22 Discourse Analysis in the Legal Context

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0 Introduction

One of the defining characteristics of discourse analysis is that it is capable of application in a wide variety of settings and contexts. Wherever there is continuous text, written or spoken, there is a potential analysis of such text. The area of law provides an open opportunity for discourse analysis, especially since law is such a highly verbal field. It is generally regarded as a field containing written discourse, for care is taken to record in print all oral interactions that occur in court. Cases are preserved in written form to serve as the basis for later decisions and to record the cases for later review. Law libraries, therefore, house immense collections of written text, such as motions, counterclaims, and judges' opinions, but they also contain spoken words, transcribed in writing, such as trial testimony, questioning, and argument. Law, therefore, is a fertile field for discourse analysts.

1 A Brief History of Discourse Analysis and Law

Forensic linguistics is a somewhat newly recognized subfield of study, having spawned its own academic organizations and journal only recently. In the 1990s, forensic linguistics, in the broader sense, seems to have flowered, with important general collections of articles on language and law (Gibbons 1994; Levi and Walker 1990; Rieber and Stewart 1990), and books on the language of the courtroom (Solan 1993; Stygall 1994), bilingualism in the courtroom (Berk-Seligson 1990), and aircraft communication breakdown (Cushing 1994). Discourse analysis plays a role in these studies, but it is not the centerpiece of these works.

There were, of course, instances of the application of linguistics to law much earlier than this. Individual linguists have been called upon to assist attorneys for many years, but, as far as I can tell, without much documentation. For example, I know from personal correspondence that the late Raven I. McDavid, Jr., was used by Chicago

area lawyers to help with the identification of dialects of defendants in law cases. There were probably other linguists used in the same way throughout the years. During the 1960s, linguists were called upon to assist both the government and local and state school systems in interpreting and evaluating issues related to new laws on bilingual education and desegregation. Again, official documentation of such consultation is either nonexistent or spotty.

Before the 1980s, it is clear that linguists who engaged in such work did so as a side-issue application of their primary work as dialectologists, phonologists, syntacticians, or, in some cases, applied linguists in the most general sense. There were several phonologists doing forensic work in voice identification (Tosi 1979), but there is no record of any linguists referring to themselves as forensic linguists, those specializing in the relationship of linguistics, in its broadest sense, and law.

It appears that the advent of surreptitious tape recordings of conversations had an important effect on expanding and organizing forensic linguistics to what it is today, largely because of two developments. By the 1970s, thanks to vast improvements in electronics and the passage of new laws related to electronic surveillance, the government had begun to increase its use of taped evidence in matters of white-collar and organized crime. It is perhaps serendipitous that during this same period, linguistics was expanding its domain to include the systematic analysis of language beyond the level of the sentence and its study of meaning beyond the level of words. "Discourse analysis," "pragmatics," "speech acts," "intentionality," "inferencing," and other such terms began to find their way into common academic use. The advent of these two developments made it possible to merge them in the use of discourse analysis to analyze the tape recorded conversations gathered by law enforcement agencies as evidence against suspects.

Nor is discourse analysis limited to criminal law cases with tape recorded evidence. Its uses were also immediately apparent and available as a further tool to be used in the stylistic identification of authors of written documents, in the patterned language use of voice identification, in the discovery of systematic language patterns that serve as profiles of suspects, and in the identification of crucial passages in civil cases such as disputes over contracts, product warning labels, and defamation.

2 Using Analysis to Analyze Criminal Cases

2.1 Using familiar tools to analyze criminal cases

2.1.1 Topic and response analyses

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

conversations. Response analysis showed that when the topic of murder was introduced by the undercover employee, Davis responded with no agreement and, in fact, no recognizable interest in the matter. His response strategies were to change the subject, say nothing at all, or offer only feedback marker "uh-huh" responses. One battle in court concerned the meaning of these "uh-huhs," the prosecution arguing that they signaled agreement with the employee's offer and the defense arguing that they indicated only that Davis was listening, but not agreeing, to what the other man was saying.

The context of the event also shed some light on Davis's verbal behavior. Davis had just been acquitted in a trial in which he had been accused of breaking into his own home, wearing a ski mask, and killing his wife's boyfriend. After his acquittal, Davis, perhaps understandably, brought divorce proceedings against his wife. During these proceedings, Davis heard, correctly or not, that his wife was running around with the judge in the divorce trial. To obtain evidence of this, Davis asked that employee to spy on his wife and catch her with the judge. The employee went to the police and told them that Davis had asked him to find someone to kill the wife and the judge. The police then wired the employee with a tape recorder and sent him to get the verbal evidence on Davis. This produced two brief meetings, both requested by the employee, in which the two men sat in a car and talked. The employee carried a gun (not uncommon in Texas) and had a black belt in karate. Davis, a slight man, appeared nervous throughout.

