PROCESS*, *supra* note 1, at 309; Michael G. Johnson, *Language and Cognition in Products Liability*, in *LANGUAGE IN THE JUDICIAL PROCESS*, *supra* note 1, at 291.

12. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Maarten Henket, *Contracts, Promises and Meaning: The Question of Intent*, 2 *INT'L J. FOR SEMIOTICS L.* 129 (1989); R.A. Samek, *Performative Utterances and the Concept of Contract*, 43 *AUSTRALASIAN*

In contracts and wills cases, a threshold issue often addressed by the courts is whether a valid contract or will exists at all. Specifically in contract law, critical distinctions exist between parties actually *promising* something—potentially forming an enforceable contract—and parties simply *talking about* promising—engaging in preliminary negotiations. Likewise, in the law of wills an important issue is whether a testator is actually *giving* away her property at death, and thus has testamentary intent, or is simply *talking about* what she hopes or plans to give later. Interestingly, J.L. Austin, the philosopher of language, observed that promising and giving are *performatives*, where properly articulating a particular speech act (“I promise” or “I give”) actually performs the act of creating obligation or transferring property.<sup>13</sup> In other words, the use of a performative is an important indicator that a speaker intends to enter into a binding contract or a valid will. Again, judges and linguists have similar concerns in this area and could learn from each other.

## V. CONSTITUTIONS AND STATUTES

### A. Interpretation

Much of the work of judges and lawyers consists of determining the meaning of constitutional and statutory language. While numerous nonlinguistic factors come into play, logic and tradition—expressed to some extent in the “plain meaning” rule—dictate that statutory or constitutional interpretation at least begin with the text. Each time judges try to determine what words mean, they are engaging in a type of linguistic analysis by applying their innate knowledge of language to process sequences of sounds or letters. Of course, all humans engage in such linguistic activity virtually every day, simply by reading or hearing others talk. What makes the work of judges much like that of professional linguists, however, is that judges not only interpret statutes, but also attempt to articulate *rules* that govern interpretation. Often the judicial rules or canons of interpretation are quite similar to, and predate, linguis-

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J. PHIL. 196 (1965); Sanford A. Schane, *A Speech Act Analysis of Consideration in Contract Law*, in LANGUAGE AND LAW: PROCEEDINGS OF THE FIRST CONFERENCE OF THE INTERNATIONAL INSTITUTE OF COMPARATIVE LINGUISTIC LAW 581 (Paul Pupier & Jose Woehrling eds., 1989); Peter M. Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189 (1986); Peter M. Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1 (1992).

13. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). On legal speech acts generally, see DENNIS KURZON, IT IS HEREBY PERFORMED . . . EXPLORATIONS IN LEGAL SPEECH ACTS (1986).

tic principles that attempt to describe how speakers understand ordinary conversation.<sup>14</sup>

Unfortunately, some decisions by judges reflect a distinct lack of linguistic sophistication. Lawrence Solan discusses one such example in his recent book, *The Language of Judges*.<sup>15</sup> In *California v. Brown*,<sup>16</sup> the trial court sentenced the defendant to death for murder. In the penalty phase of the trial, the judge instructed the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."<sup>17</sup> Brown was sentenced to death. He later argued that his death penalty proceeding violated the Eighth Amendment because the instruction limited his constitutional right to appeal to any sympathetic factors raised by the evidence.<sup>18</sup> The United States Supreme Court, however, upheld the instruction.<sup>19</sup> The plurality concluded that the adjective "mere" modified the entire list of nouns, not just "sentiment."<sup>20</sup> So interpreted, the instruction correctly stated that the jury should not be swayed by "mere sentiment" or "mere sympathy," among others. Solan shows that the instruction was in fact quite ambiguous, and that—as pointed out by the dissent—"mere" could just as well be interpreted as modifying only "sentiment," thus incorrectly informing jurors that they should not be swayed by "mere sentiment" or by *any* sympathy.<sup>21</sup>

In fact, these constructions—adjectives followed by multiple nouns—are virtually always at least somewhat ambiguous. Does "old men and women" include all women or only old women? If a statute forbids "large cars or trucks" from entering certain streets, does this refer to all trucks or just large ones? The plurality simply refused to acknowledge this ambiguity, which would probably have required awarding Brown a new penalty phase trial.<sup>22</sup>

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14. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 5 WIS. L. REV. 1179 (1990); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985).

15. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 55-59 (1993).

16. 479 U.S. 538 (1987).

17. *Id.* at 539.

18. *Id.* at 542.

19. *Id.* at 543.

20. *Id.* at 549.

21. SOLAN, *supra* note 15, at 58-59; see *Brown*, 479 U.S. at 549 (Brennan, J., dissenting) ("A juror could logically conclude that 'mere' modified only 'sentiment' . . .").

22. The decision raises questions about whether other factors may have played a role in this decision. As Lawrence Solan observed, the present Supreme Court, and particularly Chief Justice Rehnquist, the author of the plurality opinion in *Brown*, are strong supporters of the death penalty and generally resist efforts by federal courts to overturn state death penalty decisions. SOLAN, *supra* note 15, at 59-61.

B. *When Do Acts Communicate?*

Aside from interpreting statutes and constitutions, judges often address even more basic linguistic questions. For example, the First Amendment to the United States Constitution protects the freedom of speech. Similarly, the Fifth Amendment protects criminal defendants from being compelled to be witness against themselves. Both of these provisions require courts to decide when people engage in speech, or more generally, when they communicate. Only activities that communicate some message, and are thus functionally equivalent to speaking, come within the scope of the freedom of speech. Thus, a person may engage in "speech" by publicly burning an American flag<sup>23</sup> or by wearing a black armband to protest the Vietnam War.<sup>24</sup> By contrast, recreational dancing has been held not to be "speech."<sup>25</sup> Similarly, sunbathing *au naturel*, even if done to communicate opposition to antinudity laws, does not qualify for First Amendment protection.<sup>26</sup>

The Fifth Amendment raises similar issues. As relevant here, it relates to criminal defendants being called as witnesses and thus being compelled to testify against themselves. Essentially, the Fifth Amendment protects defendants from being forced to *communicate* information that can be used against them in a criminal proceeding.<sup>27</sup> The question that arises is whether compelling suspects to give blood samples forces them to communicate or "testify" against themselves, because their blood sample may be used as evidence against them.<sup>28</sup> The Supreme Court held in *Schmerber v. California*<sup>29</sup> that providing blood samples is not equivalent to communicating "I am drunk." Additionally, it observed that the privilege against compelled self-incrimination extended only to being compelled to literally testify against oneself, or to provide the state with "evidence of a testimonial or communicative nature."<sup>30</sup> Likewise, the Court has held that the acts of speaking certain words aloud to allow for voice identification or providing a handwriting sample are not testimonial.<sup>31</sup>

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23. *Texas v. Johnson*, 491 U.S. 397 (1989).

24. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

25. *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989).

26. *South Fla. Free Beaches, Inc. v. Miami*, 734 F.2d 608, 609 (11th Cir. 1984) (holding that nude sunbathing to challenge public indecency law was not expressive conduct).

27. *See Schmerber v. California*, 384 U.S. 757, 761 (1966).

28. *E.g., id.*

29. 384 U.S. 757 (1966).

30. *Id.* at 761.

31. *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (voice sample).



At first it seems quite odd that articulating or writing certain words is not considered communicative. Yet, I believe, the Court has intuitively applied linguistic principles; those principles can justify not only these Fifth Amendment cases, but also some of the Court's free speech jurisprudence. A well-known philosopher of language, H.P. Grice, suggests that acts or natural phenomena can have two types of meaning—*natural* and *nonnatural*.<sup>32</sup> Smoke, for instance, means that there is fire somewhere. This meaning is natural: The viewer reaches a conclusion by way of inference or some other mental process based on perception of, and knowledge about, the physical world. On the other hand, smoke *signals* have nonnatural meaning, since the actor intends to send a message. Roughly speaking, natural meaning refers to drawing *inferences* from physical perception; when we observe smoke, we can infer that there is a fire nearby. On the other hand, nonnatural meaning refers to instances where a person intends to *communicate* a message, as when someone sends smoke signals or tells us something.

