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Introduction

Krzysztof Kredens

Aston University, UK

This issue of *Language and Law/Linguagem e Direito* focuses on the work of the forensic linguist as expert witness. We are pleased to present contributions by authors with first-hand experience of expert witness work and/or those researching aspects of language in the legal process in a range of jurisdictions.

The issue opens with a contribution by Sabine Ehrhardt, a forensic linguist based at the German Bundeskriminalamt, who outlines the role of experts in German criminal proceedings more generally and then describes the situation of forensic linguistics in Germany more specifically, also with reference to educational settings. Ehrhard's article is perhaps doubly interesting as Germany is an inquisitorial jurisdiction and one of only a few countries where the discipline is practised in investigative and evidential capacities at a state-run forensic science institute.

The next article, by Ed Finegan, first gives an overview of the *US* court systems to subsequently talk about the most frequent types of US cases where forensic linguists are retained and the roles they take on or are cast into. It is interesting to see that the arguably prototypical task of assisting the trier of fact is only one such role, and others include e.g. that of a guide working with an attorney in questioning an expert on the opposing side. The article concludes with observations on the pros and cons of the job of a linguistics expert in an adversarial legal system.

At the beginning of her article, Nicci MacLeod notes there is no formal regulation of the provision of expert evidence in the *England and Wales* jurisdiction. She then examines the implications of this fact for expert evidence. An important point MacLeod makes is that what forensic linguists can bring to meaning determination cases is not necessarily the knowledge of a specific language variety, but a rigorous methodology leading to unbiased and reliable findings.

Aneta Pavlenko uses a criminal case to draw several lessons for language proficiency assessment tasks and to illustrate best practices in securing understanding of the rights by non-native speakers of English in the United States.

Pavlenko suggests that face-to-face assessments should be used in conjunction with analyses of recordings of police interviews and other types of case-relevant data.

Ehrhardt's, Finegan's, MacLeod's and Pavlenko's articles are conceptually similar in that they illustrate the various points around the work of the expert linguist with specific cases from the authors' case files. We thus not only find out about the various jurisdiction-specific statutory provisions around expert evidence and how these circumscribe the expert's work, but we also get a peek at actual casework by four experienced forensic linguists. Yet, engaging and informative, the four contributions do not promote a false sense of confidence in the field and its legal contexts. On the contrary, the authors openly share their various concerns: Ehrhardt speaks of fragmentation and heterogeneity of forensic linguistics in Germany and calls for closing the gap between state and private experts; Finegan voices a concern that 'much of the work currently in the record has been carried out by a generation of linguists who are now retired or retiring'; MacLeod posits that to improve access to justice '[forensic linguists] must be shameless self-promoters, taking every opportunity we can to publicise our work'; and Pavlenko is forthcoming about the problems with language assessment interviews and warns they should not be used to establish defendants' level of proficiency on their own.

Another contributor to this issue, Helen Fraser, is critical about a specific type of linguistic evidence in *Australian* courts. She takes a historical perspective on transcripts of indistinct covert recordings and describes three key cases of the 1980s and 1990s to show how the current procedures, with their misconceptions about language, have been arrived at. She also shows how, in practical terms, the procedures do not differentiate between police 'ad hoc' expertise and linguistic (including phonetic) expertise. Fraser adds to MacLeod's point about publicising our work by suggesting that better-informed judicial practice will not be achieved by simply educating legal professionals about linguistics, but by forensic linguists concurrently learning more about how the law works.

Finally, a concern about a particular type of legal-linguistic practice is at the heart of Nicholas Lynn and Patricia Canning Pask's article. Strictly speaking, the article is not about expert witness work, but it does signal the need for potential linguistic intervention in policing contexts. The authors analyse 'management guidance' reports (instruments for recording pre-charge advice in England and Wales) in 13 cases of domestic violence and argue that the language of the reports steers prosecutors to an outcome favourable to the male suspects, mostly by shifting the blame away from them and/or undermining the female victim.

We hope this issue of *Language and Law/Linguagem e Direito* will serve as a useful source of information about forensic linguistic practice in particular jurisdictional, judicial and statutory contexts. We also hope the issue will offer forensic linguists and scholars in language and law new knowledge, and help inspire burgeoning linguists to work towards making future contributions in legal and forensic settings.

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Nota introdutória

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Este número da *Language and Law/Linguagem e Direito* foca o trabalho do/a linguista forense como testemunha pericial. Temos o prazer de contar com contributos de autores com experiência em primeira mão em trabalho de testemunho pericial e/ou de investigação de aspetos da linguagem no processo judicial numa série de jurisdições.

O número abre com o contributo de Sabine Ehrhardt, uma linguista forense que trabalha no Bundeskriminalamt germânico, que descreve de forma geral o papel dos peritos no processo penal alemão, discutindo seguidamente a situação dos/as linguistas forenses mais especificamente na Alemanha, incluindo em contextos educativos. O artigo de Ehrhard possui certamente um duplo interesse, uma vez que a Alemanha assenta numa jurisdição inquisitorial e é um dos poucos países onde a disciplina é aplicada em investigação e obtenção de prova num instituto de ciências forenses público.

O artigo seguinte, de Ed Finegan, começa por traçar uma perspectiva geral sobre os sistemas judiciais americanos, discutindo, seguidamente, as categorias de casos mais frequentes nos EUA com recurso a linguistas forenses, bem como os papéis que desempenham e as funções para as quais são destacados. É interessante constatar que o inquestionável papel prototípico de auxiliar os tribunais constitui apenas uma dessas funções; outras funções incluem, por exemplo, a de guia que trabalha com o advogado para questionar o perito da outra parte. O artigo termina com observações sobre os prós e os contras do trabalho de perito linguístico no sistema jurídico adversarial.

No início de seu artigo, Nicci MacLeod observa que não existe regulamentação formal relativa à obtenção de prova pericial na jurisdição de *Inglaterra e do País de Gales*, discutindo, de seguida, as suas implicações para o testemunho pericial. Um dos aspetos cruciais destacados por MacLeod é o facto de os/as linguistas forenses poderem transpor para casos de análise de significados, não necessariamente o conhecimento de uma variedade linguística específica, mas sim uma metodologia rigorosa que conduz a conclusões imparciais e fiáveis.

Aneta Pavlenko recorre a um caso penal para retirar várias lições sobre a avaliação da competência linguística e para ilustrar boas práticas no sentido de garantir que os

falantes não nativos de inglês nos Estados Unidos da América compreendem os seus direitos. Pavlenko sugere a utilização de avaliações presenciais em conjunto com a análise de gravações de entrevistas policiais e outras categorias de dados relevantes para o caso.

Os artigos de Ehrhardt, Finegan, MacLeod e Pavlenko são concetualmente semelhantes no sentido em que ilustram os vários pontos em torno do trabalho do/a linguista como perito/a em casos específicos dos arquivos dos autores. Assim, não apenas descobrimos as várias disposições legais específicas da respetiva jurisdição em torno das provas periciais e como elas circunscrevem o trabalho do perito, como também temos acesso a casos reais nos quais trabalharam quatro linguistas forenses experientes. No entanto, os quatro contributos, apesar de cativantes e informativos, não suscitam uma falsa sensação de confiança na área e nos seus contextos jurídicos; pelo contrário, os autores partilham abertamente as suas várias preocupações: Ehrhardt discute a fragmentação e a heterogeneidade da linguística forense na Alemanha e apela à aproximação entre peritos públicos e privados; Finegan expressa a preocupação de que "muito do trabalho atualmente disponível foi realizado por uma geração de linguistas que agora estão aposentados ou prestes a aposentarem-se"; MacLeod postula que, para melhorar o acesso à justiça, os/as linguistas forenses devem "ser auto-promotores descarados, aproveitando todas as oportunidades para divulgar o nosso trabalho", e Pavlenko discute diretamente os problemas com entrevistas de avaliação de competência linguística e adverte que estas não devem ser utilizadas isoladamente para determinar o nível de competência linguística dos réus.

Contribuindo também para esta questão, Helen Fraser é crítica relativamente a um tipo específico de prova linguística em tribunais *australianos*. A autora adota uma perspetiva histórica sobre a transcrição de gravações veladas indistintas e descreve três casos fulcrais das décadas de 1980 e 1990 para mostrar como se chegou aos procedimentos atuais, com base em conceitos errados sobre a linguagem. Mostra também como, em termos práticos, os procedimentos não distinguem entre perícia policial *ad hoc* e perícia linguística (incluindo fonética). Fraser reforça o argumento de MacLeod sobre a divulgação do trabalho de linguista forense, acrescentando que não é possível alcançar uma prática judicial mais bem informada simplesmente educando profissionais jurídicos sobre linguística, mas sim através de linguistas forenses com formação sobre o funcionamento do direito.

Finalmente, o artigo de Nicholas Lynn e de Patricia Canning Pask gira em torno de uma preocupação com um tipo específico de prática jurislinguística. Especificamente, o artigo não possui como enfoque o trabalho do perito, mas assinala a necessidade de uma potencial intervenção linguística. Os autores analisam relatórios de "orientações de gestão" (instrumentos para registar aconselhamento pré-acusação na Inglaterra e no País de Gales) de 13 casos de violência doméstica e argumentam que a linguagem dos relatórios conduz os promotores a um resultado favorável aos suspeitos do sexo masculino, sobretudo isentando os suspeitos de culpa e/ou minando a vítima do sexo feminino.

Esperamos que este número da *Language and Law/Linguagem e Direito* seja uma fonte de informação útil sobre a prática linguística forense em determinados contextos jurisdicionais, judiciais e estatutários. Esperamos, também, que o número contribua para enriquecer os conhecimentos de linguistas forenses e investigadores em linguagem

e direito e sirva de inspiração para novos linguistas, no sentido de contribuírem futuramente para trabalhos em contextos jurídicos e forenses.

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Forensic linguistics in German law enforcement

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Abstract. *In Germany, forensic linguistics is regularly made use of for law enforcement purposes. Since the 1980s, it is part of a federal forensic science institute and has developed with other, more widely-known forensic sciences side by side. Its contributions are fully accepted by the German police and the courts.*
To illustrate the processes surrounding expert evidence in German jurisprudence, the forensic linguistic expert work on a homicide case will be outlined at its various stages, i.e. from investigation up to the confirmation of the judgement after an appeal to the Federal Court of Justice. Tracing the course of the case, general provisions (legal or otherwise) concerning each stage of law enforcement are outlined and it will be described how they apply to forensic linguistics. Special attention is paid to the role of the expert, the expert's rights and responsibilities, and what can be learned from the feedback of court proceedings.

Keywords: *Forensic linguistics, linguistic evidence, expert testimony, forensic sciences, inquisitorial judicial system.*

Resumo. *Na Alemanha, a linguística forense é utilizada regularmente para fins de investigação policial. Desde os anos 1980, encontra-se integrada num instituto de ciências forenses federal, tendo-se desenvolvido ao lado de outras ciências forenses mais conhecidas. Os seus contributos são totalmente aceites pela polícia e pelos tribunais alemães.*
Para ilustrar os processos em torno da perícia na jurisprudência alemã, descreve-se o trabalho pericial de linguística forense num caso de homicídio nas suas várias fases, i.e. desde a fase de investigação até à confirmação do julgamento após recurso para o Tribunal de Justiça Federal. Descrevendo-se o curso do caso, identificam-se as provisões gerais (legais ou outras) relativas a cada fase do processo, e explica-se de que modo elas são aplicáveis à linguística forense, prestando-se especial atenção ao papel do/a perito/a, aos direitos e às responsabilidades do/a perito/a e às lições que podemos retirar do feedback da decisão judicial.

Palavras-chave: *Linguística forense, prova linguística, testemunho pericial, ciências forenses, sistema judicial inquisitorial.*

Introduction: The role of an expert in German criminal proceedings

Criminal proceedings in Germany are inquisitorial in nature. This effectively means that all information that contributes to the legal decision-finding process is gathered by state bodies. Hearings of criminal law are presided by a judge, who is vested with the authority to independently evaluate the weight of evidence brought forward within the context of the case. The procedures for legal proceedings and, thus, the legal provisions for experts are laid down in the German Code of Criminal Procedure (*Strafprozessordnung*, StPO). There are more elaborate provisions on expert work in the Code of Civil Procedures (*Zivilprozessordnung*, ZPO) with some of them being applied also in criminal law if not stated otherwise[1].

Legally speaking, the expert is an individual or a public authority with expertise in a specific field. Expert opinions are classified as one of five different types of evidence, the remaining four being witness statements (StPO sections 48-71), judicial inspection results (StPO section 86), documents (StPO section 249), and statements of the accused (StPO section 136 and 243). All evidence is subject to the so-called "principle of judges' free evaluation of evidence" (StPO section 261), which means that, with only a few exceptions, the admission and weighting of evidence lies completely within the discretion of the court based on the entire hearing.

The task of an expert is to impart general knowledge and experience in a specific field of expertise, to draw conclusions and to render opinion. As part of this general goal, his/her task also includes the presentation of causal relationships and facts by means of findings based on expert knowledge. Experts can be appointed by the court, but they can also be requested during the investigation stage of a case. For this purpose, they are usually chosen by the police, whose actions are monitored by the competent prosecution office. The role of the expert can be described with regard to rights and obligations as well as in relation to other participants in the legal proceedings. It has much in common with the one of witnesses; in fact, the provisions concerning witnesses are also applied to experts if not explicitly specified differently in the Code of Criminal Procedure. For example, an expert may refuse to render an opinion for just the same reasons for which a witness may refuse to testify (StPO section 76). But the two differ in one important aspect: the expert could be replaced by another expert; however, this does not hold true for witnesses due to their unique perception of the immediate circumstances of the case. It also follows that an expert can be leaned on by litigants, which is not possible for witnesses because of the aforementioned importance of perception of immediate circumstances. The role of an expert also exhibits some similarities to judges. First and foremost, the expert is obliged to the same complete impartiality as the court itself. If there is reason to doubt impartiality, an expert can be challenged on grounds of bias. For this, the same causes of partiality apply as for the court, or as the German Code of Criminal Procedure puts it, "An expert may be challenged for the same reasons that a judge may be challenged." (StPO section 74).

In different terminology, the role of an expert is often described as an "assistant to the court" for all cases where the expertise of a judge is not sufficient for the matter at hand. However, this notion is somewhat problematic. Ulrich (2007: 159) even speaks of an inherent and characteristic field of tension between judge and expert caused by the fact that an expert is by no means called upon to render opinion to the *legal* matter at hand, not even indirectly. The designation "assistant to the court" increases the risk of

crossing the line. Instead, the expert is required to enable the judge to make his/her legal decisions by providing the necessary expertise without addressing the ultimate legal question. The court is under the obligation to evaluate the expert's report; and in order for this task to be fulfilled, the expert has to not just provide professional conclusions but also to specify what findings the conclusions are based on and which considerations have led the expert to his/her conclusions. There are various categorisation models for experts with different legal implications each. Experts can be distinguished according to how the expert work is carried out, e.g. full-time vs. half-time or on a freelance vs. commercial basis[2]. Closer to the professional activity is a differentiation of experts being officially acknowledged, publicly appointed, certified, acknowledged by an expert association and self-appointed (Ulrich 2007: 27-47). For these different types of experts, minimum regulations exist. It is important to note that the term "expert" is not legally defined with regard to the extent of expertise that a person must have in order to act as an expert, nor is it defined with respect to how the expertise has to be acquired. In fact, the term "expert" is not a registered term at all – that is the reason that there are self-appointed experts. This peculiarity places complete responsibility on the court to ensure that the claimed special expertise and experience actually exist.