The "smoking gun" evidence held by the prosecution was a passage on one of the tapes in which the employee reports to Davis, "I got the judge dead for you." To this, Davis is alleged to respond, "Good," followed by the employee saying, "And I'll get the rest of them dead for you too." These words do indeed appear on the tape but not *in response* to the employee's statement, as the government's own evidence would show. As it turns out, the police not only had the employee wear a mike but also made a videotape of the meeting, taken from a van parked across the parking lot. Correlation of the voice tracks of the audio- and videotapes indicated that Davis was getting out of the car as they were discussing the employee's boss, a man named Art. As he got out of the car, Davis continued to talk about Art while the employee, anxious to get incriminating evidence on tape, talked about getting the judge and others dead.

At trial, I testified that two separate conversations went on at the same time here. I had the jury read everything that Davis said, beginning with the preceding conversation about Art and continuing as he moved around the side of the car. It read as a continuous topic, with the "smoking gun" word, "Good," an integral and grammatical part of his own sentence. Davis's "good" was not in response to the employee's topic at all. Likewise, I had the jury read the employee's discourse continuously, also beginning with the mutual topic or Art, and showed how the moment Davis was out of clear hearing distance, the employee lowered his head to his chest, presumably where the mike was hidden, and peppered the tape with words that Davis would not be likely to hear. It was only by sheer coincidence that Davis uttered "Good" at a point where listeners who did not attend to body position changes could have heard this as a response to the bad stuff on the tape. In the courtroom, even if language evidence is tape recorded, attention is given almost entirely to the written transcript. In this case, the prosecution followed this pattern, to its ultimate disadvantage.

This case opened the door for discourse analysis in many other criminal cases over the years. The Davis case showed that topic and response analyses are salient units of analysis for any conversation, but are especially vital in criminal cases involving tape recorded evidence. Likewise, the significance of identifying dialogic discourse as needing a participatory addressee in order to have interactional meaning was emphasized in this case. Tape recordings have only minimal ways to demonstrate that interactants are different distances from each other when they utter their words. Relative degrees of loudness help, but the on- or off-topic relevance of their answers also contributes to understanding of such distance.

I have had several cases since Davis in which participants' off-topic responses indicate that they either had a hearing problem or were simply out of hearing range. Another possibility, of course, is that they were either so uninterested in the topic that they did not bother to reply to it or so afraid of the topic that they avoided it. All of these analyses, however, usually work to the benefit of the suspect and cast serious doubt on the accusation of the prosecution.

2.1.2 Speech act and pragmatic analysis

Speech acts, such as promising, offering, denying, agreeing, threatening, warning, and apologizing, have been well documented as central to conversation used as evidence in criminal cases (Shuy 1993) as well as to the intent and understanding of contracts, warning labels, and other written documents in civil cases (Dumas 1990; Shuy 1990).

One example of how speech act analysis was used in civil litigation took place in Fort Worth, Texas. In an effort to price a used car, a congenitally deaf man charged the dealership with the infliction of false imprisonment, fraud, emotional distress, and violating the state's deceptive trade practices act as well as the human resources code's protection of the handicapped. Handwritten exchanges between the customer and the salesperson constituted the evidence for the charges. During the four hours of this event, he made it clear that he would not buy that day, but his only promise was to think about it and come back when he was ready. Nevertheless, the salesperson took the keys to the customer's current car and refused to return them. The salesperson also solicited, and got, a returnable check from the customer which was allegedly to be used to convince the supervisor that the customer was interested, supposedly to produce a better deal in the long run. After less than an hour of this, the customer requested that his check and keys be returned. By the second hour, he was demanding. By the fourth hour, he took matters into his own hands, scooped up all the written exchanges, rifled the salesperson's desk until he found his check, and headed for the door, only to be blocked by the salesperson, who smiled and dangled the keys tauntingly. The customer snatched the keys out of the salesperson's hand and headed straight for an attorney.

Speech act analysis of all of the hundred or so written exchanges made it clear that the customer gave no indication that he would buy that day. He reported facts about his financial status seven times, requested information about the vehicle six times, promised to return at a later date three times, disagreed with the salesman's offers 14 times, requested his check back 12 times, and clearly said "no" to the salesperson's offer 11 times. Despite this evidence, the dealership claimed that the customer was,

indeed, interested in buying that day and, even worse, that he had agreed to purchase the vehicle, which is why they justified keeping him there so long.