In the area of forced confessions, providing a blood sample is hardly a means of communicating that "I am drunk." Consider, for example, a patient giving a blood sample to a doctor to determine blood type. By giving blood, the patient does not intend to communicate "I have type O blood"; presumably, the patient is not aware of the blood type, and cannot consciously communicate this unknown fact. Rather, the blood is simply evidence from which the doctor makes a determination. The same is true when someone suspected of being intoxicated is forced to give blood to authorities. The accused simply provides physical evidence, from which certain inferences can be drawn. The doctor or technician, who knows the blood alcohol content, communicates this to the jury.<sup>33</sup>

Providing a voice sample by reading certain words, which enables the victim of a crime or a witness to identify the perpetrator, is a more difficult case than that of providing a blood sample. Speaking is obviously communication par excellence. But while speaking communicates, it also allows for certain inferences. For example, we can often tell gender, emotional state, or national origin from a person's voice. For example, if people speak with a German accent, we can infer that they probably came from Germany. Normally, however, speakers do not intend to communicate their national origin by speaking. Indeed, after

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32. H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 377-79 (1957).

33. For a somewhat different linguistic analysis of this problem, see SOLAN, *supra* note 15, at 157-63 (suggesting that act of giving blood could be both communicative and self-damaging admission).

years in the United States, they may be annoyed that listeners can still hear an accent. This is confirmed by a linguistic test. To say, "By speaking with an accent, they told me they are German" sounds rather odd to me. It is far more natural to say "I can tell they are German from their accent." The first sentence describes obtaining information from intentional communication. The sentence sounds odd because it is unusual to view speaking with a German accent as a way to communicate to someone that you are German. The second sentence describes obtaining information by inference, and in this context it sounds completely natural.

Now compare the following sentences, each spoken by the victim on the witness stand after hearing the defendant repeat certain words:

(1) By saying "Your money or your life" the defendant told me he was the robber.

(2) I could tell the defendant was the robber from how he said "Your money or your life." As with the German accent example, the second hypothetical response sounds far more natural. The reason, again, is that by saying "Your money or your life," the defendant does not intentionally communicate that he committed the crime. Rather, the defendant merely provides evidence from which the victim can make this determination.

More difficult yet is when the accused is forced to provide documents that contain incriminating information. If I wrote you a note with the words "Meet me after school" and handed it to you, I have obviously communicated that we should meet. Now suppose that the teacher intercepts the note. Have I told the teacher to meet me? Obviously not. More plausibly, I have told or informed the teacher that I have asked you to meet me. Yet even this seems odd, because I did not intend to communicate with the teacher; the teacher merely infers the message from an intercepted note. One might argue that this example involves unintentional communication, as Larry Solan has suggested to me in personal communication. While this may be true, the Fifth Amendment privilege against self-incrimination does not extend to such unintended communication. Otherwise, no paper written by a defendant could ever come into evidence because all would constitute unintentional communication. Interestingly, however, my act of giving the teacher the note in response to her demand ("Give me the note you wrote") *does* communicate to her that I wrote the note. In contrast, if the teacher searched my desk and found it, I have communicated nothing to her about its authorship.

It is clear, therefore, that if you intercepted and read a document that I wrote to someone else, I have not communicated with you because I never intended to tell you anything. On the other hand, the act of

giving you a document may mean something, at least if it was in response to a specific request or demand. Suppose, for example, that it is illegal to note a job applicant's race, religion, or creed on any documents relating to that applicant. Suppose that I was an employer under investigation and the state asked me to surrender all of my employee files that violate the act. By giving the state two files, I have essentially told the state that these are my employee files and that I believe they may violate the act. If, on the other hand, the state asked for all employee records and I gave it a hundred file boxes of information, I have communicated at most that these are my employee records and perhaps that they constitute all such records, but nothing more. The state must determine whether I have violated the law.