In the following paragraphs, the role of the expert is further elaborated using a case study from the field of forensic linguistics in its narrow sense, referring to authorship analyses. The case example was chosen to illustrate the different stages of law enforcement from investigation up to the confirmation of the judgement after an appeal to the Federal Court of Justice, the highest appellate court in Germany. Each section comprises an account of the relevant circumstances of the case chosen for illustration, accompanied by some general remarks about that stage of law enforcement, before the details concerning forensic linguistics are outlined.

Forensic linguistics: The situation in Germany

Forensic linguistics is a multi-faceted field concerned with the interface between linguistics and law. In a narrow sense, forensic linguistics can refer to the analyses of texts with respect to issues of authorship[3]. The essence of the field in the narrow sense is the science of linguistics which is combined with forensic sciences to serve law enforcement purposes. The situation of forensic linguistics in Germany needs to be discussed both with regard to its application and with respect to its education. Unfortunately, both spheres have developed quite differently in the last 10 to 15 years (Ehrhardt 2013: 65f).

Germany is one of the few countries which have forensic linguistics incorporated in a federal forensic science institute. In the 1980s, the first forensic linguistic analyses were conducted at the Federal Criminal Police Office (Bundeskriminalamt, BKA). The subsequent evaluation of forensic linguistics as a forensic science acknowledged its value to positively contributing to law enforcement matters and thus led to the foundation of a specialist division in 1989. Since then, forensic linguistics at the BKA has developed with other, more widely-known forensic sciences side by side, e.g. by professionalising its workflow and the basic principles of forensic expert work, by establishing a text-based identification service and by developing standards in methodology for the analysis of German incriminating texts. This development has decisively shaped the German perception of what forensic linguistics is and what types of analyses it offers. Nowadays, its contributions are fully accepted by both the police and the courts. However, this only applies to forensic linguistics in the narrow sense, as authorship

analyses. Requests for other forms of linguistic support, e.g. the training of police officers for covert online investigations and the tracing of disguised identities (cf. Grant and MacLeod 2020), are rarely commissioned, and there is insufficient competence in other areas of forensic linguistics within the police.

Apart from federal and state forensic science institutes, forensic linguistic consultancy is exercised by only a few experts. Among those, some work in academia with a research focus on linguistics while others do not necessarily have a linguistics degree but still offer forensic linguistic expertise. The German Main Chamber of Commerce and Industry is a German organisation with a focus on civil law cases. Primarily for this purpose, it runs a database of officially appointed and sworn experts (cf. DIHK e.V. 2021). If it acknowledges the demand of experts for a specialist field (with respect to both civil and criminal cases), experts may commission a request to become listed there. However, consultants with forensic linguistics expertise are generally not listed there – regardless of the fact that courts and public prosecutors' offices should, in accordance with the relevant procedural regulations, predominantly use publicly appointed and sworn experts. Other persons may only be appointed if required by special circumstances (StPO section 73). To the best of the author's knowledge, it does not seem to present an advantage over other experts to acquire such an official appointment, which would include regulations concerning professional and personal qualifications as well as proof of appropriate quality-assuring measures for any consultancy work.

At universities, forensic linguistics – in its broad sense and not just the narrow, authorship-related sense – is very popular among students, presumably because it offers the application of a traditional science to a socially beneficial purpose. To meet the students' demand, the subject is widely taught at a rather basic level, especially in introductory courses. However, there are only a few scientists whose academic work focuses on forensic linguistics. For more than a decade now, there has not been a professorship in forensic linguistics at a German university. Consequently, the teaching of forensic linguistics with an emphasis on analysing German texts falls far short of an advanced level, and students have to turn elsewhere to get their desired education. This situation is now about to improve, as one German university has recently established a professorship in digital forensic linguistics attached to a linguistics department (as opposed to technical departments).

The situation of forensic linguistics in Germany is not satisfactory from a practitioner's perspective because it lacks both advanced training opportunities and professional organisations which would set at least minimum standards in training and methodology for the analysis of German texts. As a result, firstly, little is known about the methods and quality standards of experts working in the private sector. Secondly, there is no agreement on the appropriate use of linguistic methodology; and thirdly, further development of the methods cannot be advanced to the extent that would be necessary. For those who need forensic linguistic expertise, this means that they face severe difficulties to find out where the necessary expertise can be obtained and to assess the requested expert work[4]. This is how the current situation of forensic linguistics in Germany may have arisen – a situation in which inadequately trained experts can successfully offer forensic linguistic expertise, potentially influencing the image of the field among those who need its services.

Case study: Forensic linguistics in German law enforcement

In March 2012, a 24-year-old mother of a baby girl went missing. Soon afterwards, eleven text messages were sent from her mobile phone telling the addressees that she could not bear the current situation any longer and needed distance. Ten messages were sent to the missing woman's mother, one to her husband. When the husband reported his wife missing two months later, investigations started in a seeming case of a missing person. Since there were no other signs of life apart from the text messages, and furthermore no indications of suicide or kidnapping, the police quickly assumed it was a homicide case, although a body could not be found. In the course of events, the husband became the focus of the investigations. Investigations revealed a precarious financial situation of the couple, which was aggravated mainly by the fact that the husband did not fulfil his obligations and repeatedly lied to both his wife and official bodies. During a house search, a blood trace from his wife was found in the basement of the house they shared. In January 2014, the husband was taken into custody. Shortly before, the responsible investigative authority turned to the forensic science institute of the BKA and requested a comparative linguistic analysis with the investigative aim to learn if the husband had written the text messages sent after the young mother went missing.

Requesting a forensic linguistic analysis

As the forensic linguistics department of the BKA is part of a federal institute, parties commissioning forensic requests are restricted to security and law enforcement authorities, i.e. state or federal police authorities on behalf of the public prosecution offices in charge, including the customs investigation bureau, and the courts. Private individuals or lawyers who want to request a forensic examination on behalf of their clients are not admissible requestors.

According to the German Code of Criminal Procedure, general investigatory powers lie with the public prosecution office. It is entitled to request information from all the authorities and to make investigations of any kind, either itself or through the police authorities and police officers (StPO section 161). In the description given above, the proceedings are still in this investigation phase, which is supervised by the public prosecutor, and therefore the responsible police authority commissions the request for linguistic analysis of the relevant text messages. The Code of Criminal Procedure also clearly states that the public prosecution office shall ascertain both incriminating and exonerating circumstances (StPO section 160). For reasons of objectivity, investigation and forensics are organisationally separated. The management of the BKA has committed itself to creating the necessary framework conditions for the forensic science institute to perform its tasks free of influences and conflicts of interest. Within the forensic science institute of the BKA, the impartiality of forensic expert work is ensured by maintaining a quality management system and by accrediting the forensic methods. There are standard procedures for requests, the handling of objects for forensic analysis, the appropriate documentation of analyses and many more – all of them are intended to secure the whole forensic process "from crime scene to the courtroom" as it is internally specified.

The department of forensic linguistics is subject to the same regulations and provisions as any other forensic science department at the institute. Thus, the request for linguistic analysis by the responsible police authority corresponds to the standard procedures of commissioning requests. With respect to forensic linguistics, it is up to the

requesting party how much detail about the case is provided. All linguistic methods are designed to require only a minimum of case-related information. If contacted prior to the request for analysis, the linguistics department explicitly discourages any additional information. However, in the presented case and without prior contact, the police gave an unusually detailed account of what happened to make their investigatory purpose clear. For illustration, this is a quote of the part where the actual request is formulated:[5]

> Since [March 2012], there has been no sign of life from [name], who was 24 years old at the time of the crime. She was reported missing by her husband on [May 2012]. Meanwhile, the husband is suspected to have killed his wife on [March 2012] and to have disposed of the body. All investigations are still being carried out covertly.
> Today, text messages made available by the missing person's mother will be provided. We ask you to conduct a text comparison between text messages before and after [date of disappearance] as well as to describe how the writing style has changed. Additionally, 18 text messages sent after [date of disappearance] shall be examined to determine if they are written by the same person even when they were sent from different mobiles. (translated quote from the request for forensic analysis)[6].

The investigators' assumption concerning the authorship of the relevant text messages is quite obvious. But regardless of whether a request for analysis has been commissioned for investigative or evidential purposes, the linguistic analysis is principally designed to serve evidential purposes. For this reason, the wording of the original request is transformed into a forensically appropriate, i.e. unbiased, task. In the case example, the comparative analysis has to be split up into two 1:1 comparisons in which the linguistic comparison of authentic text messages by the missing person with the questioned text messages is conducted independently of the second comparison of authentic text messages by the missing person's husband and the questioned text messages in order to avoid bias.

Conducting and reporting a forensic linguistic analysis

It comes with an accreditation to have standard operation procedures which specify how a forensic task is tackled in an appropriate way and by which method. At the forensic science institute of the BKA, a comparative linguistic analysis is accredited according to the standard ISO 17020. This standard relates to so-called inspection procedures that do not only refer to analytical processes of examinations but also the evaluation of findings. Inspections are examinations of diverse items, e.g. text samples, and the subsequent assessments of their conformity with requirements. Any kind of comparative task is in fact an inspection. In the terminology of the standard, the "exercise of professional judgement" is the crucial difference to the application of the norm ISO 17025, which is also often used to accredit forensic methods. (In contrast to ISO 17020, ISO 17025 states requirements for the competence of testing and calibration laboratories and, thus, is less explicit about evaluative reporting.) As rigid as the term "standard operation procedure" may appear, it is not intended to fix the methodology to a single, pre-defined option. Instead, it is designed to ensure that a scientific method is chosen and applied in such a way that the procedure produces the intended and best possible results for the task at hand. Therefore, a sufficient degree of methodological flexibility must be included in any operating procedure and, simultaneously, arbitrariness in the choice of methodology shall be prevented.

The starting point of each text comparison is a critical assessment of the texts to be compared. This assessment is designed to reveal all aspects which might have an influence on the conduction or the result of a linguistic comparison task, e.g., insufficient amount of text samples, incomplete transmission of text files, and (mis-)matching conditions of text production which affect the comparability of the texts at hand (Ehrhardt 2021: paragraphs 18-23).

Following the critical assessment of the text samples which states the conditions under which the text comparison is carried out, the linguistic features of each text are analysed. The forensic linguistics department at the BKA has developed a method for the systematic collection of findings to ensure a comprehensive, i.e. possibly complete, description of a German text by its features (Baldauf 1999, Dern 2009: 69-70, Ehrhardt 2018: 182-184, Ehrhardt 2021: paragraphs 26-30). In a combination of analysing stylistic features as well as errors and mistakes, a structured feature collection is aimed at without considering each feature's evidential value for a specific comparative task at this stage of the analysis. The linguistic features are described with respect to their quantity, quality, consistency or variation as well as possible equivalents to the forms chosen by the author (i.e. forms that could have, but have not been used by the author), and eventually communicative constraints that might have prevailed. This analysis is supported by methods from corpus linguistics and statistics in accordance with current research findings. Fully automated processes are not used.[7]

After the extraction of linguistic features, the actual comparison is carried out by evaluating the linguistic features with respect to their discriminating power and evidential value. For this, the well-known concepts of (inter-/intra-individual) variation as well as similarity and typicality are applied, and wherever possible the necessary population-level data for specific features are estimated using relevant text corpora (Ehrhardt 2018: 187-189). The result of a linguistic comparative analysis is presented in the form of a verbal statement from a 9-level scale of statements. The statement reflects the expert's assessment of the degree of support for author identity or non-identity, e.g. "The forensic findings provide week / moderate / strong / very strong support for the first proposition rather than the alternative." (cf. ENFSI 2016: 17). This assessment is informed by similarities and discrepancies in the individual linguistic features of the authors being compared.[8]

The comparative analysis is documented in the expert report. While, for example, the Criminal Procedure Rules for England and Wales give provisions for the content of an expert report (section 19.4), there are no comparable regulations in Germany. Ultimately, it is the responsibility of each expert to design the expert report in such a way that it meets the requirements in a legal context. The guiding principle of these considerations is to be mindful of the purpose for the court and to clarify the impartiality of the requested analysis. The latter is of particular importance, since in an inquisitorial system the forensic analysis is usually commissioned by a state body, but is nonetheless to be carried out without the (state or otherwise) expert bonding with the side commissioning the request. The lack of minimum requirements for expert reports led and still leads to a variety of different design options, which is why the content and structure of expert reports continues to be a required point of discussion in German forensic linguistics. Of course, larger forensic institutes take up this topic intensively, draw up their

own specifications and ensure that they are in line with other specifications, especially those of an accreditation.

In general, the report of a comparative analysis is evaluative in nature and must enable the requesting party to fully understand what kind of analysis has been conducted and under which conditions it has been carried out. Most importantly, the findings should be presented comprehensively in order to make explicit how the expert was able to draw the conclusions presented. Thus, the report is supposed to be comprehensible both in its scientific content – particularly to those without linguistic training – and in its line of argumentation. Quality assurance measures should safeguard the work and the documentation in the expert report. For this reason, each expert report of the BKA forensic linguistics department is peer-reviewed by a second expert in the field. Furthermore, reports may be written in a way that any potential objections by the legal parties are anticipated as much as possible.

In the case of the missing woman, the critical inspection of the text material revealed that all submitted texts were text messages, which means that the text comparability is not influenced by mismatched conditions of text production. The questioned text messages added up to 446 tokens, and the authentic messages of the missing person contained 2,636 tokens. However, the authentic text messages of the missing person's husband consisted of just 159 tokens. This is below the threshold of 200 tokens, which is considered to be the minimum amount of text material for a linguistic comparison to be conducted comprehensively without limiting the evaluation of findings. Consequently, the comparative analysis of messages from the husband with the questioned messages could not be carried out. At that time, further text messages by the husband could not be obtained, so this part of the linguistic comparison was postponed.

The analysis of the missing person's text messages revealed a constellation of linguistic features, with most of them commonly used by German writers of text messages. However, rather salient features were found concerning the rate of typos, mistakes and morphological/syntactical deviations (exceptionally low rate), the use of onomatopoeia (frequent and creative use), punctuation marks (close to standard use although text messages usually display a reduced usage), and emoticons (frequent use in nearly every message). In summary, the authentic text messages of the missing person show a standard use of written German which is deliberately interspersed with features of colloquial language. In this respect, the messages do not correspond to what is particularly typical in text messages, i.e. less standard usage is the more frequently found pattern.

