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Linguistics as a Knowledge Domain in the Law

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I. LINGUISTICS AS A FIELD OF KNOWLEDGE ABOUT LANGUAGE

In recent years, a growing number of linguists have begun to focus their scholarly attention on the intersection of language and law. Evidence of this burgeoning field abounds. There exists a scholarly organization specifically dedicated to linguistic research pertaining to the law and legal processes[1] and a journal that exclusively publishes scholarship in the field.[2] Linguistics-based papers and presentations are a regular feature of the Law and Society Association Annual Meeting, the primary showcase for

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    1.   The International Association of Forensic Linguists (IAFL) welcomes participation by linguists and other scholars whose research addresses language and law. For additional information about IAFL, see IAFL, http://www.iafl.org (last visited Apr. 3, 2006).

    2.   This peer-reviewed journal, originally entitled *Forensic Linguistics*, is now called *The International Journal of Speech, Language, and the Law: Forensic Linguistics*. It began publication in 1994.

interdisciplinary scholarship on legal practices, policies, and institutions.[3] In addition, articles exploring various issues at the intersection of language and law frequently appear both in law reviews and in scholarly linguistic journals.[4] Yet, for all of this growth in scholarly activity by both linguists and other socio-legal scholars, many linguists have expressed a sense of frustration that the legal system—lawyers,[5] judges, and the legal academy[6]—still have little idea what linguistics is about and fail to fully appreciate the ways in which its insights could be useful or illuminating to law.

The field of linguistics is a multi-faceted discipline incorporating the systematic study of every aspect of human communication. One way of appreciating the breadth of the field is to consider its examination of the smallest, most basic units of human communication and move outward to consider how the discipline analyzes each level involved in language.

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3. There is such interest in language and law scholarship within that organization that a Collaborative Research Network (CRN) has been established to coordinate scholarship in the area of language and law. *See* Law and Society Association, http://www.lawandsociety.org (last visited Apr. 3, 2006).

4. Judith Levi compiled a bibliography of scholarship addressing the intersection of linguistics and law that was published by the American Bar Association. JUDITH N. LEVI, LANGUAGE AND LAW: A BIBLIOGRAPHIC GUIDE TO SOCIAL SCIENCE RESEARCH IN THE U.S.A. (1994). Law professor and linguist Peter Tiersma currently maintains a web-based bibliography of selected articles and books on language and law at LanguageandLaw.org, http://www.languageandlaw.org/BIBLIO.HTM (last visited Apr. 3, 2006).

5. At conferences where language and law scholarship is presented, linguists who consult in legal cases often trade war stories about their experiences. Lawyers and judges, who have little idea of what linguistics is or how it could be appropriately utilized, often think that what linguists do is police language for solecisms or grammatical errors. Such attorney frequently are insulting, demeaning, and hectoring on cross-examination. That last complaint, of course, is not limited to linguists but shared by many expert witnesses. *See, e.g.,* STANLEY L. BRODSKY, TESTIFYING IN COURT: GUIDELINES AND MAXIMS FOR THE EXPERT WITNESS xi (1991) (noting that some witnesses describe their testimony experiences as "terrifying" and "relate[] stories of humiliation, distress, and feelings of absolute ineptness").

6. One notable attempt to bridge the gap between linguistics scholars and legal scholars occurred in 1995. The Law and Linguistics Conference entitled, *What is Meaning in a Legal Text? A Dialogue Among Scholars of Law and Linguistics*, was jointly sponsored by Northwestern Law School and the Washington University School of Law. During that two day conference, much of the discussion between the linguistics professors and the law professors revolved around questions of what the goals and methodologies of linguistics are and how this research might be utilized by lawyers and legal scholars. A transcript of the sessions was later published along with commentaries. *See* Conference, *Northwestern University/Washington University Law and Linguistics Conference*, 73 WASH. U. L.Q. 771 (1995).

Within the field of linguistics, researchers are studying phonetics—the analysis of human speech sounds;[7] phonology—the structures and patterns of sounds used within and among languages;[8] syntax—the rules for ordering elements of meaning within a language;[9] semantics—the relationship between words and meaning;[10] pragmatics—the study of language and meaning in the context of larger discursive structures;[11] and discourse analysis—the interpretive and structural analysis of interpersonal communication.[12] Linguistics as a discipline has a long undefended border with any number of related disciplines and fields as well, generating such sub-specialties as sociolinguistics—the study of language in its social context;[13] psycholinguistics—the study of linguistic behavior in the context of cognitive psychology;[14] anthropological linguistics—the cross-cultural study of language use;[15] and neurolinguistics—the study of the neurological

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7.   *See generally* J.C. CATFORD, A PRACTICAL INTRODUCTION TO PHONETICS 1 (2d ed. 2001); JOHN CLARK & COLIN YALLOP, AN INTRODUCTION TO PHONETICS AND PHONOLOGY (2d ed. 1995).

8.   *See generally* STEPHEN R. ANDERSON, PHONOLOGY IN THE TWENTIETH CENTURY 9 (1985); FRANCIS KATAMBA, AN INTRODUCTION TO PHONOLOGY 1 (1989); ANDREW SPENCER, PHONOLOGY: THEORY AND DESCRIPTION (1996).

9.   *See generally* ROBERT D. BORSLEY, SYNTACTIC THEORY: A UNIFIED APPROACH (1991); ANDREW CARNIE, SYNTAX: A GENERATIVE INTRODUCTION 3–4 (2002); IVAN A. SAG & THOMAS WASOW, SYNTACTIC THEORY: A FORMAL INTRODUCTION 2–3 (1999).