This rather simple use of speech act analysis complemented other linguistic analyses in this case and contributed to the ultimate jury finding for the customer (Shuy 1994).

Speech act analysis has been especially helpful in cases involving alleged bribery. A classic example, again in Texas, involved the charge that a state politician had agreed to accept money in exchange for switching the state employee insurance program to a new carrier. But was the speech act of offering the deal what the prosecution said it was? First of all, it was couched in the perfectly legal context of an offer to save the state money by getting a better insurance contract. Then suddenly the agents made a second offer, for a campaign contribution of $100,000 (perfectly legal at that time in that place), to which the politician replied, "Let's get *this* done first, then let's think about *that*." The agents then upped the ante, saying, "There's $600,000 every year . . . for whatever you want to do with it to get the business." To this, the politician replied, "Our only position is that we don't want to do anything that's illegal or anything to get anybody in trouble and you all don't either. This [the insurance plan] is as legitimate as it can be because anytime somebody can show me how we can save the state some money I'm going to be for it." As for the campaign contribution, the politician accepted it as a legal campaign contribution and clearly said that he would report it. The agent urged him not to do so. He reported it anyway. Although the state did not switch insurance policies, the politician was indicted for bribery. Speech act analysis was used to show that there were two separate offers here and that the politician clearly denied the connection between the two, both by his own words and by his act of reporting it to the state campaign finance committee. The politician was acquitted.

2.2 *Newer areas for discourse analysis*

Although discourse analysis has been used in many cases such as those described above, it is not limited to cases of solicitation to murder or bribery. Other areas of law, such as voice identification and defamation, are equally promising for future work.

2.2.1 Voice identification

Throughout recorded history, people have been identified, or misidentified, by their voices. An early record of such practice is found in Genesis 27, where Jacob, stole the inheritance of his older brother Esau. In the modern American context, one of the earliest known cases involving voice identification is *U.S.* vs. *Hauptmann* in 1935, in which the famous aviator Charles Lindberg claimed at trial that he recognized Hauptmann's voice in a telephone call demanding ransom money for Lindberg's kidnapped child. Controversy over the validity of voice identification led to the modern era of scientific voice analysis (Tosi 1979). Today, those interested in the field that has come to be called forensic phonetics can benefit from starting their reading with Baldwin and French's *Forensic Phonetics* (1990), Hollien's *The Acoustics of Crime* (1990),

and a special issue of the journal *Forensic Linguistics* (vol. 3, number 1, 1996). As might be expected, these works deal primarily with the sounds of language used in voice identification and not with the discourse patterns of those whose voices come under analysis.

What can discourse analysis add to the issue of identifying the voices of otherwise unidentified speakers? The need to identify voices on a tape recording is not always limited to the types of cases normally examined by forensic phoneticians. For example, in a typical criminal case in which tape recorded conversations serve as evidence, not only must the words of each speaker be identified and transcribed, but also the speakers must be identified accurately. In most cases, this is not too difficult, especially if there are only two speakers on a tape and those two speakers have distinctively different voices. But when there are multiple speakers, things get complicated. And when some of the multiple speakers have, for example, equally deep voices, the same southern dialect, or other speaker attribution similarities, attention must be given to other voice identification features. Complicating matters even further for the use of forensic phoneticians, accurate voice identification usually requires a tape recording which is of good enough quality to be submitted to sophisticated spectographic instrumentation. This rules out many, if not most, surreptitious tape recordings made in criminal investigations, since such recordings are done under less than optimal laboratory conditions.

Earlier I briefly noted how the interruption patterns of a given speaker helped identify him as the speaker of certain passages in a tape recorded business meeting. There were discourse speaker identification features as well. One of the three speakers with the same first name, for example, dominated certain sections of the conversation, bringing up the most topics and responding first to the topics introduced by others. This pattern of dominance helped identify him as the speaker on several occasions.

A similar voice identification procedure was made in the case of *U.S.* vs. *Harrison A. Williams*, in his noted Abscam case in the early 1980s. Both Senator Williams and Camden Mayor Angelo Errichetti had deep, bass voices. Both were recorded together on several of the undercover tapes. Even when videotapes were made, the visual quality was so fuzzy and the angles and lighting were so poor that it was not always possible to determine who was speaking. On several critical occasions, the government transcript showed Senator Williams as the speaker where my analysis showed it to be Errichetti doing the talking. Since their voices were otherwise similar and the poor quality of the tape ruled out spectographic analysis, the major diagnostic clues to speech identification were found in their distinctive discourse patterns. Among other things, Errichetti interrupted other speakers frequently; Williams did not. Errichetti repeated himself regularly; Williams tended not to. Williams used frequent discourse markers (Schiffrin 1987), such as "Well," "And" (lengthened and slowed down), "So" (also lengthened), and "You know," usually as sentence starters; Errichetti did not. Attending to such discourse features, to which the courts are unaccustomed, led me to the proper speaker identification where the government had erred.