In contrast, the questioned text messages were characterised by a relatively high rate of deviations from standard use whose origin seemed to be a lack of knowledge about the standard forms rather than just having resulted from typing disfluencies, although these were evident in considerable amount as well. Furthermore, the questioned messages did not contain any emoticons or punctuation marks apart from full-stops and question marks. In this regard, they corresponded rather well with other text messages of that time. In the overall view of the linguistic findings, the questioned text messages revealed a different command of written German than the text messages of the missing person, with a number of salient features that did not have counterparts in the comparison material. Therefore, the analysis resulted in a moderate support statement for the hypothesis that, in view of the linguistic features, the authentic messages by the missing person were written by a different author than the questioned text messages.

By the end of 2015, the suspicion against the woman's husband was further substantiated. Her body had still not been found, but in the meantime the SIM card of her mobile phone was seized in the suspect's vehicle. In November 2015, the husband was accused of manslaughter and the main hearing commenced. Out of the court proceedings, a further request for a linguistic comparison was filed. For this purpose, instant messages that the accused had written to his new girlfriend were used as comparison material. In the earlier request, text messages of the accused had been too scarce to compare them to the questioned text messages. The renewed request included a sufficient amount of text material (ca. 4000 tokens), but these text samples were produced under mismatched conditions as during the time of the investigation the accused switched from classical text messaging with the 9-key pad of a mobile phone to an instant-messaging app operated with a computer keyboard.

The linguistic analysis of the defendant's messages showed many similarities to the questioned material in features with a rather low discriminating power because they are commonly used by writers of both text messages and instant messages, e.g. typos, spacing mistakes, incorrect use of upper and lower case, reduced punctuation and use of colloquialisms (instead of an orientation towards standard forms of written German). However, there were also a few features which are more distinctive such as a systematic deviation of spelling norms in exactly the same words as in the questioned material, which also proved to be extremely rare in other relevant corpora. The text messages of the accused also displayed a similar linguistic competence as the questioned material. Differences between the two text-sample groups could only be revealed for features in which writers of German usually show a high tendency for variation (and, correspondingly, uncertainty) like the differentiation of the graphemes *ß*, *s* and *ss*. Some features of the defendant's text samples could not be properly evaluated because of the mismatched conditions of text production. Taking together all the linguistic findings, the conclusion to this text comparison was a weak-support statement for the hypothesis that, in view of the linguistic features, the authentic messages by the missing person's husband were written by the same author as the questioned text messages.

Giving testimony as an expert in court

After the linguistic expert reports were made known to the court, the presiding judge decided that the appointed expert should give testimony in court.

In Germany, any main hearing under criminal law is divided into nine different phases (cf. StPO sections 35a, 243-260): The main hearing commences with the case being called up (1) and the presiding judge's determination whether defendant and defence counsel are present, followed by a questioning of the defendant on his personal situation, especially on his/her capability to plead (2). Afterwards, the public prosecutor is supposed to read out the charges brought against the defendant and submit the legal assessment on which the decision to open the main hearing was based (3). The defendant is then informed that he/she may choose to respond to the charges or not to make any statement on the charges (4). If the defendant decides to respond to the charges he/she will be heard. Afterwards, evidence will be taken (5). The taking of evidence is the essence of any main hearing and can be significantly influenced by both prosecution and defence, for example by filing motions for the admission of evidence or strategically placed questions to witnesses and experts. Eventually, the taking of evidence is the means by which the court exercises its obligation for inquiring into all facts of proof

relevant for deciding about the matter at hand. With the taking of evidence terminated, the public prosecutor gives the closing speech and usually poses an assessment of punishment, which is then followed by the closing speech of the defence counsel (6). The public prosecutor has the right to reply, but the defendant has the right to have the last word. Afterwards, the court withdraws for its deliberations, which take place in private. This is in accordance with the principle that the court shall decide on the results of the taking of evidence at its discretion and conviction based on the entire content of the hearing (7). The main hearing closes with the delivery of judgement (8). The reasons for the judgement will be given orally at first, but there is a time limit for the written form of the judgement, including explicit exposition of the reasons behind the judgement, of about five weeks with provisions for extending the time limit relative to the duration of the main hearing. The main hearing closes with the judge's instructions about the right to appeal (9).

As part of the taking of evidence, the hearing of experts in court also follows a fixed procedure (cf. Ulrich 2007: 345-355). At the beginning, the expert receives a briefing for legal consequences before he/she is questioned about his/her identity, age, profession, address, (lack of) relationship to the defendant, and qualifications. Subsequently, the expert is questioned regarding the case, which usually starts with the judge prompting the presentation of the expert report(s). Reports are often given to the court and the other parties prior to the trial. From experience, it is recommendable to prepare the presentation of the findings in a way that is close to the reports' structure and to present them in a way that is suitable for easily following the scientific argumentation, since the principle of orality is decisive in the main hearing. Elaborate presentation techniques are not necessarily the means of choice for this end. The court as well as the other legal parties involved have the right to question the expert whereby the allocation of turns is set: It starts with the presiding judge and lay assessors, then moving to the public prosecution, the defence counsel, the defendant and other experts appointed by the court, e.g. forensic psychiatrists. The examination of an expert usually serves the purpose of inquiring about the robustness of the expert's findings by the court, rather than challenging the expert's report on any conceivable grounds by the defence counsel. After the expert has rendered his/her opinion in court, the judge decides whether to place the expert under the oath that he/she has rendered his/her opinion impartially and to the best of his/her knowledge and belief. With or without oath, the expert is then released.

In principle, experts have the right to put forward questions to the defendant if the information sought is relevant for the forensic analysis: "(1) The expert may, at his request, be given further details in order to be able to prepare his opinion by means of examining witnesses or the accused. (2) He may, for the same purpose, be permitted to inspect the file, to be present at the examination of witnesses or of the accused, and to address questions to them directly." (StPO section 80).[9] But this right is rarely exercised in specialist fields such as forensic linguistics. An expert opinion can also be countered by another expert opinion on the same subject. To achieve this, a litigant must file a motion for the admission of evidence by a further expert, e.g. by proving the first expert report to be seriously flawed, and the judge granting this motion. Defence motions for evidence are usually examined very carefully by judges and they are often granted, so as not to give the opposing side grounds for an appeal on points of law (or on points of fact and law depending on the responsible jurisdiction). It is a well-known tactical move

by the defence side to file motions for evidence at the last possible chance to do so, thus creating a considerable time pressure on the main hearing and the expert, respectively.

Concerning the actual questioning of an expert, there are only a few topics that are explicitly inadmissible. They refer to questions and challenges on grounds that bear no relation to the subject matter at hand, as well as those that go beyond the stated subject matter. In addition, leading questions are inadmissible as well. In practice, an expert may consider a question inadmissible, but it would require an appeal to the judge to decide about the status of the question; and this is quite a drastic action, especially as the expert cannot be sure that the judge shares his/her views. Rather, the expert should answer the question posed in a way that makes its disputable status clear, for example by referring to only what is well within the expert's responsibility and, thus, leaving the answer incomplete, which in turn would challenge the defence side either to linger on the (potentially inadmissible) topic or to drop it. Instead of insisting on his/her rights, an expert can always smooth out difficult situations by avoiding a direct exchange of arguments with opponents. This can be achieved, for example, by persistently maintaining the direction of communication with the judge and – probably most important of all – by remaining calm and patient.

From the defence counsel's point of view, the examination of an expert serves the purpose to probe for the quality of the expert's work and his/her impartiality, which also involves whether the expert has exceeded the limits of his or her authority (Tsambikakis 2014: 2768). The answers given could later be used to challenge the expert on the ground of suspected bias. For this aim, topics typically addressed involve the expert's reference to the facts of the case and evidentiary facts, i.e. surrounding information (including how the request was filed, if the request was clearly outlined and the expert acted accordingly), the reliability of findings, the expert's expertise, training and experience as well as his/her relationship to the defendant. To be questioned on these topics often leaves the expert with the impression of having been unjustifiably challenged or provoked, but they are well within the defence's responsibility. It is the defence side's dilemma that challenging an expert in his/her field of expertise is often not realistically possible because of the existing knowledge gap; that is why they are left with challenges on grounds of basic quality principles and bias. Regarding this aspect of expert testimonies, the difference to adversarial judicial systems may become most pronounced, as the possibility of challenging an expert by another expert of the same field seems to be more readily available there.

Turning back to the case study, the responsible expert has given testimony in court for well over two hours. After the formal briefing and the questioning about personal data as outlined above, the judge prompted the presentation of the first expert report. This presentation included a shortened description of the initial request, how it had been understood and transformed to the task of a forensic analysis, methodological explanations, and finally the linguistic findings for the analysed text samples as well as the evaluation of those findings. The presentation of the second report was prompted, and the expert gave testimony about the second comparative analysis similar to the descriptions of the report.

Following the presentation of the reports, the presiding judge started the actual questioning by asking for further elaboration on the moderate-support statement that made up the first report's conclusion. To be more precise, the questions were: Which state-

ments are most often the result of a linguistic comparative analysis? What are the reasons for expressing the conclusions in the proposed way? What could have changed the moderate-support statement into a weak-support statement or a strong-support statement? With the answers given, the judge decided not to ask any follow-up questions, instead he moved on to a judicial inspection of the text samples. For this, all parties to the trial had to gather at a desk in front of the judge's table, where the expert was asked to lay out copies of the text samples. The judge, the public prosecutor and the defence counsel asked questions about selected linguistic features they discovered in the samples, with the expert explaining the features linguistically and relating their evidential value in connection with other findings of the analysis. While the previously given presentation of the expert reports did not elicit any questions about individual features or their evaluation, the "lay assessment" of linguistic features now had to be actively reconciled with the working standards of a forensic scientist. In doing so, it was particularly important to correct the personal belief of the legal parties involved that they, as native speakers, could also make assessments themselves, and to explain the scientific methodology of forensic linguistics. Feedback on whether these efforts were successful could only have been received by looking at the follow-up questions, which, however, were not asked.

After the judicial inspection of the text samples, the common seating order was resumed and the judge carried on to put questions to the expert, e.g. whether linguistic features are analysed automatically by using specialist software or rather manually by the analyst, how technical circumstances might have had an influence on the text samples, especially algorithms for auto-completion and if there is research on these functionalities.

The right to put questions to the expert was passed on to the public prosecutor, who declined and then to the defence counsel, who raised the issue of using statistics for the presentation of findings and the evaluation of evidence. In this regard, some discussion sprang up about how to get population-level data for individual linguistic features in order to determine their typicality. The defence lawyer gave the impression that what he had in mind was a presentation of findings by means of a percentage value rather than an elaborate statistical evaluation. Descriptive statistics had of course been used in the analysis, but caution is required not to convey the impression of objectivity or ground truth that, in fact, cannot be obtained for many linguistic features. The defence counsel then switched the topic to linguistic manipulation and stated that this might be the reason why the text samples of the defendant were similar in some features to the questioned text messages. The defence counsel asked for quite a detailed account on why linguistic manipulation could be ruled out for the questioned text samples. At one point, he commented on his repeated uptake of the topic: "I don't wish to cast doubt upon your results. I just want to understand them." Without clinging naively to the literal meaning of his comment, it corresponds nevertheless to the impression left by the behaviour of all parties to the trial. More or less, the examination of the expert resembled a constructive information-seeking process, whose main aim was to establish the evidential value of linguistic findings and the conclusions drawn from them. Before the examination was concluded, the judge resumed his right to put questions, and he asked for the research activities in forensic linguistics in general and the expert's research in particular, how the field is represented in academic associations and otherwise, how the expert's obligation

to continue education and enhance her skills was fulfilled as well as what the expert's practical experiences are. After making sure that none of the parties to the trial had any more questions to ask, the judge released the expert without administering her to an oath.

Both the court and the defence counsel showed well-grounded knowledge of forensic sciences, although not of forensic linguistics. They did not challenge forensic linguistics at all, and they admitted to be less familiar with forensic linguistics than with other forensic sciences. Therefore, if the account of expert testimony described above gives the impression that it was a comparatively smooth and constructive matter, then this corresponds to the experience of the author in most cases. However, experts working in the private sector often have quite different experiences. Being part of a forensic science institute, and especially being just one forensic science among many there, seems to contribute very much to the acceptance of forensic linguistics. When giving testimony, it is of course the *linguistic* expertise that is decisive, but for all aspects concerning the operation of law enforcement (requests, framework conditions for examinations, evaluation of evidence, quality management), the experience as a *forensic* expert is equally important. These are the aspects that the defence side may challenge the expert on. For this reason, it may prove beneficial to draw more from other forensic sciences rather than relying solely on the application of linguistics in a forensic context. Ultimately, the question is whether forensic linguistics is merely an application of linguistics or whether it is an interdisciplinary science that draws from both linguistics and forensic science to contribute to law enforcement.

Outcome of the case

The main trial lasted nine months and turned out to be difficult due to the circumstantial evidence. The defendant did not comment on the charges brought against him for the most part of the hearing, only with his last words he proclaimed his innocence; and there was still no evidence of the body. In March 2016, the court sentenced the defendant to 12 years in prison for manslaughter.

For reasons of quality assurance, the BKA's forensic linguistics department always seeks permission to get access to the judgement, including the reasoning. The judgement was written down on more than 200 pages, with four of them referring to the expert testimony and its evaluation. In fact, the testimony was described and sporadically complemented by evaluative statements. Special reference was only made to the expert's explanations being "detailed, clear and illustrated with numerous examples". However, the written judgement revealed at various points that the expert's statements made in court had been misunderstood (or recorded incorrectly in the minutes of the court). The most striking of these misunderstandings is the following record:

> In doing so, the expert emphasised that, on the usually used scale, this support statement was the second above the non-decisive statement (non liquet), while at the same time stating that the support statements exceeding moderate support were not usually awarded by experts, as these relate to comparative tasks in which it was obvious even to the layperson that the authors were not identical and that requests for a forensic analysis were superfluous for such texts. (translated quote from the written judgement)

This account is simply false and, of course, nothing like this had ever been mentioned. In retrospect, it does not even occur to the expert which statements could have led to this misunderstanding.

A further interesting point to be learned from the written judgement is how the expert testimony is connected to other evidence, especially the witness statement by the victim's mother. Apparently, she had doubts about the authorship of the text messages sent to her after her daughter went missing:

> The expert statements also confirm the impression gained by the joint plaintiff. She vividly described that when she read the short messages she had received, she noticed a change in both spelling and writing style, which ultimately led her to believe that the short messages did not come from [her daughter]. (translated quote from the judgement)

The different types of evidence – expert testimony and witness testimony – are not weighted.

The judgement's section on the expert testimony ends with the court's conclusion: "The court agrees with the convincing explanations of the expert, which were comprehensible and conclusive." (quote from the judgement).

Following the judgement, the defence side lodged an appeal. The case presented was heard by a regional court (*Landgericht*), which has jurisdiction in the more serious criminal cases as opposed to local courts (*Amtsgerichte*, which are the lowest German courts) and higher regional courts (*Oberlandesgerichte*, which have jurisdiction for offences against the security of the state). The defence has therefore appealed on points of law at the highest appellate court in Germany, the Federal Court of Justice (*Bundesgerichtshof*). Unfortunately, the reasons for the appeal are not known to the author. The Federal Court of Justice confirmed the verdict of the regional court, with minor changes in the length of the prison sentence (11.5 years instead of 12 years).