10.   *See generally* IRENE HEIM & ANGELIKA KRATZER, SEMANTICS IN GENERATIVE GRAMMAR 1–2 (1998); RAY JACKENDOFF, SEMANTIC STRUCTURES 1–4 (1990); JOHN LYONS, LINGUISTIC SEMANTICS: AN INTRODUCTION (1995); JOHN I. SAEED, SEMANTICS 3 (1997).

11.   *See generally* GEORGIA M. GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 1–3 (1989); JACOB L. LEVY, PRAGMATICS: AN INTRODUCTION 1–5 (1993); STEPHEN C. LEVINSON, PRAGMATICS (1983); PRAGMATICS: A READER 3–11 (Steven Davis ed., 1991).

12.   *See generally* GILLIAN BROWN & GEORGE YULE, DISCOURSE ANALYSIS 1 (1983); FRAMING IN DISCOURSE (Deborah Tannen ed., 1993); JOHN J. GUMPERZ, DISCOURSE STRATEGIES 1–8 (1982); RONALD WARDHAUGH, HOW CONVERSATION WORKS 1–23 (1985).

13.   *See generally* J.K. CHAMBERS, SOCIOLINGUISTIC THEORY: LINGUISTIC VARIATION AND ITS SOCIAL SIGNIFICANCE 1–2 (1995); RALPH FASOLD, THE SOCIOLINGUISTICS OF LANGUAGE 1–3 (1990); BARBARA JOHNSTONE, QUALITATIVE METHODS IN SOCIOLINGUISTICS (2000); RONALD WARDHAUGH, AN INTRODUCTION TO SOCIOLINGUISTICS 1 (2d ed. 1992).

14.   *See generally* JEAN AITCHISON, THE ARTICULATE MAMMAL: AN INTRODUCTION TO PSYCHOLINGUISTICS 1–5 (4th ed. 1998); MICHAEL GARMAN, PSYCHOLINGUISTICS 3 (1990); PSYCHOLINGUISTICS (Jean Berko Gleason & Nan Bernstein Ratner eds., 2d ed. 1998).

15.   *See generally* NANCY BONVILLAIN, LANGUAGE, CULTURE, AND

basis of language acquisition and use.[16] When Clifford Geertz wrote of the modern confluence of intellectual disciplines,[17] linguistics could easily have been the poster child for that process. Law, like other fields of knowledge in which language plays a central role, has benefited from this research. However, a fuller understanding of the nature of linguistics research could open up new and more fruitful applications of this body of scholarship for lawyers, judges, and legal scholars.

II. ADMISSION OF EXPERT TESTIMONY AND THE EVOLVING GATEKEEPING FUNCTION OF JUDGES

Linguistics research, like other expert evidence, can be properly assimilated into law only to the extent that we understand its goals, its distinctive methodologies, and its criteria for assessing the reliability of its scholarly work. It is this concern for the appropriate use of knowledge from outside the world of law that shapes the legal rules governing the admissibility at trial of expert testimony. For many years the standard for determining the admissibility of expert testimony was that articulated in the 1923 case *Frye v. United States*.[18] In *Frye*, the appropriate test or standard governing admissibility of scientific evidence was defined as turning on whether the science in question was "sufficiently established to have gained general acceptance in the particular field in which it belongs."[19] This test was adopted not only in the federal courts but in most state courts as well and became the predominant test for the admission of scientific knowledge at trial. However, with the 1975 adoption of the Federal Rules of Evidence, it was unclear whether the *Frye* standard was still the governing test in federal courts. Rule 702 liberalized the rules on expert witness evidence by providing that testimony regarding technical or scientific evidence could be admitted if it would "assist the trier of fact [in]

COMMUNICATION: THE MEANING OF MESSAGES (1993); CULTURAL MODELS IN LANGUAGE AND THOUGHT (Dorothy Holland & Naomi Quinn eds., 1987); CAROL M. EASTMAN, ASPECTS OF LANGUAGE AND CULTURE 1 (2d ed. 1990); ZDENEK SALZMANN, LANGUAGE, CULTURE, AND SOCIETY: AN INTRODUCTION TO LINGUISTIC ANTHROPOLOGY 2–3 (1993).

    16.   *See generally* DAVID CAPLAN, NEUROLINGUISTICS AND LINGUISTIC APHASIOLOGY: AN INTRODUCTION 3 (1987); HANDBOOK OF NEUROLINGUISTICS (Brigitte Stemmer & Harry A. Whitaker eds., 1998).

    17.   CLIFFORD GEERTZ, *Blurred Genres: The Refiguration of Social Thought*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 19–35 (1983).

    18.   Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

    19.   *Id.* at 1014.

understand[ing] the evidence or [in] determin[ing] a fact in issue."[20] Rule 702 was silent as to whether scientific consensus was still the threshold standard for admission of such evidence.

In a series of cases in the early 1990s, the United States Supreme Court interpreted Rule 702 as superseding the *Frye* test.[21] In the first of these cases, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[22] the Court held that admissibility of scientific evidence in federal court requires a determination of its scientific validity as well as its relevance to the matter at hand.[23] No longer was it dispositive for the trial court to ask whether there was scientific consensus as to the reliability of the science behind expert testimony. Instead, the Court propounded a nonexclusive four-factor test for the admissibility of scientific evidence, emphasizing the trial judge's affirmative responsibility to determine that proffered evidence is "ground[ed] in the *methods and procedures* of science."[24] In addition to the *Frye* touchstone of general acceptance within the scientific community three other factors were added: whether the theory had been subjected to falsifiable tests, whether the science in question "was subject[] to peer review and publication," and whether there was a known error rate for the test or theory in question.[25] The Court reaffirmed this multi-factor test and expanded the reach of the *Daubert* analysis in *Kumho Tire Co. v. Carmichael*.[26] In *Kumho*, the Court indicated that the *Daubert* test was the appropriate standard for admissibility not merely for scientific evidence, but for all forms of technical or experiential expert testimony.[27]

The *Daubert* test has also been adopted in some state jurisdictions.[28] Even for those states in which the *Frye* test or a variant is still the legal

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20.   FED. R. EVID. 702.