To a large extent, the Supreme Court's decisions conform to these linguistic judgments. In *United States v. Doe*,<sup>34</sup> the Court held that simply producing business papers is not communicative, even if they might incriminate the defendant. The Court continued, however, by observing that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be."<sup>35</sup> If, by producing business records, the owner would tacitly admit that the papers did exist and were in his possession, and where production of documents would relieve the government of the need to authenticate them, the act of producing documents would be communicative. Without a government grant of use immunity, the production would constitute compelled self-incrimination.<sup>36</sup>

We can also apply this distinction to free speech cases, such as flag burning. Suppose that we see someone burn an American flag in the back yard. We might be able to draw certain inferences from this action. For example, perhaps the flag is old and should be disposed of. We might also infer that the flag burner is a relatively patriotic person who knows how to properly dispose of an old flag. We can infer this because we know that burning is the preferred method of disposing of worn flags. Critically, the flag burner is not *communicating* to observers that the flag is old, or that the flag burner knows what to do with an old flag; we simply draw these conclusions from the flag burner's actions. On the other hand, if the flag burner burns the American flag in front of the house, on the day that the United States announces that it will engage in a highly controversial military action, and she knows that many neighbors will be around to watch, it is far more likely that the flag burner intends to communicate opposition to the military action. Communica-

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34. 465 U.S. 605 (1984).

35. *Id.* at 612.

36. *Id.* at 615-17.

tion is even more likely when the flag burning occurs in front of a government building, as in *Texas v. Johnson*.<sup>37</sup>

### C. *The Meaning of "Interrogation"*

In *Rhode Island v. Innis*,<sup>38</sup> a defendant was suspected of killing a taxicab driver with a shotgun. Once arrested, the police read him the customary *Miranda* warning.<sup>39</sup> The defendant consequently asked to speak to an attorney.<sup>40</sup> The police then placed the defendant in a vehicle to be taken to the police station.<sup>41</sup> Under the *Miranda* decision, once a suspect in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.<sup>42</sup> Thus, the officers in *Innis* could not question the defendant during the drive to the station.<sup>43</sup> Importantly, the police had not yet found the murder weapon, which would doubtless provide important evidence against the accused.<sup>44</sup> While en route to the station, one of the accompanying officers mentioned that there were a lot of disabled children in the area, and said, "God forbid one of them might find a weapon with shells and they might hurt themselves."<sup>45</sup> The defendant, expressing concern about the children, then showed the officers where the gun was located.<sup>46</sup>

The issue before the Supreme Court in *Innis* was whether the officers had engaged in "interrogation" or "questioning." It would have been easy enough for the Court to dispose of the case by observing that the officers asked no questions of the defendant, but merely stated that they were worried about the schoolchildren. Instead, the Court concluded that *Miranda*'s prohibition against further "questioning" extends not only to literal questioning, but also to its "functional equivalent."<sup>47</sup>

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37. I explored the difference between communication and inference as applied to the First Amendment in Peter M. Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. (forthcoming Dec. 1993).

38. 446 U.S. 291 (1980).

39. *Id.* at 294.

40. *Id.*

41. *Id.*

42. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

43. *Innis*, 446 U.S. at 294.

44. *Id.*

45. *Id.* at 294-95 (internal quotation marks omitted).

46. *Id.* at 295.

47. *Id.* at 300-01. The Court defined the functional equivalent of questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (citation omitted).

The Court ultimately held that the officers did not, under this definition, engage in questioning.<sup>48</sup>

The Court correctly recognized that speech acts are often accomplished by indirect means, although one might dispute its ultimate conclusion. Consider the following sentence, said by a burglar with a gun to the occupant of a house: "I will kill your child unless you tell me where your money is." Obviously, this is not just a statement about what may happen in the future. Implicit in the threat is a command to provide information ("Tell me where the money is") or at least a question ("Where is the money?").