Summary

The circumstances of the case presented, especially the fact that a body has never been found, meant that the text messages sent after the victim's disappearance were given great significance in the court proceedings. As a result, the linguistic comparison also had an unusually large influence on the overall result, where otherwise forensic linguistic evidence is rather treated as a supplement to other evidence. The contribution of forensic linguistics was not challenged at any point in the proceedings regarding the linguistic methods, the conclusions drawn from the linguistic findings and the question of admissibility of linguistic evidence in general.

As far as the situation of forensic linguistics in Germany is concerned, it seems that the subject and its experts can benefit from the proximity to the more established forensic sciences if their standards are adopted in dealing with everything that lies at the interface of law and linguistics. This assumption is also based on the experience that the courts often make use of section 256 in the Code of Criminal Procedures. It states that expert opinion from public authorities and experts who have been sworn to render opinions of the relevant kind may be read out in court (by the judge, for example) instead of summoning the expert to the main hearing to present the opinion him-/herself and being examined subsequently. From experience, it is also known that experts without an affiliation with a forensic science institute are examined much more critically. This

is, of course, well within the court's responsibility when an expert has to take care of all relevant aspects of expert work on his/her own.

It would be all the more desirable to overcome the current situation of forensic linguistics in Germany, characterised by fragmentation and heterogeneity, and to close the gap between state experts and those working in the private sector. In this way, and by linking up with other forensic disciplines, the scepticism that some forensic linguists encounter could be reduced and, above all, the necessary further developments could be pushed forward.

Notes

[1]The abbreviations *StPO* and *ZPO* will be used for referencing. Both StPO and ZPO are used in their official English version. For the translation of legal content that is not part of officially acknowledged legal texts Dietl and Lorenz 2020 was used.

[2]In Germany, there is a difference between work on a freelance basis and a commercial basis. The main characteristic of freelancers is the assessment of their work to be intellectual and/or creative. Which label applies has implications for the taxation of income.

[3]Linguistic evidence relating to other issues than authorship will not be considered here.

[4]To address this demand, Ehrhardt/Fobbe 2021 published a booklet which tries to answer four main questions from the perspective of those in police and justice requesting forensic linguistic expertise: *What do I need? Where do I get it? How does it work? Have I received what I requested?*

[5]For data protection reasons, details cannot be related here. They are substituted by vague paraphrases.

[6]The request mentions 18 messages, but seven messages have been misattributed, so eventually, there are just 11 text messages whose authorship was questioned.

[7]Due to this paper's emphasis on procedural aspects and the role of the expert, the linguistic details cannot be related comprehensively.

[8]For the purpose of this article, conclusions of authorship comparisons are expressed in the "support-form". Support statements are verbal equivalents for ranges of likelihood-ratio values (ENFSI 2016: 17). In the time when the texts were analysed, the department of forensic linguistics (and phonetics, handwriting analysis etc.) was using "verbal posterior probabilities" (Morrison *et al.* 2016). There is however a transition in progress in which these verbal posterior probabilities are replaced by support statements.

[9]That this right can also be extended to allow an expert to question other experts, the author has already experienced when she was questioned by a psychiatrist about a defendant's frequent use of certain (perfectly well-formed) words which, however, the expert defined as "non-existent words".

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Expert testimony by linguists in U.S. courts: An illustrative case of practices

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Abstract. *This article describes procedures surrounding expert testimony in U.S. federal courts, exemplifying with details of an expert's experience in one case. The exemplar is a civil (not criminal) case brought for defamation, tried to a jury in a federal district court, and subsequently appealed to a higher court. The article discusses reasons for which attorneys retain expert linguists, why courts welcome experts when their testimony is deemed helpful in deciding a disputed fact but exclude them if they are not qualified or the proffered testimony is deemed insufficiently helpful or possibly prejudicial to a jury. The article concludes with observations about the pros and cons of serving as a linguistics expert in contested legal matters in an adversarial system.*

Keywords: *Expert testimony, adversarial legal proceedings, U.S. courts, Daubert criteria, discovery process.*

Resumo. *Este artigo descreve os procedimentos subjacentes ao testemunho nos tribunais federais dos EUA, usando como exemplo pormenores da experiência de um perito num caso num caso cível (não criminal) de difamação, julgado em tribunal de júri num tribunal federal de primeira instância, e posteriormente objeto de recurso para um tribunal superior. Este artigo discute os motivos pelos quais os advogados recorrem a peritos linguistas e por que razão os tribunais admitem peritos quando o seu testemunho é útil para decidir um facto contestado, mas excluem-nos se estes não possuírem qualificações ou quando o testemunho é considerado insuficientemente útil ou, possivelmente, prejudicial para avaliação pelo júri. O artigo termina com observações acerca dos prós e contras de desempenhar o papel de perito linguista em assuntos de natureza legal contestados num sistema adversarial.*

Palavras-chave: *Testemunho pericial, processo jurídico adversarial, tribunais dos EUA, critérios de Daubert, processo de averiguação.*

Introduction

Within the United States, policies and practices surrounding expert testimony in courts and within broader legal contexts vary somewhat from jurisdiction to jurisdiction. Besides the federal court systems, each of the 50 states has systems of its own, from Alabama at the head of the alphabet to Wyoming at the tail. Within a state there are statutes that apply statewide, as well as municipal and county codes that address local issues; any disputes over these latter would fall under the jurisdiction of local courts. Differences between practices surrounding criminal offenses (those that may entail possible incarceration) and civil litigation (disputes that do not involve criminal activity or possible incarceration) may also differ within a jurisdiction. The article focuses on one linguistics expert's experience in a defamation case tried in a federal court. The outcome of the trial was subsequently appealed to a higher court, which is also documented here, although the basis for the appeal was not related to the linguistics expert's testimony. Procedures in this case are identical to or have close parallels in other kinds of cases, particularly civil cases, and in other jurisdictions. The descriptions and analyses are thus generally applicable beyond the example case.

The article also discusses some of the reasons for which attorneys retain expert linguists, why courts welcome their expertise when it is judged helpful in establishing a disputed fact but may exclude their testimony if the expert is judged insufficiently qualified or the proffered testimony deemed prejudicial to the jury or insufficiently helpful in establishing matters of fact. The article concludes with observations about the pros and cons of serving as a linguistics expert in an adversarial legal system, including on the positive side an opportunity to play a role in the administration of justice and on the negative side the challenge of facing opposing counsel intent on undercutting the expert's opinion.

In discussing expert testimony in U.S. courts, it is crucial to recognize the adversarial nature of litigation in the system. Criminal cases are brought by government prosecutors against those accused of a crime, who thus become defendants. Civil cases (i.e. those not involving crimes) originate when an attorney files a complaint for an alleged offense on behalf of a plaintiff. Parties to both criminal charges and civil lawsuits are almost invariably represented by legal counsel if the charge is serious enough. The principal aim of the present article is to illustrate typical procedures for an expert linguist in a civil case tried in a federal court. The legal issues surrounding defamation are addressed only incidentally.

Court systems in the United States

Federal Courts

The federal trial courts in the U.S. are called district courts. There are 94 districts, each state having at least one district court and the larger ones having several – for example, the U.S. District Court for the Central District of California and the U.S. District Court for the Southern District of New York. Although Washington D.C. and Puerto Rico are not states, each has a district court, as do certain U.S. territories. By law there are 678 judges functioning in the district courts. An additional 551 magistrate judges assist the circuit courts by handling administrative issues like setting bail and reducing sentences, each magistrate judge operating usually for one circuit court judge.

Each district belongs to one of thirteen regional 'circuits', and the circuit courts serve as courts of appeal in their circuit. By law, there are 179 judges serving in the thirteen circuits; they hear cases that have been appealed from the district courts in that circuit. As an example, the Ninth Circuit is the largest and covers nine western states and two territories. Above the appellate courts of the circuits sits the U.S. Supreme Court, with nine justices; published decisions of the U.S. Supreme Court constitute law for the entire United States. Appellate courts rely principally on written submissions – records from the trial (or trials) below and appellate briefs submitted in the appeal process – and thus do not involve expert witnesses. Sometimes a district court case is appealed on the grounds that the judge wrongly admitted or excluded an expert. More generally, criteria for admitting expert testimony have been established by the U.S. Supreme Court's interpretation of federal legislation, as discussed below in connection with the 'Daubert criteria'.

At the federal level there are also specialized courts or enforcement jurisdictions. The United States Patent and Trademark Office and its Trademark Trial and Appeal Board is a frequent venue for forensic linguists rendering expert opinion. The USPTO and TTAB rely on administrative law judges, who act in an administrative capacity as both judge and finder of fact, never with a jury, and weigh and decide on patent and trademark applications and disputes arising from their decisions. There are appeal mechanisms within the USPTO, but dissatisfied applicants or opposers to an application may take the dispute to a federal district court.

State Courts

In the U.S., each state has its own court system, with trial courts and appellate courts. Depending on the size of its population, a state may have only a few appellate courts or an extensive system of them. Linguists serve as experts in those courts as well, and many states abide by the same criteria in admitting experts as does the federal court system (whose details I discuss below).

Why attorneys retain experts

Three kinds of evidence that linguistics experts testify about in the U.S. – having to do with authorship identification (see Brooklyn Law School 2013; Sousa-Silva and Coulthard 2018), defamation (Tiersma 1987; Shuy 2010), and trademark (see Shuy 2002; Butters 2021) – are common. Phoneticians may serve in other capacities such as voice analysis (see, e.g., Labov 1988). In all such cases, language is at the heart of the dispute, and linguists are increasingly retained to testify in such cases in the U.S., although the same few seem to do most of the expert witnessing, perhaps because attorneys tend to rely on experienced experts or because attorneys ask one another for recommendations. (It might also be noted that some witnesses allowed to testify in linguistic matters lack linguistic expertise – see Butters 2009 – although judges seem to be increasingly perspicacious.)

Among the reasons that attorneys retain experts, common ones include an expert's ability to assemble evidence from sources unfamiliar to the parties and help explain subtle or complex matters of fact or interpretation to a court, especially technical matters, including a range of language facts. Experts can help identify and explain scientifically what attorneys may only intuit, and within their domains of expertise they are able to weigh the pros and cons of competing fact claims. Sometimes the effect of an expert's

preliminary report moves the retaining attorney to urge a client not to proceed with a case or to settle the dispute outside of court or, in a criminal case, seek a plea bargain. Effective experts are also helpful in explaining linguistic science to a lay jury in understandable terms.

An attorney may retain a linguist as a consultant, solely to help assess aspects of a claim or help guide the attorney in questioning an expert on the opposing side, or as a formally designated expert witness to help the trier of fact – the jury or judge – decide a matter of fact. Consulting roles need not be disclosed to opposing counsel or the court, but if a litigant intends to offer an expert's testimony at trial the expert must be designated as such, submit a report, and be subject to examination by opposing counsel in the process of discovery (a topic I return to below). In this respect, the practices in an adversarial legal system such as that in the U.S. may differ considerably from those in an inquisitorial system. In the U.S., experts are retained by attorneys on one side or the other of a dispute or criminal charge; experts are seldom retained by the court (except perhaps in family court). Although an expert's principal legal obligation is to the court, they function on one side of the litigation or the other, and as Lawrence Solan has written about experts in an adversarial system, 'One lawyer wants the expert witness to act as a good team player, while the other attempts to rip the expert to shreds' (Solan 2021: 350). In the same vein, Justice Peter Gray of the Federal Court of Australia has noted that '[j]udges in civil cases in common law courts need expert witnesses to resolve many issues, but distrust those experts. The distrust is partly due to [...] the perception that expert witnesses are beholden to their clients' (Gray 2010: 201); those words apply equally well to U.S. courts. (See also Clarke and Kredens 2018, whose analysis relies on reports of experienced forensic linguists.)

As the illustrative dispute in this article deals with defamation, a few words about that offense will be helpful. *Black's Law Dictionary* (Garner 2019) defines defamation as a 'false written or oral statement that damages another's reputation'. It is thus an act that damages the good reputation of the defamed person. While defamation is criminalized in some states, it is not a federal crime; it is, however, subject to civil suit, and when the plaintiff and defendant reside in different states the law permits the plaintiff to choose a federal court trial; it is for that reason that the Cohen trial, discussed below, was held in the U.S. District Court of Nevada.

An expert linguist is not retained to assess reputations, of course, nor the possible damage inflicted by an alleged defamation but generally to offer analysis and expert opinion as to what an ordinary speaker of a language would take a spoken or written text – in context – to be saying or implying about the person claiming to be defamed. For a linguist, a defamation analysis is essentially a discourse analysis, sometimes also involving interpretation of particular words (Tiersma 1987; Shuy 2010). Given that sophisticated defamers are careful not to express anything known to be false, their claims or implied accusations are often couched in language that is ambiguous or originates in the speech or writing of third parties. For example, a headline in a supermarket tabloid might read '[Name] Drinking Herself into the Grave', with words such as 'Friends say' in smaller print above the headline, easily overlooked, and with alleged friends of Name expressing their concern over her health in the article itself. A discourse analysis can be helpful in demonstrating how a reader infers meaning and intended meaning from

language, relying for example on speech act theory (Austin 1962) and the Cooperative Principle (Grice 1989).

Admissibility of experts at trial

U.S. federal law specifies criteria for admission of expert testimony at trial in Article VI 'Witnesses' and Article VII 'Opinions and Expert Testimony' of the Federal Rules of Evidence (FRE 2021). It is nonetheless up to the trial judge to interpret the criteria in particular cases. In technical or scientific matters that a judge or jury may not be familiar with – DNA evidence, for example – judges are inclined to admit expert testimony. In language matters, however, if judges regard themselves as possessing expertise and deem jurors as having first-hand knowledge, they may exclude proffered expert testimony, especially if opposing counsel offers a compelling legal reason in a motion to exclude. In my experience, judges are more open to permitting an expert to testify about language in a bench trial (a trial without a jury), where the judge is the sole finder of fact and may feel better able than a jury to interpret testimony without being unduly biased by it. (For a report about a language issue where expert testimony was not permitted, see Finegan 2020a.) The testimony of any expert must be seen to have evidentiary value – ability to assist the trier of fact in deciding a factual matter. In an adversarial system, where proposed expert testimony must be disclosed in writing to opposing counsel, opposing counsel often moves to exclude linguistic testimony as irrelevant or prejudicial or failing to meet the Daubert criteria. The Federal Rules of Evidence permit court-appointed expert witnesses, but on linguistic matters they are, at most, infrequent. As gatekeepers, judges could decide on their own to exclude proffered expert testimony, but exclusion of an expert's testimony is virtually always a consequence of opposing counsel's convincingly moving to exclude it. Sometimes, too, a judge admits certain aspects of an expert's testimony but excludes other aspects – for example, by allowing a language analysis in an authorship case but not permitting the expert to express a conclusion based on the analysis.