If the potential of discourse analysis for voice identification has been underrealized to date, it is probably because the opportunities to use discourse features have been few. In much of the research on discourse analysis, the significance of such features may be considerably less apparent and significant than in a law case involving the potential loss of property or individual freedom. In that even today there is a relatively

small number of linguists active in the field of forensic linguistics, the frequency of using discourse analysis for voice identification has not been great.

2.2.2 Defamation

In recent years linguists have begun to be called as witnesses in cases involving charges of libel or slander. Defamation laws specify that if something is published (in writing or orally) that contains information that is not true and is put forth as fact rather than as opinion, the author of such material is subject to prosecution for defamation of character. The issue of the truth of the statement is arguable by both parties but the way in which the statement is put forth is the proper subject of linguistics. There are structural ways that a statement can be identified as either fact or opinion.

An opinion is defined as a view, judgment, or appraisal formed in the mind about a particular matter. The structure of opinion statements, however, calls on linguistic expertise. There are what might be called performatively stated opinions, usually accompanied by words such as "I think that . . . ," "I believe that . . . ," "It appears to me . . . ," or, best of all, "In my opinion, ..." Opinions are often accompanied by conditional modals, such as "I would think . . . ," "One could believe . . . ," or "It would appear that . . . ."

A fact is defined as a thing done, the quality of being actual, information having objective reality, something that has actual existence. Facts are represented grammatically in the past or present tense, but not in the future. Information conveyed as fact is capable of independent verification while information conveyed as opinion is not.

Defamation law and dictionaries are in agreement with the definitions of both "opinion" and "fact," but both law and lexicography are predictably silent about their linguistic structure. Yet it is the discourse structure of the language used as evidence of defamation that is often most crucial to the resolution of the case.

Defamation is an extremely sensitive area in which to cite actual cases. Therefore, the following examples will protect participants by maintaining anonymity with pseudonyms.

A defamation case was brought by Roy Harris against a television station which, he claimed, went beyond calling him a suspect to accusing him of committing the crime in news segments of two different programs. In most of the two programs, Harris was consistently referred to as "the only suspect" or "the one and only suspect." Being the only suspect does not defame him, however, since this is a verifiable fact. Nor does it mean that he actually committed the crime, for that is a different conclusion. In fact, the use of these words might even have been defended by the station as evidence of police incompetence. However, in one of the broadcasts, the police investigator said, "The suspect went directly into the house, into the kitchen, and shot the victim in the head." Elsewhere in the programs, Harris was said to be the only suspect. Now we are told that the suspect shot the victim. Put these together and one can easily understand the program to be stating as a fact, not opinion, that Roy Harris killed the victim. This referential definition was overlooked by both the plaintiff and the defense, until the linguist called it to their attention.

Referential definition is not the only discourse analysis procedure found useful in defamation cases. Discourse framing, for example, also played a role in the Harris case. Television news programs characteristically frame their stories with introductions

and conclusions that relevantly focus on the specific news item. In this case, the introductory frame went a bit beyond this, as follows:

(1) *Female announcer*: During the past few weeks, you've probably heard about the latest in the murder of a suburban Kenmore housewife.
Male announcer: A husband and his one-time girl friend have been indicted for murder in that case. Well, tonight's special examines another case where the victim's husband is coming under close scrutiny.

Here the murder story frame makes use of an analogy. An analogy is defined as an inference that if two or more things agree with one another in some respects, they will probably agree in others as well. Thus by using the analogy of the husband's indictment in the prior Kenmore murder with the current Harris case, the discourse frame encourages the inference that these two separate and unrelated cases are alike even though Harris was never indicted. The use of the discourse marker, "Well," uttered with a lengthened vowel, signals that what follows has semantic cohesion with the Kenmore murder. The male announcer's use of "another" strengthens this connection. The use of analogical discourse framing encourages listeners to infer that Harris, like the Kenmore husband, is more than just a suspect.

As with other areas of the legal context, discourse analysis has been underutilized in defamation cases so far.