Now compare this with what the police in *Innis* essentially told the suspect: "A disabled child may die unless you tell us where the shotgun is." While not a threat to the defendant, the sentence conveyed that something very bad might happen unless he provided the information. It clearly functioned as a request for information, and was therefore the "functional equivalent" of a question.<sup>49</sup>

#### D. Consensual Searches

Another instance in which the Supreme Court analyzed the language of the police occurred in *Schneckloth v. Bustamonte*.<sup>50</sup> There, the defendant challenged the constitutionality of a search of a car trunk in which police found incriminating evidence of the crime of possessing a check with intent to defraud.<sup>51</sup> The police had stopped the car in which the defendant was riding because of minor vehicle code violations.<sup>52</sup> Since the officers had neither a warrant nor other grounds to search the car, a search would have been constitutional only if the defendant or another occupant had voluntarily consented to it.<sup>53</sup> After rummaging through the car itself, the officer asked the occupants: "Does the trunk open?"<sup>54</sup> One of the occupants said "yes," got the keys, and opened the trunk.<sup>55</sup>

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48. *Id.* at 302.

49. Should there be any remaining doubt, consider the following. A mad scientist has developed a small but lethal bomb that can only be deactivated with a secret code. He plans to test it in an isolated barn and places it there. Unfortunately, a small child becomes trapped in the barn. If the child plays with the bomb, there is a danger that it may explode. People now come to the scientist and say: "The child may die unless you tell us what the secret code is." Surely they are asking for the secret code!

50. 412 U.S. 218 (1973).

51. *Id.* at 219-20.

52. *Id.* at 220.

53. *Id.* at 219.

54. *Id.* at 220 (internal quotation marks omitted).

55. *Id.*

Literally, the officer simply inquired whether the trunk was capable of being opened. The occupant's response—to actually open the trunk—indicates that he understood the officer's question as more of a request or command to open the trunk. This comports with linguistic research on indirect requests or demands. For example, asking a fellow diner, "Can you pass the salt?" is not merely a question regarding the diner's capability to pass the salt, but a request or command to do so.<sup>56</sup> If the addressee says "yes" but does nothing, she has acted inappropriately, or at best made a joke by playing on the literal meaning of the words. A similar historical example is the words attributed to King Henry II regarding his enemy, Thomas Becket. King Henry said to his knights: "Will no one rid me of this turbulent priest?" Not long later, four of Henry's knights assassinated Becket.<sup>57</sup> "Does the trunk open?" is therefore not simply a question about the capabilities of the trunk, but is at least a request to open the trunk, or a command to do so.

Whether the utterance is a request or is instead a command is critical to the voluntariness of the consent, and thus to the constitutionality of the search. Where a uniformed police officer commands someone to open a car trunk, any "consent" can hardly be termed voluntary because the person who consents will assume that the officer has the authority to ensure compliance and there is no choice in the matter.<sup>58</sup> Following the orders of a uniformed and armed officer ("Pull over" or "Place your hands on the car") is never truly voluntary.

Whether a question like "Does the trunk open?" or "May I look in the trunk?" is merely a request that can be refused or a command that must be obeyed depends not so much on the language used, but on the power relationship between the speaker and addressee. If an ordinary citizen, taking a tour of the White House, asks a guard standing in front of the door to the Oval Office, "May I enter this room?" it is simply a request. If the President asks, he is ordering the guard to step aside.<sup>59</sup> Likewise, suppose that a police officer pulls over a car and asks the driver, "May I see your license?" "No" is simply not an appropriate

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56. See John R. Searle, *Indirect Speech Acts*, in *PRAGMATICS: A READER* 265, 265 (Steven Davis ed., 1991).

57. *THE MACMILLAN DICTIONARY OF QUOTATIONS* 34 (1989).

58. See *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (holding that consent was not voluntary where officers appeared at defendant's residence and falsely claimed to have warrant).

59. John Searle provides a similar example. "If the general asks the private to clean up the room, that is in all likelihood a command or an order. If the private asks the general to clean up the room, that is likely to be a suggestion or proposal or request but not an order or command." John R. Searle, *A Classification of Illocutionary Acts*, 5 *LANGUAGE SOC'Y* 1, 5 (1976).

response. We know that the officer has the right to see our license, has the power to enforce this right, and that refusing to show our license would only get us into worse trouble, or at least greatly inconvenience us. The officer's polite request is really nothing less than a command.<sup>60</sup>

We now return to the plight of Mr. Bustamonte. While the facts do not directly say so, it seems a reasonable assumption that he and his friends, all apparently Chicano and driving a borrowed car,<sup>61</sup> were not particularly high on the socioeconomic ladder, nor particularly well educated. Most likely, they were not particularly aware of their constitutional right to be free of unreasonable searches. Would someone engaged in activities of questionable legality consent to any type of police search?