Current standards for admissibility were established by Congress in 1975 (and subsequently amended), and they were interpreted in the 1993 U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals Inc.* (and a follow-up case); for that reason, the standards that now exist are commonly called the Daubert criteria (Daubert 1993). The Daubert decision modified the earlier 'Frye' standards (named after a 1923 federal case) and laid down these criteria to guide judges in their gatekeeping function: (1) whether the theory or technique in question can be, and has been, tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within the relevant scientific community. The criteria are interpreted by the trial court in a case, and not every criterion is applicable in each case. It is useful to bear in mind Justice Gray's observation, cited above: judges are eager to have whatever expert guidance can be helpful and, as gatekeepers, they permit what they deem will be helpful. (See also Cheng and Yoon 2005; Cheng 2013.)

An illustrative case: Cohen v. Hansen

The facts

Ross Hansen, a former commercial tenant of businessman Bradley S. Cohen, published two websites that compared Cohen to Bernie Madoff, an infamous American white-

collar fraudster. At the time of publication, Madoff was serving a 150-year sentence for carrying out a so-called Ponzi scheme that defrauded investors of $65 billion, a charge Madoff had pleaded guilty to in 2009. Cohen sued Hansen for internet defamation and related offenses in August of 2012. The facts of the case as relevant to a linguist will become clear as I describe the processes of serving as an expert witness in the case. The focus here is on the procedures principally as they relate to expert testimony, and I exemplify with this case chiefly because it involved both expert trial testimony and led to an appellate court decision, albeit one not related to the linguist's testimony.

Discovery

In the U.S. legal system, a crucial part of an expert's engagement occurs during the legally mandated 'discovery' process. As characterized by the American Bar Association (ABA 2019), discovery is 'the formal process of exchanging information between the parties about the witnesses and evidence they'll present at trial'; it 'enables the parties to know before the trial begins what evidence may be presented'; it is 'designed to prevent "trial by ambush," where one side does not learn of the other side's evidence or witnesses until the trial, when there's no time to obtain answering evidence'. In this respect, then, it differs from the fictional television trials in which surprise witnesses are called during trial and 'ambush' one side or the other.

In the Cohen case, I was retained on behalf of the plaintiff. My task was to analyze the websites with a view to what ordinary reasonable viewers would understand the sites to be communicating about Bradley S. Cohen. (The sites were earlier and later versions, nearly identical except that some significant material was omitted from the later version.) After becoming familiar with the facts of the case as relevant to linguistic expertise from the point of view of a discourse analyst, and after consultation between me and the retaining attorney about my assessment, I submitted a report in August of 2013. The 4,700-word report and its appendices described my task and relevant credentials, and laid out my professional assessment of the relevant facts and the bases for them, as required by the Federal Rules of Civil Procedure, which also require experts to disclose their publications from the preceding ten years, all cases in which they have given testimony in the preceding four years, and their fee arrangement; except when performing pro bono work, linguistic experts in the U.S. typically operate under an agreement with the retaining attorney's law firm that spells out various mechanical details of the engagement, including an hourly fee for time spent, irrespective of the outcome of the litigation; some agreements specify higher hourly fees for time spent in testimony than for time spent preparing a report. In compliance with the statutory requirements governing discovery, my report in Cohen was served to opposing counsel by the retaining attorney, and a month later I was issued an official 'notice to appear' for a deposition to be taken by opposing counsel, again in compliance with established federal rules. (It is useful to note that the federal rules have parallels in state courts.)

A deposition is sworn oral testimony given by a designated witness preceding a trial. Testifying in deposition or in court requires an oath or affirmation to testify truthfully and, according to the Federal Rules of Evidence, it 'must be in a form designed to impress that duty on the witness's conscience' (FRE 2021: Rule 603); it functions to inform the opposing side in litigation as to an expert's intended testimony – the conclusions and their bases, along with the other matters just identified. A deposition creates a structured opportunity for opposing counsel to question a designated expert about the contents of

their report and related matters such as when and by whom it was written and the expert's credentials. Arrangements for the deposition – time, place, other routine matters – are agreed by counsel. Depositions are not required, but counsel rarely forgoes an opportunity to depose an opposing expert. Among other reasons, counsel's not taking an expert's deposition may influence a judge to deny a motion to exclude the expert at trial. In my experience, a motion asking the court to exclude an expert's testimony frequently arises as a consequence of information disclosed during the deposition, although a motion to exclude could be made when an expert and the topic of testimony is first disclosed.

Depositions are tedious as well as challenging, in part because the deposing attorney would probably like to keep the expert from testifying; consequently, the questions posed, however neutrally phrased, may be intended to discredit the expert or undermine the basis for the proffered testimony. At a deposition no judge is present to resolve disputes arising between the attorneys and there is no jury to impress. Minimally present at a deposition is an attorney for each side, a court reporter, and the expert. Sometimes, there are several attorneys representing different interests related to the case, as with a representative of an insurance firm responsible for potential financial damages arising from a verdict. The retaining attorney 'defends' the deposition not on behalf of the expert (with whom they may have worked closely for weeks or months) but on behalf of the retaining attorney's client. Sometimes this legally important fact is explained to an expert deponent early in the deposition but more commonly it goes unsaid; I have read depositions at which experts express surprise when they are told, essentially, that they are on their own legally – that the retaining attorney is committed to doing the best for their client, not to protect the deponent from a possible ethical transgression. Opposing counsel – likewise present on behalf of their client – seeks to gain a fuller and clearer understanding of the expert's credentials and opinions on the matter at bar, opinions previously expressed in the expert's written report. A videographer may be present to videotape the entire on-the-record portion of the proceedings. Because depositions typically last for hours (usually not exceeding seven hours), participants may ask to take breaks, including for lunch, and sometimes attorneys wish to talk with one another about mechanical matters and go off the record to do so.

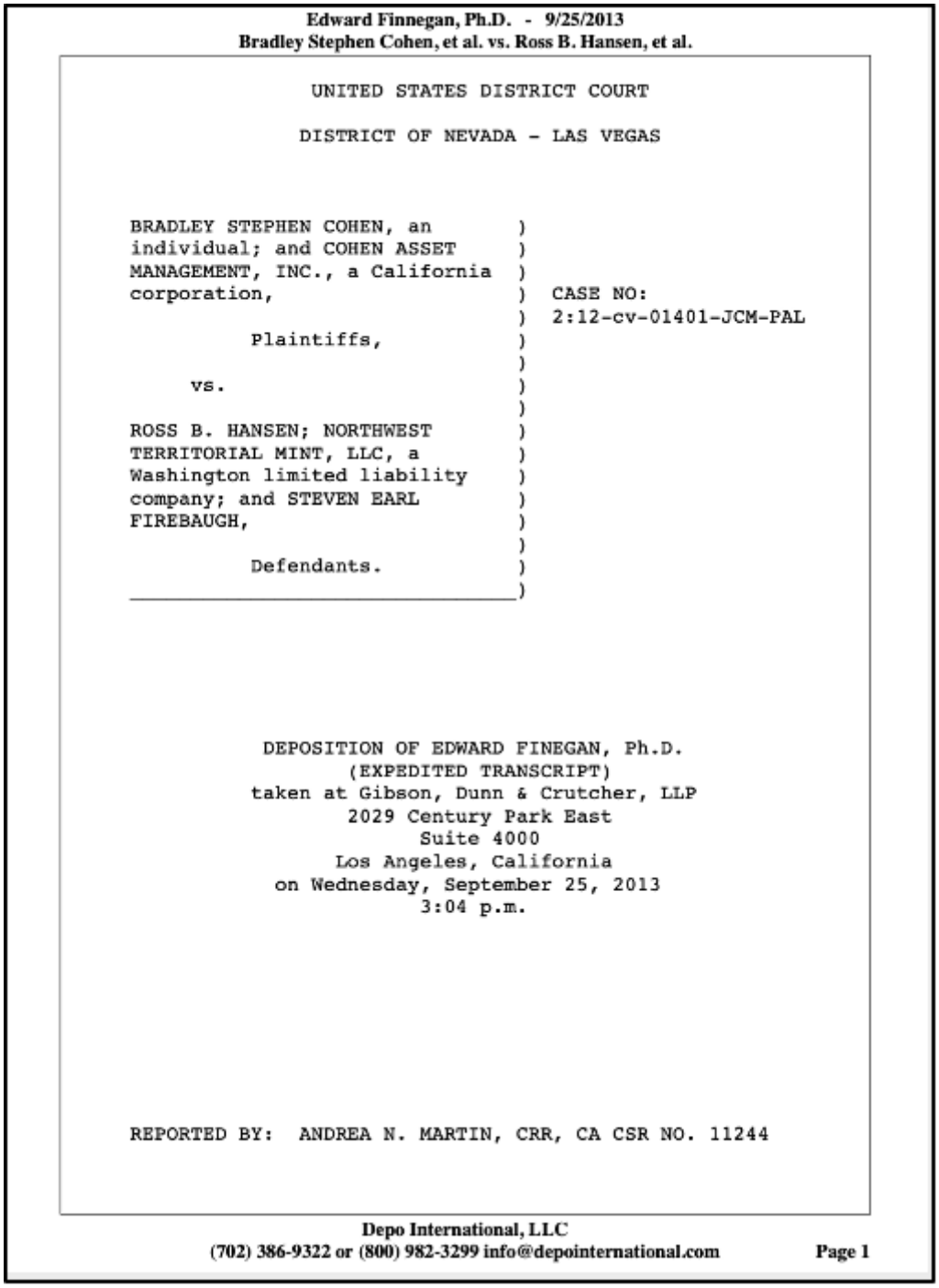
The deponent is sworn in by the court reporter, and the deposition testimony can be used at trial. In a report the expert gets to lay out their opinion; the questions asked at deposition are probing ones about the expert's opinions and their basis, as well as their credentials as an expert. Rules of engagement are spelled out in the Federal Rules of Civil Procedure, in particular Rule 30 (see FRCP 2019), although they are not generally known by expert deponents except as violations or putative violations make an appearance during the deposition and the expert's retaining attorney objects. Retaining attorneys may object frequently, sometimes on legal bases that may not be familiar to the expert. Sometimes an objection is entered for the record and left to be settled later by the judge if need be. At other times, in practice, objections are made chiefly to alert the expert to be cautious answering the question just asked. Experts are routinely advised by retaining attorneys to pause before answering a question, allowing opportunity for an objection whose intention may include alerting or warning the expert. Any disputes between attorneys occur on the record and may be referred to the trial judge to resolve if the case goes to trial and the issue remains unsettled. Deposition testimony can also be

cited in a motion to exclude an expert. Motions to exclude an expert take place among the attorneys and the court, often without the expert's knowledge unless the motion to exclude succeeds or limits their testimony. Additional information about the topics discussed here can be found at the website of the American Bar Association (ABA 2019) and, more technically, at FRCP (2019).

After testifying at deposition, the expert must review a transcript of the testimony to correct any errors of transcription and sign the record. Figure 1 shows the cover sheet for my deposition in the Cohen matter. Figure 2 shows the second and third pages of the deposition, which lay out the names of the attorneys for the plaintiff and defendant in the case and a table of contents, including reference to the exhibits the deposing attorney produced during the deposition, here just a few but sometimes numbering dozens. Note that one of the exhibits is an article I had written (Finegan 2009) that the deposing attorney quizzed me about during the deposition. I have occasionally faced a foot-high stack of my publications, with bookmarks protruding in my direction throughout the entire deposition, possibly intended as an implied threat that the attorney would ask questions about each of them and thereby catch me in a contradiction between what I'd written for publication and what I'd opined in my report in the case. (See also Gray 2010: 204.)

Figure 3 shows the opening question and answer sequence of the formal deposition. When not taking place via Zoom or other electronic means (as has occurred during the Covid-19 pandemic), depositions typically take place around a large conference table in the offices of a law firm. Beforehand, typically, the retaining attorney and the expert meet, sometimes for several hours, to prepare the expert for the structure of the deposition, go over anticipated questions the expert may be asked, perhaps report how the deposing attorney has behaved with other deponents in the case, and answer any questions the expert may have about the deposition process.

After depositions are taken on both sides, many cases, especially in civil matters, settle outside of court before the trial stage. I have chosen the Cohen trial as illustration precisely because it proceeded to trial and presents an opportunity to describe the process of trial preparation, trial testimony, and what may happen afterwards.



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA - LAS VEGAS

BRADLEY STEPHEN COHEN, an individual; and COHEN ASSET MANAGEMENT, INC., a California corporation,

Plaintiffs,

vs.

ROSS B. HANSEN; NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company; and STEVEN EARL FIREBAUGH,

Defendants.

CASE NO:
2:12-cv-01401-JCM-PAL

DEPOSITION OF EDWARD FINEGAN, Ph.D.
(EXPEDITED TRANSCRIPT)
taken at Gibson, Dunn & Crutcher, LLP
2029 Century Park East
Suite 4000
Los Angeles, California
on Wednesday, September 25, 2013
3:04 p.m.

REPORTED BY: ANDREA N. MARTIN, CRR, CA CSR NO. 11244

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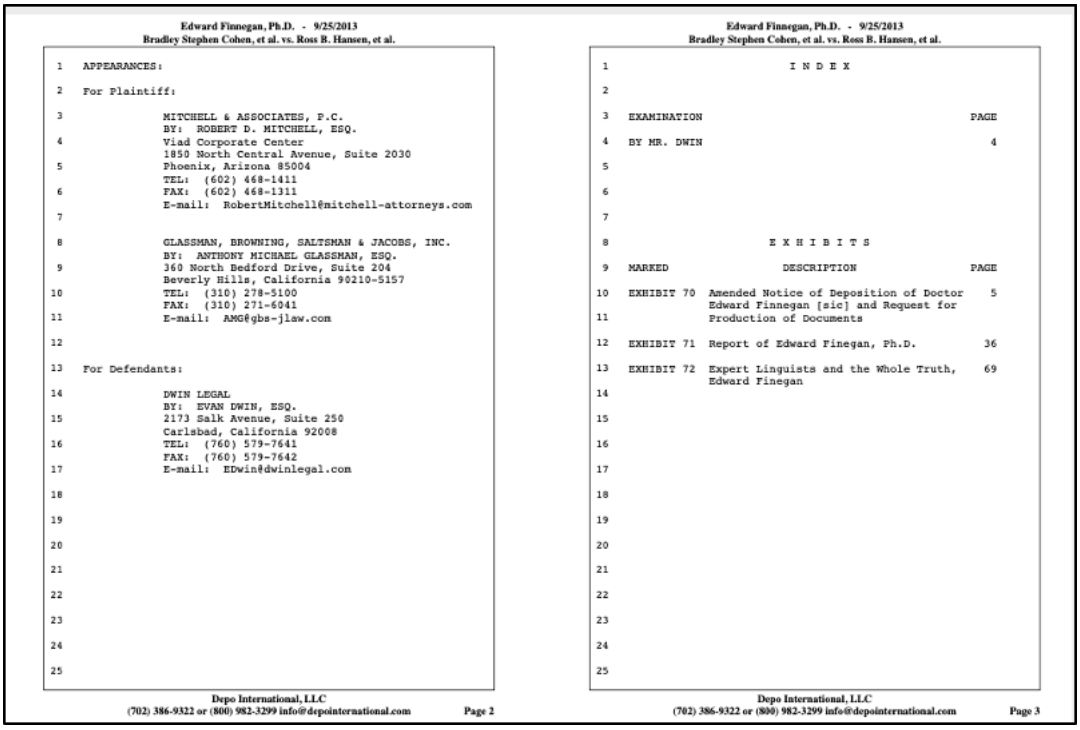
Figure 1. Cover Page for Deposition Transcript in *Cohen v. Hansen.*