21.   Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (explaining that *Daubert's* "gatekeeping" obligation, requiring an inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to *all* expert testimony); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997) (establishing that appellate courts applying the "abuse of discretion" standard to a trial judge's evidentiary rulings may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it).

22.   Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

23.   *Id.* at 589–90.

24.   *Id.* (emphasis added).

25.   *Id.* at 593–94.

26.   Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

27.   *Id.* at 141.

28.   *See, e.g.*, Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 579 (Ky. 2000) (noting the applicability of the *Daubert* test to all expert testimony pursuant to Kentucky Rule of Evidence 702).

standard for admissibility, the more stringent gatekeeping functions of the *Daubert* test—are consistent with increasing concern over the admission of so-called "junk science"—has tended to foster a greater judicial oversight of expert testimony.[29]   While the *Frye* test focused on the question of whether the proffered testimony was consistent with established consensus of those within the field, the *Daubert*–governed judge has additional gatekeeping responsibility and the authority to make an independent determination of the validity of the underlying science, considering the degree to which the field in question is based on testable or falsifiable propositions, its error rate, and the degree to which the research has been subjected to peer review.[30]   In short, *Daubert* is squarely based on a positivist view of scientific expertise.[31]   Thus, to the extent that a knowledge domain mimics the practices and methods of the "hard" paradigm sciences, *Daubert* will militate in favor of the admissibility of its forms of expertise. In contrast, for those domains of knowledge for which a positivist view of knowledge is ill-fitting—for example, many social sciences—*Daubert* may be misapplied as a roadblock to the admission of valuable evidence.

III. IS LINGUISTICS A SCIENCE?

One might wonder why anyone would care whether linguistics is a science, a social science, or somewhere in between. It may seem a pointless taxonomy for the sake of taxonomy alone. This Article suggests, however, that law has a responsibility to properly assess the nature of knowledge claims within the disciplines that assert a privileged claim to some form of "truth."   Disciplinary methodologies, goals, and the assessment of what counts as valid knowledge differ considerably for different scholarly enterprises. Scholars in humanities like art criticism, history, philosophy, and comparative literature are surely all seeking some kind of truth, but it is of a different order and nature than the truth sought by a molecular chemist or a geneticist. For example, a bad interpretation of *War and Peace* is wrong in a different kind of way than a poorly designed experiment in embryonic cloning is wrong. Of course, this is not to say that hard sciences are in any sense absolutely objective. Modern philosophy of

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29.   *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 153 & n.6 (1997) (noting the *Daubert* Court's concern with "junk science").

30.   *See supra* notes 24–25 and accompanying text.

31.   For the classic exposition of positivism in the philosophy of science, see KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1961), which distinguishes scientific inquiry from other belief systems by the insistence of science on the falsifiability of its hypotheses.

science has long recognized the degree to which science is itself an interpretive form of knowledge.[32] Nevertheless, the scope of interpretation and framing varies for different disciplines along a continuum, with humanities at one pole and physical sciences at the other. Social sciences sit somewhere in the middle of this continuum, with some closer to the sciences and others closer to the humanities.

Because the tests for the admission of expert testimony are structured to best fit those forms of expertise that are most "science-like," understanding the disciplinary nature of the form of expertise at issue becomes necessary. As noted, the *Daubert* test for expert testimony in particular, maps closely onto a positivist model of scientific knowledge.[33] Given the strictures of the *Daubert* factors as filters for admissible expert evidence at trial,[34] the more like a science a particular knowledge domain is seen to be, the more receptive courts ought to be to admitting evidence grounded in that domain. In this sense, the answer to the question "Is linguistics a science?" really does matter because the more science-like linguistic evidence is, the more readily it should be admitted.

So, how should we go about determining whether linguistics is a science? One way to do so would be to ask linguists what methodologies and disciplinary characteristics mark the field of linguistics and whether they think what they are doing is a science. At a joint conference of linguists and legal scholars held in 1995,[35] that very question was posed by the lawyers to the linguists. Linguist Jerrold Sadock expressed some skepticism about whether the category of science was itself more problematic than the lawyers might think, but even with that caveat he situated linguistics within the realm of science.[36] He defined sciences as disciplines that make falsifiable predictions about data outside the

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32.   *See generally* H.M. COLLINS & T.J. PINCH, FRAMES OF MEANING: THE SOCIAL CONSTRUCTION OF EXTRAORDINARY SCIENCE (1982); MARY HESSE, REVOLUTIONS AND RECONSTRUCTIONS IN THE PHILOSOPHY OF SCIENCE (1980); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). Even engineering, the most relentlessly quantitative of sciences, is not as cut-and-dried and mathematically governed as we might imagine. *See* EUGENE S. FERGUSON, ENGINEERING AND THE MIND'S EYE xii (1993) (arguing "that most of an engineer's deep understanding is by nature nonverbal, the kind of intuitive knowledge that experts accumulate").
33..   *See* discussion *supra* Part II.
34.   *See supra* notes 23–25 and accompanying text.
35.   Conference, *supra* note 6, at 785.
36.   *Id.* at 905.