3 Using Criminal Cases to Address Linguistic Problems

To this point we have noted how discourse analysis can be used to address legal issues in certain criminal and civil cases. Such a process is one definition of applied linguistics. There are those, however, who believe that the relationship of linguistics to real world problems is more iterative. They aver that through the process of addressing real-world problems, new insights emerge in the development of linguistics. Such may well be the case with discourse analysis.

3.1 Discourse analysis and intentionality

Topic and response analysis has the advantage of opening the door a bit to the perplexing problem of intentionality. Nobody, linguist, psychologist, or anybody else, can get into the mind of a speaker and figure out exactly what that person's intentions are. But tape recordings make it possible for us to freeze the lightning-fast pace of everyday conversation, to examine it over and over again, and to determine *clues* to such intentions that reside in the speakers' topics and response strategies, much like the way pieces of pottery give clues to past civilizations in archeological studies. This difference between actual intentions and clues to such intentions is very important. When I introduce such ideas, attorneys often accuse me of mind-reading. When they do so, however, they fail to listen carefully to the distinction I am making.

One way to determine the intention of people is to simply ask them about their intentions. But the possibility of getting an accurate and truthful answer in a court case is diminished by the fact that participants naturally want to protect their own best interests. In everyday life, people may not even be aware of their own intentions or, more likely, they are unable to articulate them clearly. In any case, self-report data are not highly regarded in the social sciences. Short of inventing a machine that gets into the mind and captures actual intentions, the topics one introduces in a conversation come closer to indicating agendas or intentions than anything else. One should be very careful not to claim that these clues to intention are actually the real intentions. But real intentions can certainly be inferred justifiably from them.

Likewise, the responses people make to the topics of others can also provide *clues* to their intentions. We have a number of response strategies available to us. We can agree or disagree with the other person's topic. We can elaborate on that topic in ways that indicate that we accept/reject it or even agree/disagree with it. In either case, the intentions are reasonably clear, even performative. Alternatively, we can change the subject, an act which offers several possible interpretations, including lack of interest in it, inability or unwillingness to hear it, mental wandering from it, rudeness, or fear of getting involved in that topic. But in any of these alternatives, it is very difficult to claim that the responder had the intention of either agreeing or disagreeing with the topic. In a court of law it is very difficult, if not impossible, to prove that such responses indicate agreement to participate in a crime.

3.2 Discourse analysis and ambiguity

Ambiguity in the use of language is often thought to be the sole province of semantics. Discourse ambiguity, however, is equally present in both written and spoken language. The sequencing of discourse can create an ambiguity that is not always immediately apparent in the individual words or sentences.

For example, the criminal case of *U.S.* v. *John DeLorean* hinged on whether or not DeLorean, the auto manufacturer whose new car plant in Ireland was built with money from the British government but had run into financial difficulties when the government changed, had agreed to purchase and then sell drugs in order to salvage his company from impending bankruptcy (Shuy 1993). The prosecution thought that it had DeLorean when, on tape, he agreed that "investment" was a good thing. Undercover agents had tried for several months to entice DeLorean to invest in their fake drug business but DeLorean had never bitten. In fact, he had previously rejected such a plan outright.

Closer examination of the context that led up to DeLorean's agreement makes it clear, however, that the discourse sequence puts a quite different spin on his agreement that investment would be a good thing. As it turns out, the undercover agents, though admitting that they were in the drug business, had actually made two separate propositions to DeLorean. One was to make him a kind of partner in their drug business, which he rejected, and the second was to continue to try to help him find legitimate investors in his car business. Thus, when they met on the occasion of DeLorean's alleged agreement that investment was a good thing, two different contextual meanings of "investment" were operational. The government chose to

believe that DeLorean meant that he would invest in their drug business, get a quick resale turnaround, and gain enough money to keep his company afloat. DeLorean's position, argued by the defense and supported by my analysis, was that he agreed that it would be best for these people to find investors in his company. The word "investment" was used by both the agent and DeLorean without benefit of any sentence context definition. Such definition had to be discovered by carefully examining the discourse context and sequence.

Many criminal law cases center on the words used by the participants. Elsewhere I have referred to such as language crimes (Shuy 1993). That is, there is no physical damage done to victims, such as robbery, murder, or assault. Such crimes are based solely on the language used in cases involving bribing, buying or selling illegal property or substances, illegal soliciting of various sorts, extorting, and conspiring to do something illegal.

Often in such cases, the participants are not crystal clear in their interactions with each other. Sometimes they speak in vague generalities. Sometimes they even use code. This makes it difficult for suspects to understand what agents are getting at and for law enforcement to pinpoint the intentions of the suspects. Nevertheless, ambiguity of interaction will not produce convictions at trial.