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

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I N D E X

EXAMINATION		PAGE
BY MR. DWIN		4

E X H I B I T S

MARKED	DESCRIPTION	PAGE
EXHIBIT 70	Amended Notice of Deposition of Doctor Edward Finnegan [sic] and Request for Production of Documents	5
EXHIBIT 71	Report of Edward Finegan, Ph.D.	36
EXHIBIT 72	Expert Linguists and the Whole Truth, Edward Finegan	69

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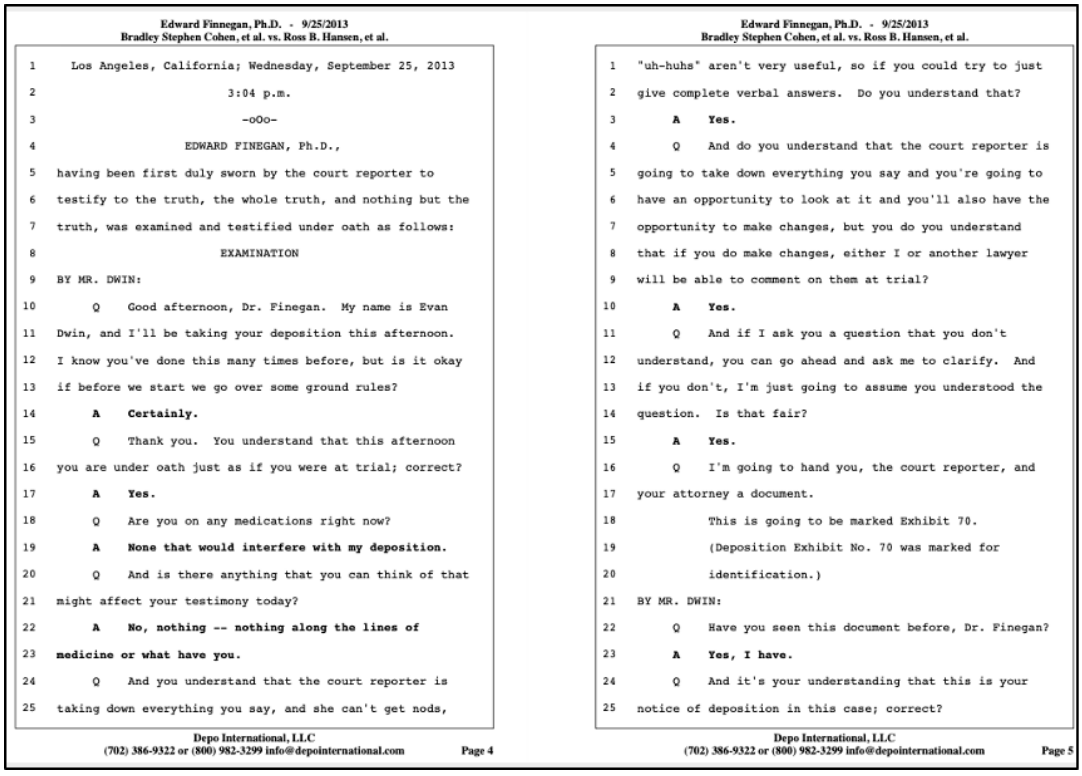
Figure 2. Second and Third Pages of Deposition Transcript in *Cohen v. Hansen.*



Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

Los Angeles, California; Wednesday, September 25, 2013
3:04 p.m.
-oOo-
EDWARD FINEGAN, Ph.D.,
having been first duly sworn by the court reporter to testify to the truth, the whole truth, and nothing but the truth, was examined and testified under oath as follows:

EXAMINATION

BY MR. DWIN:

Q Good afternoon, Dr. Finegan. My name is Evan Dwin, and I'll be taking your deposition this afternoon. I know you've done this many times before, but is it okay if before we start we go over some ground rules?

A Certainly.

Q Thank you. You understand that this afternoon you are under oath just as if you were at trial; correct?

A Yes.

Q Are you on any medications right now?

A None that would interfere with my deposition.

Q And is there anything that you can think of that might affect your testimony today?

A No, nothing -- nothing along the lines of medicine or what have you.

Q And you understand that the court reporter is taking down everything you say, and she can't get nods,

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Edward Finnegan, Ph.D. - 9/25/2013
Bradley Stephen Cohen, et al. vs. Ross B. Hansen, et al.

"uh-huhs" aren't very useful, so if you could try to just give complete verbal answers. Do you understand that?

A Yes.

Q And do you understand that the court reporter is going to take down everything you say and you're going to have an opportunity to look at it and you'll also have the opportunity to make changes, but you do you understand that if you do make changes, either I or another lawyer will be able to comment on them at trial?

A Yes.

Q And if I ask you a question that you don't understand, you can go ahead and ask me to clarify. And if you don't, I'm just going to assume you understood the question. Is that fair?

A Yes.

Q I'm going to hand you, the court reporter, and your attorney a document.

This is going to be marked Exhibit 70.

(Deposition Exhibit No. 70 was marked for identification.)

BY MR. DWIN:

Q Have you seen this document before, Dr. Finegan?

A Yes, I have.

Q And it's your understanding that this is your notice of deposition in this case; correct?

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Figure 3. Fourth and Fifth Pages of Deposition Transcript in *Cohen v. Hansen.*

Trial

Because pre-trial negotiations between litigants in civil cases can lead to a settlement at any time, it is sometimes uncertain until the last moment whether a scheduled trial will take place. In May 2021, for example, a trial at which the court agreed to permit me to testify (and for which I possessed airplane tickets to fly to the venue) settled one day before the trial was to begin (and just an hour before I was scheduled to board a plane headed to the court 1,500 miles away). Sometimes even after appearing at a trial venue, it remains uncertain that an expert will be permitted to testify. For example, in 1977, at the very first trial in my experience as an expert linguist, I waited outside the courtroom ready to testify to a jury, only to be thwarted by the court's decision not to permit my testimony in the presence of the jurors (see Finegan 2020a). In the Cohen case, the retaining attorneys had not received a decision about the court's willingness to allow me to testify before I needed to be at the trial venue in case the court permitted my testimony, so I flew from Los Angeles to Las Vegas and awaited the court's decision: in the end, the judge permitted me to be sworn in and testify. Before returning to the testimony itself, it is instructive to describe something of the preparation that preceded my appearance in a United States District Court before a federal judge in a jury trial.

In my written report, I had opined that visitors to the websites would have concluded that the website creators intended to persuade them that the answer to the prominently and repeatedly displayed question 'Is Bradley S. Cohen the Next Bernie Madoff?' was yes, and I explained how the website accomplished making that accusation without articulating it directly. Following my written report and deposition, as the possibility of my testifying in court approached, the retaining attorney and his staff, comprising other attorneys and technical assistants who worked up the slides I had prepared for presentation at trial, met with me on several occasions. Sometimes beforehand and sometimes afterwards, I received a list of questions that the attorney was planning to ask me on direct examination (i.e. the question-and-answer sequence on the witness stand in which the questions are asked by the attorney who has called the witness). Figure 4 shows a slide that Cohen's attorney planned to display and ask me to explain to the jury. On the slide are two questions I would be asked about it: 'Describe what this is / what you understand this to represent' and 'How does the repetition of the banner affect the average reader?' The first question allowed me to explain to the jury what the slide represented, while the second allowed me to begin discussing a discourse analysis in lay terms and to explain in part how the site conveyed its accusations. The slide depicts the six pages of the offending (second) website, the fifth page encompassing two columns on the slide. Across every page is a banner that asks, 'Is Bradley S. Cohen the Bernie Madoff of real estate?' and, in large font above photographs of both men side-by-side, 'Is Bradley S. Cohen the Next Bernie Madoff?'

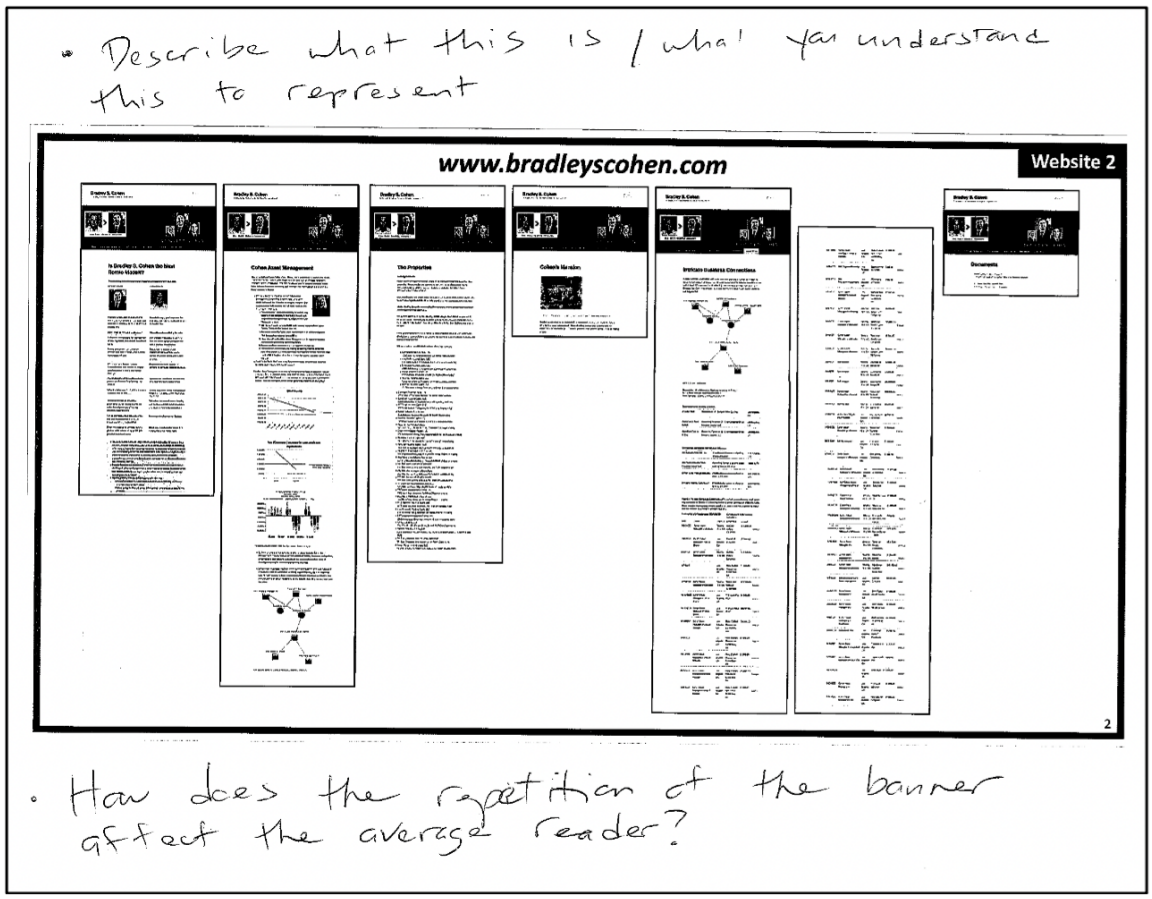


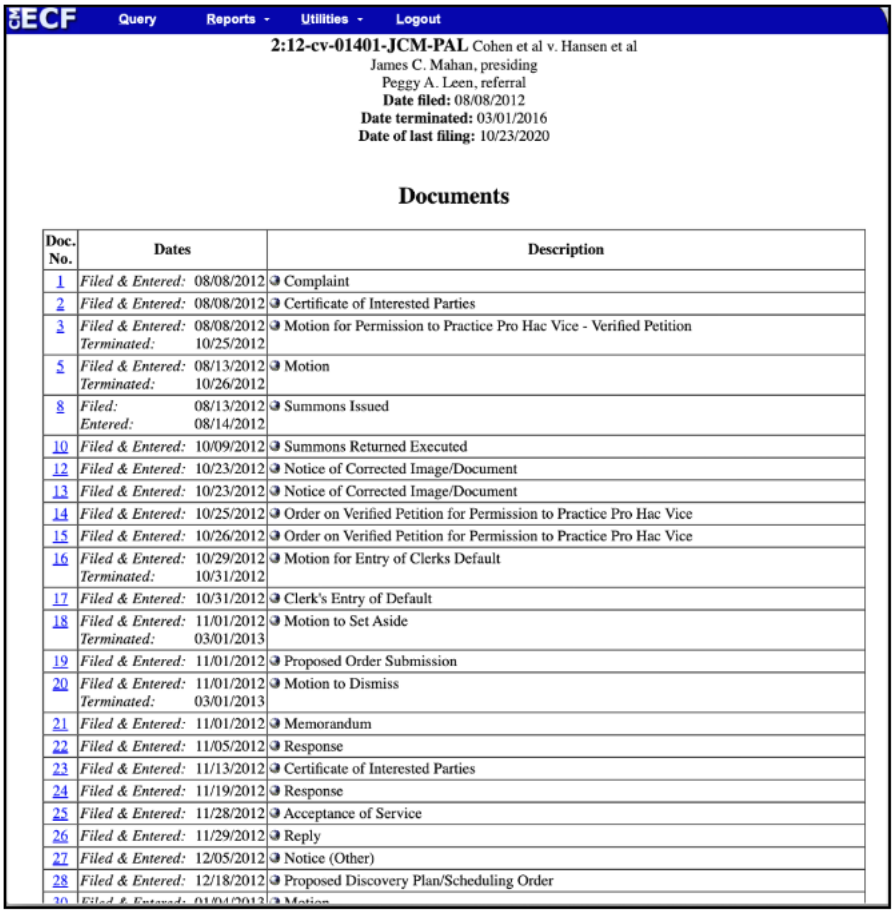
Figure 4. Example Preparation Sheet for Trial Testimony in *Cohen v. Hansen.*

Figure 4, shown here to illustrate an expert's preparation for trial, serves also as an example of a slide that was shown to jurors during my testimony, though in court the handwritten questions were absent; following this overview of the website, slide by slide, I focused on several sections, appropriately highlighted to capture the jury's attention, until the major points in the analysis had been explained to the jury. The slides were shown to the jury as occasions to testify about the syntax, semantics, and pragmatics, for example, of the question 'Is Bradley S. Cohen the Next Bernie Madoff?' and a caption like 'The alarming similarities between these two investment firm founders'. Question by question, under direct examination (where leading questions are not permitted), the retaining attorney asked me to address various aspects of my testimony, calculating at each step the jury's reaction and deciding when he had gone far enough. Under questioning, I went through the slides explaining how the website containing the images and texts conveyed a particular understanding of Cohen. I did not address legal questions, of course, or the truth of the stated and implied information. My task was to explain how the website was crafted to create the impression that an ordinary speaker of English would experience in viewing the website and how that understanding included accusations of Bradley S. Cohen.