In any event, with three armed police officers on the scene, the lights on their squad cars flashing, Bustamonte and his friends may well have concluded that even if they might have had the right to refuse access to the car trunk, it would have been unwise to do so. Like the speeder who says nothing, but simply hands the officer his driver's license when the officers asks if he or she "may see" it, Mr. Bustamonte and his friends simply opened the trunk when the officer requested to look inside.

When someone in a position of power and authority makes what is literally a request to a subordinate, and the person in power has the right to command the other, the request will be interpreted as a command. It is phrased in the language of requesting permission in order to express politeness, by giving a superficial choice to the addressee. In fact the power relationships dictate that when the police make a "request," and they could apparently compel the suspect to carry out the request, the suspect will view the request as a command.

Applying this principle to the *Bustamonte* case, only if Mr. Bustamonte and his friends were aware that the police had no authority to order them to open the trunk could the "request" to look inside be interpreted as an actual request that could be refused with no negative consequences. The Supreme Court explicitly rejected requiring such awareness in *Bustamonte*, suggesting that although knowledge of the right to refuse consent was a factor to consider in deciding whether consent was voluntary, it was not determinative.<sup>62</sup> Requiring proof that the

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60. Consider some other types of indirect commands (at least, in the right context). None of these are literally imperatives, although all could be phrased as such: "You are standing on my foot" (Get off my foot!); "I would like you to go now" (Go now!); "Officers will henceforth wear ties at dinner" (Officers, wear ties at dinner!); "Would you mind not making so much noise?" (Be quiet!); "How many times have I told you not to eat with your fingers?" (Don't eat with your fingers!). These examples are from Searle, *supra* note 56, at 268-69.

61. *Bustamonte*, 412 U.S. at 220.

62. *Id.* at 226.

suspects knew their right to refuse would allow them to frustrate the use of the evidence at trial by failing to testify that they were aware of this right.<sup>63</sup>

The Court also rejected the obvious solution to the problem—having police advise suspects of their right to refuse.<sup>64</sup> The Court declined this solution because “it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.”<sup>65</sup> In actuality, simply adding “You have the right to say no” to any search request would be quite effective in advising suspects of their rights, and does not seem particularly burdensome.

As a linguistic matter, the notion that Mr. Bustamonte and his friends freely consented to the search is highly questionable. The real animus behind the decision becomes apparent in the Court’s observation that “[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies”<sup>66</sup> and its acknowledgement of the “legitimate need for such searches.”<sup>67</sup> Thus, the Court’s concern seems to be that advising suspects of their constitutional right to refuse will encourage them to exercise that right, thus leading to fewer criminals being apprehended.<sup>68</sup> While apprehending criminals is certainly a laudable goal, one wonders whether it might not be attainable without manipulating the meaning of voluntary consent.

## VI. CONCLUSION

Judges often engage in various types of linguistic analysis. The United States Supreme Court, for example, has exhibited both surprising linguistic acumen and, on the other hand, woeful disregard for how language operates in real life situations. Of course, there is not always a single correct linguistic analysis of legislative texts or conspiratorial conversations. Additionally, factors other than language are often relevant in determining the meaning of legal language; these factors are particularly relevant when the text is incomplete or ambiguous. But when interpreting a text, be it statutory or conversational, a careful linguistic analysis should always be the point of departure.

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63. *Id.* at 230.

64. *Id.* at 231.

65. *Id.*

66. *Id.* at 231-32.

67. *Id.* at 227-28.

68. Note, incidentally, that while liberal judges have often been accused of engaging in “result-oriented” jurisprudence, this analysis reveals that moderate and conservative judges are likewise capable of doing so.