The reasons for ambiguous statements vary greatly. Speakers may intend to be ambiguous, they may be on totally different wave lengths and be unintentionally ambiguous, or they simply may be verbally sloppy. In criminal cases, both the government and the defense tend to hear what they want to hear and interpret ambiguous utterances in a way that best serves their own goals. The prosecution often puts the worst spin on it, interpreting the suspect's ambiguity as an intentional ploy to disguise obvious guilt. The defense often interprets the same passage as evidence that the suspect was thinking of something entirely different, something nonincriminating.

Different types and interpretations of discourse ambiguity can be illustrated in a 1997 criminal conspiracy case brought against the president of a Texas manufacturer of helicopters (*U.S.* vs. *David Smith*, 18 U.S.C. 371). Smith's company, a subsidiary of a French manufacturer, held a contract to produce a number of military-style helicopters for the nation of Israel. Israel, as an ally of the US, comes under the provisions of the Foreign Military Financing (FMF) Program, which was set up to assist allies in the purchase of hardware and equipment manufactured in the US, using US government funds while also promoting the interests of domestic American business. In short, as long as the helicopters were made in America, FMF funds could support a large amount of Israel's costs. If only part of the helicopters were manufactured in the US, only a proportional amount of the purchase would receive FMF support.

For reasons that are unclear, the government suspected Smith's company of falsely documenting the amount of FMF moneys to which Israel was entitled. They first went after Smith's employee in charge of the contract with Israel, Ron Tolfa. Having convinced him that there was, indeed, something illegal going on, they gained his cooperation in tape recording Smith and others in their meetings and discussions of this matter. The evidence against Smith consisted of these tapes alone. Thus, the indictment rested only on tape recorded conversation evidence.

It is possible that the French parent company may well have had some knowledge of or involvement in misconduct in this matter but the case against Smith was whether or not he and his company had such knowledge or, as the indictment put it, "should

have known" about it. Tolfa's assignment was to elicit Smith's knowledge on tape. Four conversations between Smith and Tolfa were recorded, none of which produced clear evidence that Smith had any knowledge of this matter. Nevertheless, the government cited some passages of these conversations that they believed suggested Smith's complicity or knowledge of the parent company's complicity, and indicted him. Needless to say, these passages were, at best, ambiguous.

At the center of the government's case was the issue of whether or not the Israeli broker, Ori Edelsburg, was being paid a commission out of FMF funds. If so, and if Smith knew that this was the case or if he should have known this, it would prove that Smith was involved in the alleged conspiracy. On the other hand, if Edelsburg were receiving a commission from the French parent company on some other aspect of the transaction that did not involve FMF funding, there could be no case against Smith.

As it turns out, this transaction was very complicated. Edelsburg had created a deal that involved not only the sale of new helicopters to Israel but also, combined in his brokering, the sale of old equipment from Israel to Chile. The latter was a deal between Edelsburg and the Israeli government alone, for which a commission was entirely proper. Naturally, confusion about Edelsburg's alleged commission was at the center of the trial.

Tolfa tried his best to elicit Smith's knowledge of any commission that Edelsburg might get, but did not disambiguate what the commission was for. The best he could get out of Smith, however, were feedback marker "uh-huhs," expressions of surprise, and eventual outright denials that the broker received any commission growing out the FMF moneys. Aided by my analysis of Smith's responses to Tolfa's suggestions of illegality, Smith's Dallas attorney, Mark Werbner, led Smith to an acquittal of all charges.

In his earlier conversations with Smith, Tolfa provided many opportunities for Smith to self-generate his own guilt. In this, Tolfa's effort was totally unsuccessful. Tolfa then began to gingerly suggest that the broker, Ori Edelsburg, was getting a commission out of FMF funding, as follows:

(2) **(Feedback marker) April 11, 1995 meeting**
Tolfa: Ori's calling me every day . . . he's worried, I guess, about his payment, his commission.
Smith: Uh-huh.

The government obviously believed that Smith's feedback marker response, "uh-huh," was enough to send Tolfa back for another try, even though Smith offered absolutely no self-generated statements that could be used against him.

Over a month later, Tolfa tried again, this time with the obvious FBI instructions to focus on tying Ori's commission to the milestone payments Smith's company was receiving from Israel, as follows:

(3) **(Surprise about procedure) May 19, 1995 meeting**
Tolfa: Ori's been . . . beatin' me over the head about this payment . . . He wants his commission.
Smith: So he gets paid when we get paid huh? Is that how it works?