Following the direct examination, I was cross-examined by opposing counsel and was then excused from the witness stand, my engagement complete. At least one other expert testified, though not on language-related matters. Hansen had not engaged an

expert linguist to rebut my testimony. Had he done so, we would have testified independently of one another, and there would not have been an opportunity for us to meet and agree on certain matters and identify for the court those matters on which disagreement remained. While that situation may occur in jurisdictions outside the U.S. (see Gray 2010), I am not aware of such instances in the U.S. In the Cohen case, after its deliberations, the jury returned a verdict finding in favor of Cohen and awarding him damages of $38.3 million. It was thus a consequential trial for litigants and attorneys, and with such a steep penalty it is not surprising that Hansen appealed the verdict, a topic I return to in the following section.

Before doing that, it is helpful to examine the court docket in the Cohen case because experts may not recognize what a relatively limited part they play in a larger legal battle (however important their role may be). A court docket, the first page of which for the Cohen case shown in Figure 5, is simply a log of official court proceedings – motions and responses of the court, as well as other documents submitted by the parties and other official actions in the case; it is in effect the broad outline of the court proceedings from beginning to end. The first entry in a civil case is the 'Complaint', in the Cohen case dated August 8, 2012. The final entry (numbered 429 but not shown in Figure 5) is dated October 23, 2020 – eight years after the Complaint. It is easy for an expert witness not to appreciate the larger legal contest in which they play one role, sometimes not much more than a cameo appearance in a larger drama.



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2:12-cv-01401-JCM-PAL Cohen et al v. Hansen et al
James C. Mahan, presiding
Peggy A. Leen, referral
Date filed: 08/08/2012
Date terminated: 03/01/2016
Date of last filing: 10/23/2020

Documents

Doc. No.	Dates	Description
1	*Filed & Entered:* 08/08/2012	Complaint
2	*Filed & Entered:* 08/08/2012	Certificate of Interested Parties
3	*Filed & Entered:* 08/08/2012 *Terminated:* 10/25/2012	Motion for Permission to Practice Pro Hac Vice - Verified Petition
5	*Filed & Entered:* 08/13/2012 *Terminated:* 10/26/2012	Motion
8	*Filed:* 08/13/2012 *Entered:* 08/14/2012	Summons Issued
10	*Filed & Entered:* 10/09/2012	Summons Returned Executed
12	*Filed & Entered:* 10/23/2012	Notice of Corrected Image/Document
13	*Filed & Entered:* 10/23/2012	Notice of Corrected Image/Document
14	*Filed & Entered:* 10/25/2012	Order on Verified Petition for Permission to Practice Pro Hac Vice
15	*Filed & Entered:* 10/26/2012	Order on Verified Petition for Permission to Practice Pro Hac Vice
16	*Filed & Entered:* 10/29/2012 *Terminated:* 10/31/2012	Motion for Entry of Clerks Default
17	*Filed & Entered:* 10/31/2012	Clerk's Entry of Default
18	*Filed & Entered:* 11/01/2012 *Terminated:* 03/01/2013	Motion to Set Aside
19	*Filed & Entered:* 11/01/2012	Proposed Order Submission
20	*Filed & Entered:* 11/01/2012 *Terminated:* 03/01/2013	Motion to Dismiss
21	*Filed & Entered:* 11/01/2012	Memorandum
22	*Filed & Entered:* 11/05/2012	Response
23	*Filed & Entered:* 11/13/2012	Certificate of Interested Parties
24	*Filed & Entered:* 11/19/2012	Response
25	*Filed & Entered:* 11/28/2012	Acceptance of Service
26	*Filed & Entered:* 11/29/2012	Reply
27	*Filed & Entered:* 12/05/2012	Notice (Other)
28	*Filed & Entered:* 12/18/2012	Proposed Discovery Plan/Scheduling Order

Figure 5. The First 28 of 429 Docket Entries in *Cohen v. Hansen.*

An expert linguist would not be involved in any but a very few entries and ordinarily would not be aware of all the other court proceedings because they have nothing to do with the expert's role or testimony. Because the linguist's involvement is chiefly, if not solely, what the retaining attorney and the expert discuss, it may be tempting for an expert to imagine their involvement playing a larger or more central role in a litigation than is accurate. But the length of a docket and the extensive legal maneuvering that it represents is useful for experts to bear in mind, even though it does not involve them directly. To underscore the point, it is sobering to recognize that in the Cohen case, despite my involvement over several years, the judge could have decided just a short while before I was to testify that my testimony was not deemed sufficiently helpful to warrant admission. The case would have gone ahead in all its other complexity, and no one knows what the jury's verdict would have been under those circumstances. Not a few published reports by linguists discussing their experience as an expert witness seem to suggest that the linguistic issue was the only issue or at the very center of a case, and while that is sometimes accurate, it is far from true in many other cases.

The appeal and the appellate court

After the jury returned a verdict and damages of more than $38 million, Hansen sought a retrial, citing certain pre-trial agreements among counsel and the court, but the court did not grant a retrial (see Mahan 2016). Hansen then appealed to the U.S. Court of Appeals for the Ninth Circuit, which has appellate jurisdiction for the District of Nevada. The Ninth Circuit has 29 judges sitting on it, and for most cases a panel of three judges is assigned to hear the appeal, as with Hansen's appeal here.

In appellate courts, including the U.S. Supreme Court, virtually all proceedings take place via written filings, including a transcription of the trial court(s) and appellate briefs filed by each side laying out their case for or against some or all of the underlying verdicts or decisions to be overturned. In addition to the written documentation, there is a surprisingly brief live interaction, where appellant and respondent are given equal time to address the panel and answer questions about the briefs filed in the appeal. The testimony of attorneys before the appellate court is usually available on the court's website in one form or another, sometimes including videos, as with Hansen's appeal. Figure 6 is a screen capture from the appearance of Cohen's attorney before the three-member appellate court panel. He addressed the panel after Hansen's appellate attorney addressed it. The inset may suggest the attorney is facing away from the three-judge panel, but of course that is misleading. The 15 minutes allotted to each side in this matter might be thought to belong entirely to the attorney, but a visit to the site demonstrates otherwise. Attorneys seldom get far into their presentation before an appellate court judge interrupts with a question to clarify some aspect of the briefings. For readers with half an hour to spend, a viewing of this hearing may be of interest; among other things, the differences between the attorneys' approaches is striking. (See Ninth Circuit 2020.) Oral arguments before the United States Supreme Court – in approximately 70–80 cases each year – are available online (see SCOTUS 2020); for an oral argument involving linguistic questions, *Facebook Inc. v. Duguid* (Facebook 2020) may be of interest.

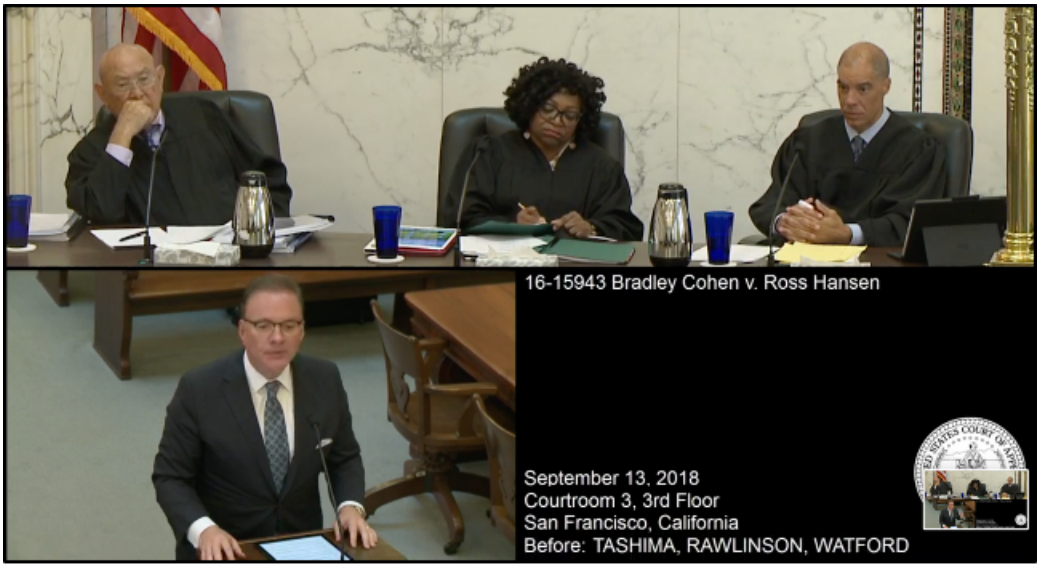
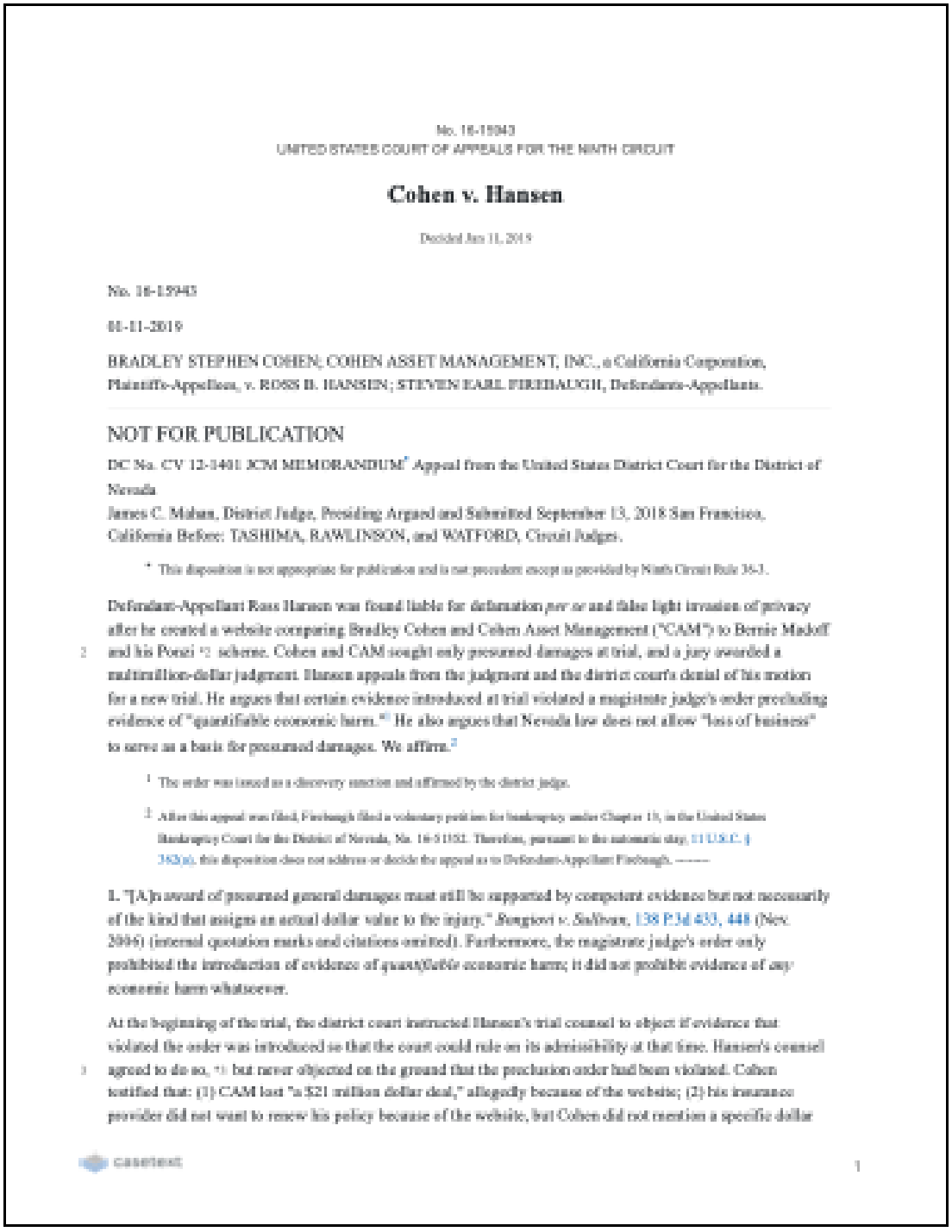


Figure 6. Cohen Attorney Robert D. Mitchell Addressing Ninth Circuit Appellate Court.

Appellate court decision

Four months after attorneys for Cohen and Hansen testified before the three-judge Ninth Circuit panel, the court issued its decision, affirming the district court's judgment. The basis of the appeal made by Hansen was unrelated to the linguistic issues, as the Court of Appeals' decision explains. (See Figure 7.) It is worth calling attention to the notice NOT FOR PUBLICATION in all caps, which appears nine lines down in the decision document. Decisions that appellate courts designate 'not for publication' identify them as not constituting legal precedent and therefore not citable as precedential or authoritative in subsequent related or unrelated litigation. In other words, such decisions would not find their way into the law books that constitute case law. Note, too, that the final line of the court's decision, set off from all else, reads, "The judgment of the district court is AFFIRMED."



No. 18-15043
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cohen v. Hansen

Decided Jan 11, 2019

No. 18-15943

01-11-2019

BRADLEY STEPHEN COHEN; COHEN ASSET MANAGEMENT, INC., a California Corporation, Plaintiffs-Appellees, v. ROSS B. HANSEN; STEVEN EARL FIREBAUGH, Defendants-Appellants.