discipline[37] and "involve[s] a tight set of rules . . . that aren't merely observations of the event you're attempting to describe."[38] Based on this positivist definition of science, Sadock argues that "linguistics gets a pretty high score as a science[:] . . . a 70 out of 100 . . . . And it's probably one of the highest if not the highest score of any social science[,]" though not as high as he thought physics would score.[39] Judith Levi, another linguist in attendance at the conference, agreed with Sadock that linguistics is a scientific activity.[40] She described modern linguistics[41] as a "theory building enterprise where [linguists] develop[] rigorous expectations for [the description of] language," analogous to the theory-testing activities of physicists and chemists.[42] She noted that linguists' hypotheses about language make predictions that can be tested by external data and that these hypotheses will either be corroborated or not by that data.[43]

This categorization of linguistics as science is not unique to practicing linguists. The venerable Oxford Dictionary defines linguistics as "the scientific study of languages and its structure."[44] Linguists take their professional place within the world of academic science. The Linguistics Society of America is a member of the umbrella organization for the sciences—the American Association for the Advancement of Science (AAAS).[45] Linguists take part in the cavalcade of scientific presentations

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37. The concept of falsifiability is key to a positivist view of science in which only those hypotheses whose predictions can be in some way tested count as "science." Unless a theory can be tested in such a way as to disconfirm it, the theory is not scientific. *See* POPPER, *supra* note 31, at 40–41.

38. Conference, *supra* note 6, at 905.

39. *Id.* at 905–06.

40. *Id.* at 899–900.

41. By modern linguistics, I am referring to post-Chomskyan linguistics. While many linguists vigorously disagree with Noam Chomsky with respect to particulars of the various theories he has propounded since the 1950s, no one seriously denies that the agendas he set have transformed the field of contemporary linguistic inquiry. His enormous influence is impossible to overstate—even those who reject his positions tend to define their theories in relation to Chomsky's positions. *See generally* RANDY ALLEN HARRIS, THE LINGUISTICS WARS (1993); FREDERICK J. NEWMEYER, LINGUISTIC THEORY IN AMERICA (2d ed. 1986); NEIL SMITH & DEIDRE WILSON, MODERN LINGUISTICS: THE RESULT OF CHOMSKY'S REVOLUTION (1979).

42. Conference, *supra* note 6, at 899.

43. *Id.*

44. THE OXFORD AMERICAN COLLEGE DICTIONARY 781 (2002). This usage is consistent with that given in DAVID CRYSTAL, A DICTIONARY OF LINGUISTICS AND PHONETICS 204 (3d ed. 1991), which defines linguistics as "[t]he scientific study of language."

45. *See* American Association for the Advancement of Science,

held annually under the auspices of the AAAS, presenting their latest research alongside researchers in such fields as astrophysics, marine biology, and nanotechnology. From the point of view of other scientists, linguists are fellow scientific researchers.

As a science, then, linguistics demands that the test for the acceptability of a linguistics theory is not whether it is elegant, interesting, or plausible, but solely whether it correctly makes predictions that fit linguistic data. Often well-articulated theories have to be abandoned when they fail to make correct predictions about data. For example, Judith Levi described a theory of compound nouns that she developed in 1978 as "a great theory . . . it was really neat."[46] But, she noted ruefully, she had to discard it because it turned out to be wrong.[47] Another example, one of the most highly contentious debates within modern linguistics, was the acrimonious challenge between generative semantics and interpretive semantics in the 1970s. Despite the dedicated scholarly contributions to generative semantics by a number of exceptionally bright and imaginative scholars, it ultimately failed because, in the words of linguist Jerry Fodor, "it was disconfirmed"; that is, language data stubbornly failed to fit the predictions of the generative semantics framework.[48] Because the field of linguistics operates under the methodologies and assessment standards of positivist science, testing proffered linguistics evidence under the *Daubert* standard should appropriately measure its validity.

IV. LINGUISTIC EVIDENCE AS AN AID TO FACT-FINDING

The testimony of linguists has in recent years been offered in both civil and criminal cases as relevant to a myriad of specific issues. It is difficult to come up with an accurate measurement of the number of cases in which linguists have been used. However, based on the writings of linguists describing their experiences as expert witnesses, it appears that linguistic expertise is being increasingly utilized by litigants, both as consultants in cases that ultimately settle and as expert witnesses at trial.[49]

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http://www.aaas.org (last visited Mar. 30, 2006).

46.   Conference, *supra* note 6, at 901.

47.   *Id.*

48.   HARRIS, *supra* note 41, at 241.

49.   *See generally* Judith N. Levi, *Language as Evidence: The Linguist as Expert Witness in North American Courts*, 1 FORENSIC LINGUISTICS 1–3 (1994). Linguist Roger Shuy has personally consulted on several hundred cases and testified in dozens. For a discussion of some of those cases, see generally ROGER W. SHUY, CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE (2005) [hereinafter SHUY, CREATING LANGUAGE CRIMES]; ROGER W. SHUY,

An examination of appellate case law almost certainly understates the extent to which linguists are appearing in court. Cases that the party proffering the linguist's testimony win are obviously not appealed by that party, even if the linguist was not permitted to testify, and, thus, such cases are invisible in the appellate record. Likewise, cases in which there was no objection at trial to the linguist's testimony will also be absent from the record because failure to object generally precludes appellate review. An appellate issue is most typically created when the losing party's proffer of linguistic expert testimony has been rejected. The losers in these circumstances face a daunting burden on appeal. Trial judges have long had—and, under recent Supreme Court precedent, continue to have— enormous discretion in the admission or exclusion of expert testimony, reviewable only for manifest abuse of discretion.[50] Because the standard of review is so deferential to trial court decisions on admissibility of expert evidence, appellate cases upholding trial court exclusion of linguistic evidence are not an accurate indicator of the degree of judicial hostility toward this type of expertise. Trial court receptivity to linguistic evidence is thus far more favorable than appellate case law would suggest.