Again, the tapes provided little for the government's case. The best that Tolfa could get out of Smith was his surprise that Ori's commission was timed with the milestone payments Israel made to the company. The possible reason for such a tie was not suggested or discussed. In fact, it is not even clear that Ori was making such calls to Tolfa. Tolfa's ambiguity could well have worked for the government, if Smith had self-generated any type of complicity in the matter. But he did not.

So five months later, Tolfa tried again.

(4) **(Denial of involvement) October 2, 1996 meeting**

Tolfa: ECF [the French parent company] has, you know, Ori's contract.

Smith: Uh-hmm.

Tolfa: If they get their hands on that, then we have a problem with the certification.

Smith: We didn't want the same signature on the cert as on the main (contract). That was check and balance.

Tolfa: If they can get ECF's documentation and find out that Ori's getting a commission –

Smith: AEC [Smith's company] did not have one on this contract. ECF will tie Ori to the Chilean transaction.

This time, Tolfa became a bit more specific, stating that the French parent company, ECF, indeed has Ori under contract and suggesting that Smith's company has a problem with their certification to the government about the extent of FMF funding to which Israel was entitled. That Smith did not really catch Tolfa's ambiguous drift here is evidenced by his response. Smith realized that he, as president, signed the main contract but that he had some other company official sign the certification about FMF entitlements to Israel. He interprets Tolfa's "we have a problem with the certification" in this benign way. Tolfa, recognizing that he would have to be even less ambiguous, finally comes out with a nonambiguous statement, attempting to connect the French parent company's files with Ori's commission. Now that Tolfa's drift is out in the open, Smith categorically denies, saying that his company has no contract with the broker, Ori Edelsburg, and that any contract Ori Edelsburg might have with the French parent company is connected with the part of the transaction that involved the Israeli's sale of equipment to the Chilean military.

As an elicitation strategy, ambiguity can be a very effective tool for uncovering language crime, at least in the initial stages of an investigation. The less explicit one is, the more opportunity there is for respondents to clarify the ambiguity and implicate themselves. If such clarification leads to incrimination, the government has done its work effectively. On the other hand, when suspects do not even seek clarification, we may suspect (1) that they understand the drift of the ambiguity and may be, indeed, guilty, (2) that their minds are on something else, (3) that they are so fearful of talking about the issue that they retreat into silence, perhaps even suspecting that they are being taped, or (4) that they are so innocent that they do not even catch the drift of the hinted ambiguity or innuendo. The first three of these interpretations may suggest to the government that it is worth another try at tape recording conversations with the suspect. Elicitation of responses in the fourth interpretation suggest that future taping may well yield nothing again.

Table 22.1

Tolfa suggests	*Smith responds*
1. Ori gets a commission	Feedback marker "uh-huh"
2. Ori's commission repeated	New information to Smith: "Is that how that works?"
3. Parent company has contract with Ori that we must hide from the investigators	Misunderstands thrust and explains something else
4. Specific request for what Ori's involvement is	Explanation that any pay to Ori is paid by parent company for legal sale of equipment to Chile, not from FMF money

The government obviously wanted to try once more, even though they still had nothing solid to show that Smith knew or should have known that Edelsburg was getting a broker's commission illegally out of FMF funds. Now Tolfa, probably with instructions from the FBI case agent, abandons ambiguity and goes for the homerun, as follows:

(5) **(Denial of involvement) July 26, 1996**
Tolfa: How does Ori get involved in this?
Smith: Ori's gonna have to be paid through ECF you know, the outbound loop.

Obviously, the ploy fails completely, for Smith, finally understanding what Tolfa had only hitherto hinted at, explicitly points out that any pay Ori gets will have to be from the parent company concerning the "outbound loop." It was not contested that "outbound loop" refers to Israel's sale of used military equipment to Chile.

Table 22.1 summarizes the agent's use of ambiguity in this case.

One cannot fault the government's elicitation strategy of starting with ambiguity and gradually moving toward explicitness. It is not unlike the strategy of salesmanship, in which the seller speaks benignly about what features the buyer might like in a product before trying to make the sale (Shuy 1994). What was lacking in the government's pursuit of this case was an effective intelligence analysis that would have revealed the hopelessness of their case before time, money, and the suspect's emotional state of mind were unnecessarily expended. Using ambiguity may have been an effective strategy but when that ambiguity was finally resolved, the case against Smith evaporated.