Criminal cases present a multitude of issues for which a linguist's expertise could prove valuable. For example, where a defendant is accused of making a tape-recorded threat, analysis of the regional dialect characteristics of the threatener's voice could potentially exclude the defendant as the person making the threat.[51] Discourse analysis of surreptitiously recorded conversations can help jurors determine whether someone made a threat, solicited a bribe, or was rather the victim of police entrapment.[52] Similarly, a linguist's analysis of taped conversations could

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LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM (1993) [hereinafter SHUY, LANGUAGE EVIDENCE IN THE COURTROOM]; ROGER W. SHUY, THE LANGUAGE OF CONFESSION, INTERROGATION AND DECEPTION (1998) [hereinafter SHUY, CONFESSION, INTERROGATION AND DECEPTION]; ROGER SHUY, LINGUISTIC BATTLES IN TRADEMARK DISPUTES (2002) [hereinafter SHUY, TRADEMARK DISPUTES]. *See also* Peter Tiersma & Lawrence M. Solan, *The Linguist on the Witness Stand: Forensic Linguists in American Courts*, 78 LANGUAGE 221, 221– 23 (2001) (discussing the increasing use of linguists as expert witnesses in court).

50. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138–39 (1997).

51. Levi, *supra* note 49, at 2–3 (discussing three cases exonerating defendants in threat cases); *see also* Bethany K. Dumas, *Voice Identification in a Criminal Law Context*, 65 AM. SPEECH 341, 341 (1990).

52. *See generally* SHUY, CREATING LANGUAGE CRIMES, *supra* note 50 (collecting and discussing cases involving discourse analysis); SHUY, LANGUAGE EVIDENCE IN THE COURTROOM, *supra* note 49 (same); SHUY, CONFESSION, INTERROGATION AND DECEPTION, *supra* note 49 (same); LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 179–

be helpful in determining whether purported misstatements in a warrant application based on those conversations rise to the level necessary to require a *Franks* hearing.[53]   Linguists with expertise in language comprehension could be useful to assess the English language proficiency of a defendant in determining whether she was able to understand enough English to validly waive her *Miranda* rights or consent to a search.[54] More generally, linguistic analysis of the comprehensibility of *Miranda* warnings could be helpful in judging the level of understanding of juveniles, those of low intelligence, or those with cognitive impairment.[55]   Likewise, sociolinguistic and pragmatic analysis could be highly relevant to whether a particular suspect had attempted to invoke her *Miranda* rights in the context of police questioning.[56]

Civil cases also present many kinds of issues and problems for which linguistic expertise could be valuable.   For example, a linguist could perform a semantic analysis to assess the adequacy of a warning label at issue in a personal injury action.[57]   Comprehensibility of documents or notices is frequently at issue in civil actions; linguistic testimony would obviously be relevant in such cases.[58]   For example, in one case the plaintiffs proffered a linguist to provide evidence that American Sign Language users would not necessarily receive adequate notice from signs posted in English.[59] In another case, employees alleging that English-only

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211 (2005) (discussing cases involving threats, solicitation, and bribery).

    53.   *See* United States v. Jabero, 368 F. Supp. 2d 702, 716 (E.D. Mich. 2005) (finding that analysis of taped conversation by linguist did not convince trial court to order a *Franks* hearing on whether there were material misstatements in search warrant application).

    54.   *See, e.g.*, Levi, *supra* note 49, at 18–20; Tiersma & Solan, *supra* note 50, at 227–28; *see also* United States v. Gutierrez-Mederos, 965 F.2d 800, 803 (9th Cir. 1992) (addressing linguist's expert testimony as to defendant's English language proficiency on the issue of whether he had consented to search).

    55.   SOLAN & TIERSMA, *supra* note 52, at 73–93.

    56.   *Id.* at 106–08. *See generally* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 298–315 (1993) (discussing the problems with suspects' ambiguous and equivocal invocations of their right to counsel).

    57.   *See generally* Bethany K. Dumas, *Warning Labels and Industry Safety Information Standards: The Case of Loctite RC/609, in* LANGUAGE IN ACTION: NEW STUDIES OF LANGUAGE IN SOCIETY 302 (Joy Kreeft Peyton et al. eds., 2000).

    58.   *See* Levi, *supra* note 49, at 7–9, 13–14, 16–18; Tiersma & Solan, *supra* note 50, at 227.

    59.   Hall v. Saint Joseph's Hosp., 777 A.2d 1002, 1006 (N.J. Super. Ct. App. Div. 2001) (permitting a linguist to testify that the deaf patient was basically monolingual in American Sign Language and would have had difficulty adequately

workplace rules were violative of their rights successfully used linguistic expert testimony on the prevalence and importance of code-switching among bilingual speakers.[60]

One type of case in which linguists routinely testify is trademark litigation,[61] often with both sides offering linguistic testimony.[62] Morphological and phonological evidence can be proffered to demonstrate the likelihood of consumer confusion or dilution of the value of the mark in question. Recent cases involving this kind of expert evidence include whether Barnes and Noble infringed Half Price Books' trademark in using the phrase "half price books,"[63] whether Burger King was entitled to call a new menu item "steakburger" when that term had earlier been used by another restaurant chain,[64] whether a magazine could use the term "entrepreneur" in its title when there already existed a magazine by that name,[65] and whether a candy company could call its gummy fish candy "Famous Sqwish Candy Fish" without infringing the trademark "Swedish Fish" for similar candy.[66] Linguistic evidence has also been utilized in trademark cases to resolve the question of whether a once-protected trademark has become a generic term no longer entitled to legal protection from infringement.[67] One of the more unusual trademark cases in which linguistic evidence was admitted was an appeal taken from the cancellation of trademarks based on the team name "Redskins" on the grounds that

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understanding written information).

60. EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1069–71 (N.D. Tex. 2000) (relying on linguist's testimony concerning code-switching of bilingual speakers in finding civil rights violation in English-only workplace rules).

61. Linguist Roger Shuy has been an expert consultant and witness in so many trademark cases that he has written an entire book about some of the cases on which he has worked. *See* SHUY, TRADEMARK DISPUTES, *supra* note 49.

62. *See, e.g.,* Quality Inns Int'l, Inc. v. McDonald's Corp., 695 F. Supp. 198, 215–16 (D. Md. 1988) (admitting linguistic evidence from both parties on the question of whether "McSleep" motels infringed McDonald's trademark); *see* Levi, *supra* note 49, at 5–6 (detailing the testimony in the McDonald's case).

63. Half Price Books, Records, Magazines, Inc. v. Barnesandnoble.com, LLC, No. Civ. A. 302CV2518–G, 2003 WL 23175436, at *1 (N.D. Tex. Aug. 15, 2003).

64. Steak n Shake Co. v. Burger King Corp., 323 F. Supp. 2d 983, 985 (E.D. Mo. 2004).

65. Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1138–39 (9th Cir. 2002).

66. Malaco Leaf, AB v. Promotion in Motion, Inc., 287 F. Supp. 2d. 355, 360–62 (S.D.N.Y. 2003).

67. *See, e.g.,* Am. Thermos Prods. Co. v. Aladdin Indus., Inc., 207 F. Supp. 9, 20 (D. Conn. 1962), *aff'd sub nom.* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963) (demonstrating with semantic analysis how the term "thermos" had become generic and was no longer protected).

trademarks that are derogatory and offensive are subject to cancellation.[68]

When trial courts reject proffered expert testimony by linguists they do so for a variety of reasons, some entirely legitimate and others more problematic. In some cases, trial courts have determined that the proffered testimony was based on unreliable methodologies and thus was potentially confusing to the jury.[69] Others have found inadequate evidence of expertise on the part of the proffered witness[70] or that the expert had insufficient data upon which to render a reliable opinion in the case.[71] In addition, certain kinds of linguistic testimony are sufficiently controversial among linguists that courts are unlikely to find such evidence adequately reliable because it lacks scientific consensus. For example, the accuracy of so-called "voiceprints" to identify speakers,[72] and of author identification of written documents through stylistic analysis[73] are still hotly debated within the linguistic scholarly community. Rejecting testimony for any of these reasons is entirely consistent with the gatekeeping obligation trial judges have to ensure that admitted evidence is relevant and reliable.

Other reasons sometimes given for excluding expert testimony are less convincing, however. Judges have at times excluded expert testimony because it is feared that the credentials and expertise of the witness will overawe the jurors and cause them to give undue weight to the testimony.[74]

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68.   Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 107–09 (D.D.C. 2003), *reh'g denied*, 415 F.3d 44 (D.D.C. 2005) (en banc).

69.   *E.g.*, Mowry v. Viacom Int'l, Inc., No. 03 Civ. 3090, 2005 WL 1793773, at *12–14 (S.D.N.Y. July 29, 2005) (holding that the testimony of a linguist premised on highly unusual methodology without demonstrated indicia of reliability was properly excluded).

70.   *E.g.*, United States v. Tin Yat Chin, 371 F.3d 31, 40–41 (2d Cir. 2004) (reviewing the district court's limitation of defendant's expert testimony on the grounds that the proffer failed to show adequate expertise and data upon which to make her determination).

71.   *See, e.g.*, United States v. Gutierrez-Mederos, 965 F.2d 800, 803 (9th Cir. 1992) (noting that the linguistics expert had never interviewed the defendant and that most of her testimony consisted of "responses to hypothetical questions that presumed [the defendant's] limited language skills and 'cultural heritage'").

72.   SOLAN & TIERSMA, *supra* note 52, at 140–48 (noting skepticism within the field as to the reliability of voiceprint evidence); *see also* Levi, *supra* note 50, at 1–2.

73.   SOLAN & TIERSMA, *supra* note 52, at 149–78 (noting that although some promising methodologies are being developed for author identification from a sample corpus of writings, reliability of these techniques has not yet been demonstrated).

74.   *See generally* United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (articulating concern that experts may assume "mystic infallibility" in eyes of jurors); United States v. Amaral, 488 F.2d 1148, 1152–53 (9th Cir. 1973) (expressing concern regarding experts' "aura of special reliability and trustworthiness").

Social scientists investigating this possibility have concluded, however, that this fear is unwarranted. Jurors, it turns out, are quite capable of evaluating scientific expert evidence fairly[75] and without giving it excessive weight in their deliberations.[76]

Another reason some judges have given to exclude expert testimony by linguists is the erroneous belief that the linguist has no expertise beyond that possessed by jurors themselves.[77] Professor, linguist, and lawyer Lawrence Solan has called this the "we have a jury, so who needs a linguist?" rationale for excluding linguistic expertise.[78] Roger Shuy, a linguist who has frequently testified in court, describes the tension for the linguist between being too technical in one's testimony—risking that the judge will exclude the testimony as confusing and unhelpful to the jury— and being too straightforward and non-technical—risking that the judge will exclude the testimony because it does not add to what the jurors already know.[79] He notes that judges who may be skeptical about whether a linguist's testimony assists the jury's understanding of language misunderstand what it is that linguists do when they analyze data.[80] For example, Shuy often performs discourse analyses of tape recorded conversations at issue in a trial:

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75. Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 CONN. L. REV. 1083, 1094–98 (1993) (discussing studies indicating that jurors are able to draw valid factual conclusions even with regard to complicated scientific matters).

76. Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, LAW & CONTEMP. PROBS., Autumn 1989, at 133, 173 (reviewing studies assessing whether expert testimony carries excessive weight with jurors and concluding that it does not).

77. *See, e.g.*, Tilton v. Capital Cities/ABC Inc., 938 F. Supp. 751, 753 (N.D. Okla. 1995), *aff'd*, 95 F.3d 32 (10th Cir. 1996).

78. Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167, 1180 (1999).

79. SHUY, LANGUAGE EVIDENCE IN THE COURTROOM, *supra* note 49, at xix. He notes the following:

> Appearing as an expert witness may well be the ultimate test of the applied linguist, since we are expected to be technically expert enough to have useful things to tell the jury but, at the same time, effective enough as teachers to be able to communicate technical information in ways that can be of immediate interest and usefulness to a jury.

Id.

80. *Id.* at xvii.

Prosecutors regularly proclaim that it does not take [linguistics] expertise to hear and understand a conversation. One such prosecutor recently asked me, in fact, whether I had had my hearing checked recently. His focus, of course, was on the wrong thing. A linguist's hearing may be no better than a juror's hearing, but the linguist's *listening* skills are finely honed by training and experience. Listening goes beyond hearing. . . . It includes attending to the many things that average listeners overlook when they hear speech

. . . [L]inguists know what to listen for in a conversation. They listen for topic initiations, topic recycling, response strategies, interruption patterns, intonation markers, pause lengths, speech event structure, speech acts, inferencing, ambiguity resolution, transcript accuracy and many other things. Scientific training enables linguists to categorize structures that are alike and to compare or contrast structures that are not.[81]

Just as linguists may help to focus jurors on aspects of a conversation that they would have failed to pay attention to without such guidance, linguists may also be helpful in elucidating structures of meaning in legal documents. Although courts have generally not been receptive to the admission of this sort of testimony,[82] it has been suggested that this evidence could be helpful to courts, with the linguist serving not as an arbiter of meaning but rather as a "semantic 'tour guide.'"[83] In that role, the linguist would assist the court by providing the scientific framework in which to understand intuitions speakers have about language and meaning. Solan gives the example of a linguist who was asked to perform a syntactic analysis of some purportedly ambiguous language in a contract.[84] Although the ultimate issue of whether the language really was subject to differing interpretations was properly for the trier of fact, the linguist's analysis did demonstrate that the structure of the language in question was consistent with two different interpretations.[85] In that case, the linguist's

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81.   *Id.* at xvii–xviii.
82.   *See, e.g.,* Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 420–21 (7th Cir. 2005) (finding no abuse of discretion to exclude linguist's testimony as to whether collection letters were confusing or ambiguous); Howard v. Or. Mut. Ins. Co., 46 P.3d 510, 515 (Idaho 2002) (finding no abuse of discretion in striking proffered testimony by linguist as to whether an insurance contract provision was ambiguous); *see also* Solan, *supra* note 79, at 1180–82 (noting cases that have rejected testimony by linguists, including testimony on the meaning of insurance contracts).
83.   Solan, *supra* note 78, at 1184.
84.   *Id.* at 1189–90.
85.   *Id.* at 1190.

"semantic tour" may well have been helpful to the jury in reaching their verdict.[86]

V. LINGUISTIC EXPERTISE IN AID OF PUBLIC POLICY

This Article has been focusing thus far on the use of linguistic expertise by trial courts to aid in fact-finding in individual cases. There is, however, another way that the law can make use of linguistic expertise, and it is one that is largely underutilized at present—namely, the use of linguistic knowledge by appellate courts as a tool for crafting and applying doctrinal rules. The distinction between these two uses of social science research was first pointed out by Professor Kenneth Davis in his dichotomy between what he called "adjudicative facts"—those facts that are specific to a particular set of litigants in a particular cause of action—and "legislative facts"—those relevant to the development and articulation of the appropriate contours and applications of legal doctrine transcending a specific cases.[87] John Monahan and Lauren Walker have appropriated Davis's categories and renamed them "social facts" and "social authority;"—terminology that perhaps better captures the case-specific fact-finding and case-transcendent rule-developing notions behind the distinction.[88] Although some appellate courts have explicitly[89] and implicitly[90] made use of linguistics research as "social authority," generally

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86. *Id.*

87. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 423–25 (1942).

88. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 482–91 (1986). Monahan and Walker have gone on to elaborate their suggestion that social science research be more comprehensively utilized as a resource in propounding and applying legal rules. *See generally* John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569 (1991); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

89. For example, the United States Supreme Court in its 1994 term cited with approval a book review co-authored by law professors and linguists using linguistic research to support its ultimate resolution of several cases. *See* United States v. Granderson, 511 U.S. 39, 53 (1994) (citing Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (reviewing LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993))); Staples v. United States, 511 U.S. 600, 623 (1994) (same); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994) (same).