Law enforcement agencies, such as the FBI, often have guidelines for undercover agents to follow. One of the specified FBI guidelines that agents are required to follow is that "of making clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy" (United States Congress 1984: 36). In the Smith case above, that representation of illegality was finally made clear and the suspect clearly distanced himself from it. But often the ambiguity is far from resolved. In such instances suspects may well agree to do something that is quite different from that which the undercover agent means. When this happens, it is not uncommon for the

prosecution to extract from the discourse context words, phrases, or sentences that seem to indicate guilt but which, when seen holistically in context, easily can be understood to mean something else. We have seen this in each of the cases described thus far.

3.3 Discourse analysis and stylistics

Stylistic analysis is the examination of the characteristic use of language features by a given writer or writers. The analyst reviews the material presented, written or spoken, and compares the text of unknown origin with that of the known. Such comparison focuses on language features of which speakers or writers have little or no conscious knowledge or control as they speak or write. For example, writers have rather high levels of consciousness and control over vocabulary choices but considerably less consciousness and control over their grammar, spelling, or punctuation patterns. Discourse style is another language feature of which most speakers and writers have little or no conscious awareness or control.

This is not to say that such features as patterns of vocabulary and punctuation are not central to the identification of authorship. Indeed, Vassar professor Donald Foster concluded (correctly, as it turns out) that the anonymous author of the novel *Primary Colors* was *Newsweek*'s Joe Klein by comparing his use of adverbs derived from adjectives ending in -y, such as "scarily" and "huffily," the common use of the nouns, "mode" and "style," and the tendency to use the colon excessively (Garreau and Weeks 1996).

Perhaps the most celebrated investigators of authorship in recent years are Walter Stewart and Ned Feder, the NIH scientists who created what came to be called "The Plagiarism Machine," a program that searched for and compared duplicated phrases and sentences, using modern scanning and computerized approaches. But finding plagiarism is not the same thing as finding style and it was soon discovered that their "machine," geared as it was to scientific writing alone, could not pinpoint the writer of *Primary Colors*.

The contribution of stylistics to the broad field of forensic linguistics is well documented by Gerald McMenamin's comprehensive text *Forensic Stylistics* (1993), a book which is an excellent resource for this field. The major thrust of forensic stylistics, however, has been the study of linguistic forms, such as vocabulary, grammatical categories, syntax, punctuation, and length of expressions or text, rather than discourse style. The latter has been dealt with ably in nonforensic contexts (Tannen 1982, 1984; Brown and Yule 1983), especially with written text, but the application to forensic discourse is only recently beginning.

What then can discourse analysis add to the mix of current forensic stylistics? Although features of discourse style have not been focused commonly on characteristics of author or speaker identification, there is no reason why they cannot be. The use of discourse markers (Schiffrin 1987), for example, has served as an identifier of an individual's style in at least one known legal dispute (Katherine Thomas, pers. comm.). The analyst was able to determine that the speaker in question was not the one suspected by comparing that person's use of discourse markers in known speech samples with the sample in question.

Patterns of interruption can characterize not only the social relationship of speakers (Tannen 1984) but also their group or individual styles. In a business meeting involving the sale of an insurance company, for example, a dispute arose over whether or not the company's real assets and liabilities were accurately revealed to the buyer, leading to a civil suit. A rather poor-quality tape recording was made openly at that meeting by the selling party. I was called on to prepare a transcript of the meeting, which involved a dozen participants. No help was to be given me in identifying the speakers. All were male and, to make speaker identification even more difficult, three had the same first name and two others had the same last name. One characteristic language feature which I found helpful in identifying one of the speakers was his style of interrupting other speakers. Not only was this far more frequent than that of any other person but also there were predictable points in the discourse at which these interruptions took place, and predictable persons whom he interrupted.

Other indicators of discourse style are available for similar analysis and comparison, such as organizational style, patterns and types of register shifting or mixing, patterns of sequencing given versus new information (Brown and Yule 1983), the use of cohesion (Halliday and Hassan 1976; Scinto 1986), and many others.

4 Directions and Future Connections

The legal context appears ot be just beginning to take advantage of discourse analysis to help unravel the complexities of litigation. Whether the language evidence is written or spoken, whether the case is criminal or civil, and whether the analysis is done for the defense, prosecution, or plaintiff, discourse analysis has a bright future in legal disputes. Issues of intentionality, ambiguity, stylistics, voice identification, defamation, bribery, solicitation, and many others provide a vast arena for linguists to explore the uses of these, and other, aspects of discourse analysis. The field of law seems to be more and more open to such assistance (Wallace 1986). It is up to linguists to respond.

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