90. In *Bailey v. United States*, 516 U.S. 137 (1995), the petitioners cited the Cunningham book review in their reply brief to the Court. *See* Reply Brief for Petitioners at 2 n.1, 3 n.2, *Bailey*, 516 U.S. 137 (Nos. 94–7448, 94–7492). While the

appellate courts have made less use of this resource than have trial courts.[91]

This Article advocates that appellate courts take full advantage of scientific linguistics research as a resource to aid them in the articulation and the application of legal rules that depend in some way on an understanding of how language works.[92] In *Language Crimes*, linguist Roger Shuy describes misconceptions jurors have about the nature of language and its social use.[93] He then demonstrates how his testimony was used in a number of cases to overcome those mistaken beliefs and promote more accurate factual determinations.[94] But it is not just good fact-finding that can be hampered by misconceptions about language. Legal doctrines themselves are premised on unexamined beliefs about how language works—beliefs that are often misconceived and inaccurate.   Just as scientific linguistic knowledge is crucial in resolving particular factual disputes accurately, so too it is also indispensable in crafting legal rules that are consonant with how people actually use language. In *The Language of Judges*, linguist Lawrence Solan argues judges do not make good linguists.[95] This is not meant as an indictment of judges—any more than if he were to say that judges make poor astronomers. What Solan means is that a lack of scientific linguistic training can cause judges to employ incoherent and inconsistent underlying theories of language and meaning. To the extent that judges utilize something that on the surface looks like linguistic principles, they are frequently forced to subordinate these quasi-linguistic principles to other values and principles to get the case "right." Judges would be better off having the benefit of actual linguistic expertise. This would be beneficial not because the linguistic principles would be dispositive in crafting legal doctrines, but because scientifically valid linguistic concepts could then be explicitly considered and weighed against competing values, concepts, and principles in an open and honest manner.

Court did not cite the book review in its opinion, its reasoning seems to parallel the review's analysis.

     91.   For example, despite the fact that the Law and Linguistics Consortium, composed of linguists and law professors, filed an amicus brief in *United States v. X-Citement Video, Inc.*, 513 U.S 64 (1994), the Court's ultimate decision did not appear to be influenced by their analysis.

     92.   Other scholars have suggested appellate courts make greater use of other kinds of scientific and technical expertise that are provided through amicus curiae briefs. *See, e.g.*, Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 WASH. U. L.Q. 789, 794–97 (2000).

     93.   SHUY, LANGUAGE EVIDENCE IN THE COURTROOM, *supra* note 49, at 1–19.

     94.   *Id.*

     95.   LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 59–63 (1993).

Judges, in both trial and appellate courts, have become increasingly comfortable taking economic analysis into account in determining appropriate legal rules. Law and Economics scholarship, both in its original University of Chicago-based incarnation and in its numerous progeny and spin-offs, has been frequently cited with approval by appellate courts in arriving at and articulating the most appropriate rules in resolving legal issues.[96] No one seriously suggests that doctrine driven by economic perspectives is in any sense illegitimate. Neither should legal doctrine that takes into account the science of linguistics be problematic. Ironically, measured by the *Daubert* standards, linguistics would appear to be at least as scientifically valid as the "dismal science" of economics. Although neither discipline has much use for laboratories and white coats,[97] the theoretical predictions of linguistics are more easily testable and falsifiable through examination of objective data than those of economics. Utilizing research in linguistics where pertinent is no more inappropriate and no more threatening to the legal order than using economic insights has been.

Appellate courts are by no means the only forums in which linguistic expertise could be valuable to the legal system. To take just one example, linguist and law professor Peter Tiersma recently played a major role in rewriting the California pattern jury instructions used in criminal cases to make them less confusing and less ambiguous.[98] Linguistic research in the comprehensibility of texts has obvious utility in the crafting of jury instructions that are properly understood by lay readers.[99] Likewise, linguists who have studied textual ambiguity can flush out unintended instances of lexical, syntactic, and indexical ambiguity in proposed instructions and rewrite them to eliminate the problem. Often ambiguity in a text goes unnoticed by its original author because the author knows what

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96.   *See, e.g.,* Harvard Real Estate-Allston, Inc. v. KMART Corp., 407 F. Supp. 2d 317, 320 n.2 (D. Mass. 2005) ("With the rise of law and economics scholarship, it is difficult to conceive of any legal dispute that cannot be expressed through a plausible, if speculative, valuation framework.").

97.   Jerry Sadock described how experiments to test the validity of linguistics theories proceed: It begins with a hypothesis that:

> Make[s] different predictions [and] . . . different claims about facts. Then we'll go out and test those facts. We'll perform an experiment. The thing about experiments in linguistics is they're not very grand. They usually consist of just thinking, no laboratories, no white coat. You don't even have to wash your hands usually.

Conference, *supra* note 6, at 910.

98.   SOLAN & TIERSMA, *supra* note 52, at 248 n.46.

99.   Tiersma & Solan, *supra* note 49, at 227.

he intended to say and thinks he has clearly said it. Because linguists understand the structural aspects of language that give rise to ambiguity,[100] they can more easily spot unintended ambiguities than untrained writers can. Legislatures and law reform commissions need the expertise of linguists as much as judges and courts do if law is to reflect the reality of the human social order.

So much of what we are and do as humans is composed of or mediated by language that it would seem obvious that the science of language would be highly relevant for sound policy analysis in law. Indeed, the centrality of an understanding of the nature of language and its use to any understanding of the human social world has led one linguist to wryly comment that linguistics has become the quintessential "universal donor" discipline to the scholarly world.[101] As suggested in this Article, the legal system has already been enriched by donations from linguistics scholarship, but there are many additional areas in which lawyers and judges could and should make fruitful use of the research generated by the universal donor discipline of linguistics.

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100.   There are defined structural explanations for the ambiguities in simple sentences like: "Everyone didn't like the movie.", "The missionaries are too hot to eat.", "Visiting relatives can be tedious.", "Competent women and men have all the good jobs.", and "What disturbed John was being ignored by everyone." Linguists' understanding of the structural genesis of ambiguity can uncover such problems in more complex sentences as well. For a comprehensive (if dauntingly technical) linguistic analysis of textual forms of ambiguity, see GRAEME HIRST, SEMANTIC INTERPRETATION AND THE RESOLUTION OF AMBIGUITY (1987).

101.   Robin Tolmach Lakoff, Redrawing the Gender Line in the Sand, Lecture Handout given at Seattle University, Jan. 13, 2005 (on file with author).