NOT FOR PUBLICATION

DC No. CV 12-1401 JCM MEMORANDUM* Appeal from the United States District Court for the District of Nevada
James C. Mahan, District Judge, Presiding Argued and Submitted September 13, 2018 San Francisco, California Before: TASHIMA, RAWLINSON, and WATFORD, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

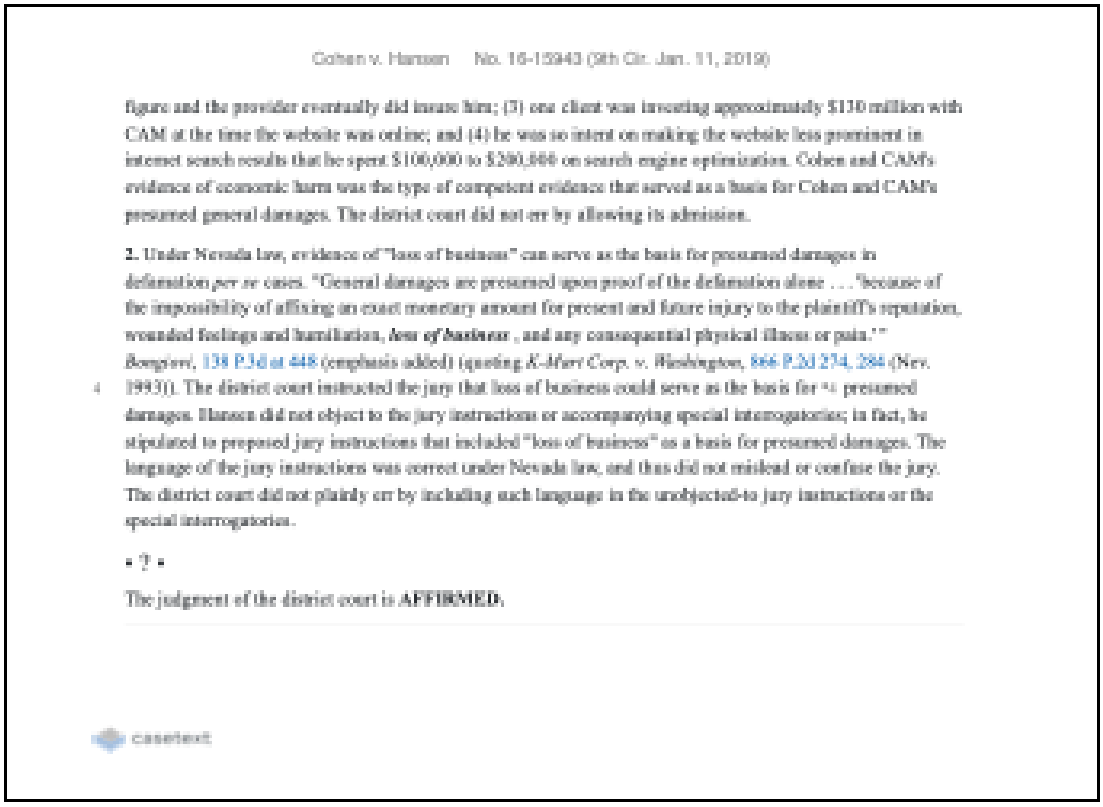
Defendant-Appellant Ross Hansen was found liable for defamation *per se* and false light invasion of privacy after he created a website comparing Bradley Cohen and Cohen Asset Management ("CAM") to Bernie Madoff and his Ponzi [2] scheme. Cohen and CAM sought only presumed damages at trial, and a jury awarded a multimillion-dollar judgment. Hansen appeals from the judgment and the district court's denial of his motion for a new trial. He argues that certain evidence introduced at trial violated a magistrate judge's order precluding evidence of "quantifiable economic harm." [1] He also argues that Nevada law does not allow "loss of business" to serve as a basis for presumed damages. We affirm.[2]

[1] The order was issued as a discovery sanction and affirmed by the district judge.

[2] After this appeal was filed, Firebaugh filed a voluntary petition for bankruptcy under Chapter 13, in the United States Bankruptcy Court for the District of Nevada, No. 18-51152. Therefore, pursuant to the automatic stay, 11 U.S.C. § 362(a), this disposition does not address or decide the appeal as to Defendant-Appellant Firebaugh. ———

I. "[A]n award of presumed general damages must still be supported by competent evidence but not necessarily of the kind that assigns an actual dollar value to the injury." *Rosgiovi v. Sullivan*, 138 P.3d 433, 448 (Nev. 2006) (internal quotation marks and citations omitted). Furthermore, the magistrate judge's order only prohibited the introduction of evidence of *quantifiable* economic harm; it did not prohibit evidence of *any* economic harm whatsoever.

At the beginning of the trial, the district court instructed Hansen's trial counsel to object if evidence that violated the order was introduced so that the court could rule on its admissibility at that time. Hansen's counsel agreed to do so, [3] but never objected on the ground that the preclusion order had been violated. Cohen testified that: (1) CAM lost "a $21 million dollar deal," allegedly because of the website; (2) his insurance provider did not want to renew his policy because of the website, but Cohen did not mention a specific dollar



Cohen v. Hansen No. 16-15943 (9th Cir. Jan. 11, 2019)

figure and the provider eventually did insure him; (3) one client was investing approximately $130 million with CAM at the time the website was online; and (4) he was so intent on making the website less prominent in internet search results that he spent $100,000 to $200,000 on search engine optimization. Cohen and CAM's evidence of economic harm was the type of competent evidence that served as a basis for Cohen and CAM's presumed general damages. The district court did not err by allowing its admission.

2. Under Nevada law, evidence of "loss of business" can serve as the basis for presumed damages in defamation *per se* cases. "General damages are presumed upon proof of the defamation alone . . . 'because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, ***loss of business***, and any consequential physical illness or pain.'" *Bongiovi*, 138 P.3d at 448 (emphasis added) (quoting *K-Mart Corp. v. Washington*, 866 P.2d 274, 284 (Nev. 1993)). The district court instructed the jury that loss of business could serve as the basis for presumed damages. Hansen did not object to the jury instructions or accompanying special interrogatories; in fact, he stipulated to proposed jury instructions that included "loss of business" as a basis for presumed damages. The language of the jury instructions was correct under Nevada law, and thus did not mislead or confuse the jury. The district court did not plainly err by including such language in the unobjected-to jury instructions or the special interrogatories.

* 7 *

The judgment of the district court is **AFFIRMED**.

casetext

Figure 7. Decision of the Ninth Circuit Appellate Court in *Cohen v. Hansen.*

Pros and cons of serving as a linguistics expert in litigation

Especially early-career linguists and graduate students are sometimes keen to engage as forensic linguists and consult as experts in court cases. What appeals to them varies a good deal and may include the excitement of a court appearance or the lure of earning consulting wages or a commitment to social justice. By no means is the desire to consult limited to early-career linguists and graduate students. Linguists at all stages have inquired of me and others about how to get involved in forensic linguistics, how to be retained by a law firm in a case that requires their specialization. Sometimes at talks or presentations concerning forensic linguistic expert testimony, the first question asked is, 'How do I get to do it?' It is important that a younger generation take an interest in the work of forensic linguists because the contribution that linguists can make is significant, but much of the work currently in the record has been carried out by a generation of linguists who are now retired or retiring. (See Finegan 2020b and Finegan 2021b for a remembrance of a recent death, one among several.)

Here I describe what I view as some of the pros and cons of serving as an expert. So as to leave the pros as a final positive observation, I begin with the cons. In virtually all instances in the U.S., the initial request to serve as an expert comes from an attorney who represents one of the litigants in a case. The fact that a linguist has been approached as a potential expert witness indicates that the existing or anticipated litigation involves a contested linguistics issue. An expert linguist may already be retained on the opposing side. If opposing counsel has already retained a linguist (or goes on to do so), that linguist likely believes the facts of the case do not lead to the conclusions the attorney seeking one's expertise expects, indeed needs, one to arrive at if one is to be of assistance to the

attorney's client. In short, requests for expertise that arise in a contested situation are, almost by definition, weighted with pros and cons on both sides of the issue. While an expert's primary duty is to the court, in an adversarial system the expert is retained by one of the litigants and paid by the litigant in other than pro bono service.

As a second entry in the debit column, the process of providing testimony is unlike anything else a linguist experiences as a professional – in a classroom, laboratory, conference presentation, and so on – and it can prove challenging and has discouraged some linguists from giving testimony (see Gray 2010: 204–205, Fadden and Solan 2015: 223–225). In the U.S., the expert is nearly always required to sit for a deposition and be subjected to questions from opposing counsel whose duty extends beyond learning the expert's opinion and its bases to finding possible flaws in the methodology, analysis, or conclusions or identifying any other reason to discredit the expert or demonstrate that they should not be permitted to testify in the dispute at bar. Should the litigation not settle out of court but go to trial, the expert who has not been excluded by the court will take the witness stand and, under oath, be examined first by the retaining attorney and then cross-examined by opposing counsel with some of the same discrediting aims motivating the deposition. Sworn testimony, especially in answer to questions from opposing counsel, can be challenging in ways an academic linguist may be unaccustomed to. As Justice Gray has written, '[l]awyers try to discredit expert witnesses, which discourages experts from wanting to give evidence' (Gray 2010: 201).

Another way in which serving as an expert differs significantly from engagements as an educator or researcher, say, is that in either of those systems the linguist has a relatively tidy schedule: classes or meetings on certain days of the week at certain hours of the day; semester or trimesters or quarters tidily laid out months or years in advance for academics. Serving as an expert requires sometimes extraordinary adaptability in scheduling because court calendars can change and litigants themselves may delay for settlement talks or tactical reasons. Because civil and criminal cases are tried in the same courts, and because criminal court cases take precedence over civil cases, a judge may need to change a planned civil trial date to accommodate a criminal case. Sometimes, too, in the midst of a case, a legal dispute will arise between litigants that necessitates postponing the expert's planned courtroom appearance for an indeterminate amount of time. (For an example, see Finegan 2020a.) Expert testimony, then, requires adaptability, and senior academics and researchers may have greater control over their schedules than less senior ones.

In any case, litigation is characterized by stops and starts, often extending over months or even years. In the Cohen case, after weeks of analysis and discussion with counsel, I submitted my report to Cohen's counsel in August of 2013 and sat for deposition a month later, but my trial testimony was not given for another two and a half years. While the trial concluded my involvement in the case, the appellate court hearing did not take place until another two and a half years had passed. The appeal in the Cohen case did not involve my trial testimony, but in other cases the expert's testimony – particularly its inclusion or exclusion – could be the basis for appeal, as it was in Daubert, which was appealed to the Ninth Circuit (the same one that decided the appeal in the Cohen case) and then, beyond that, to the U.S. Supreme Court, whose opinion in the matter established the Daubert criteria discussed above.

Experts with sufficient experience become accustomed to the starts and stops of litigation and regard their involvement concluded only once they have testified at trial, for example, or been informed by the retaining attorney that the case has settled or their services are no longer required. In an earlier case in which no fewer than five linguistics experts had been retained, the attorney I worked most closely with informed me just before the trial date that the case had settled. That was the last substantive communication he and I had on the matter. I understood settled to mean, among other things, that there would be no trial and, thus, no linguistics testimony. In fact, I published an article reporting certain aspects of the case, including that it had settled and not gone to trial (Finegan 1990). A few years later, however, I and one of the experts in the earlier case were both engaged, again on opposing sides. At a hearing in the later case, I confirmed my understanding that the earlier case had not gone to trial, only to be confronted with evidence that it had and that the opposing expert had testified in it. As a further development, it happens that neither the other expert nor I was aware of significant developments in the earlier case because the attorneys had become involved in related financial disputes that did not directly involve us, and they simply did not take time to inform us that the case was being appealed. Ironically, upon appeal the linguist's trial testimony was vacated and, thus lacking validity, should not have been cited in the second case to undercut my report in the published article and my testimony in the later matter. (For further details about this turn of affairs, see Finegan 2021a.)

Returning to the pros and cons of serving as an expert linguist, on the positive side of the ledger, the pros outweigh the cons by far. One rewarding aspect is the opportunity to apply abstract or theoretical linguistic knowledge to real-world problems, appealing to many linguists who would not otherwise identify themselves as applied linguists. Further, participation as an expert witness provides an exceptional window on the legal world – an opportunity to gain knowledge not ordinarily part of a linguist's education or experience. Another window opened by serving as an expert is the opportunity to join professional and scholarly groups other than those in one's linguistic specialization. While the shared focus may be linguistics in the law, the range of linguistic topics is wider than in a typical linguist's immediate environment or, for that matter, the ordinary conferences attended. Forensic linguists represent a disparate group of subfields – phonetics, discourse, sociolinguistics, computational linguistics, syntax, semantics, and so on – and there is value in sharing a common focus across subdisciplines of linguistics in conferences of the International Association of Forensic Linguists, for example. Beyond the subfields themselves are the linguists, many of whom are exceptionally high minded and dedicated to issues of social justice. Further still, the personal interactions among colleagues around the world with an interest in applications to law is a window on diverse legal systems and an occasion to experience courtrooms in countries and systems one would otherwise miss out on.

Depending on the kind of case, serving as an expert permits a linguist to contribute to real-world dispute resolution, solve perplexing problems, and contribute to social justice issues. More generally, an expert linguist can take pride in contributing to the cause of justice broadly conceived. In so doing – in communicating what one knows to attorneys on both sides of a case, as well as to judges and jurors – serving as an expert offers an opportunity to enhance one's communication skills in ways that differ dramatically from scholarly exposition and argumentation directed to fellow experts. Another

positive is the supplemental income that serving as an expert affords, and – as a final positive note and on the other hand – to offer expertise pro bono to those in need. (See Nunberg 2009.)

Acknowledgements

I am grateful to two anonymous referees whose guidance I tried to take to heart in revising this article for an international audience.

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Art vs Craft: Expert Evidence in the England and Wales Criminal Justice System

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https://doi.org/10.21747/21833745/lanlaw/8_1a3

Abstract. *Standards for expert testimony in England and Wales have long been described as laissez-faire and in desperate need of reform, with decisions about admissibility being left entirely to the trial judge (Turner 2009) and numerous calls for legislation going unheeded. Rules for the methods and content of an expert's written and oral evidence therefore derive entirely from common law together with the publications of the Forensic Science Regulator (FSR). With extensive reference to a recent murder trial involving determining the meaning of a particular Urban British English lexical item where I had the rare opportunity to watch an opposing expert in action, this paper discusses current requirements and the obstacles these may present for the delivery of justice. The implications of admitting expertise in the form of unstructured, unquantifiable art alongside that which adopts a rigorous, replicable craft-like approach are drawn out in relation to this case and to the law as it stands. The paper concludes with a two-pronged solution for addressing these issues. Firstly, a dedicated training programme or system of guidance to enable judges to identify reliable expertise is proposed. Secondly addressing the 'widespread ignorance' (Heydon 2020) in the legal system of lesser-known fields of scholarship (such as forensic linguistics) is identified as a key strategy for improving standards of expert evidence.*

Keywords: *XXXXXXXXXXX*

Resumo. *Há muito que as normas aplicáveis a perícias em Inglaterra e no País de Gales são descritas como sendo tipicamente "laissez-faire" e como carecendo urgentemente de reforma, uma vez que as decisões sobre admissibilidade ficam inteiramente nas mãos do juiz (Turner 2009) e os inúmeros pedidos de legislação são ignorados. As regras relativas aos métodos e conteúdo de uma perícia oral e escrita decorrem integralmente da "common law", em conjunto com as publicações do regulador de ciências forenses (FSR, Forensic Science Regulator). Fazendo extensiva referência a um julgamento recente de homicídio que exigiu a análise de*

significados para determinar o significado de um vocábulo de inglês britânico urbano no qual tive a rara oportunidade de ver o perito da outra parte em ação, este artigo discute os atuais requisitos e obstáculos que estes podem representar para a administração de justiça. Avalia-se as implicações subjacentes à admissão de perícias de forma não estruturada e não quantificável, em paralelo com perícias que adotam uma abordagem rigorosa e replicável, no contexto deste caso e e no contexto da lei. O artigo termina com a proposta de uma solução bifaseada para resolver estas questões. Primeiro, propõe-se um programa de formação ou sistema de orientação dedicado para permitir aos juizes identificar perícias fiáveis. Em segundo lugar, a "ignorância generalizada" (Heydon 2020) no sistema judicial relativamente a áreas de conhecimento menos conhecidas (como a linguística forense) é identificada como uma estratégia crucial para melhorar os padrões de aprovisionamento de perícia.

Palavras-chave: *XXXXXXXXXXX*

Introduction

In England and Wales the provision of expert evidence in criminal proceedings is legislated for by section 30 of the Criminal Justice Act 1988, which states merely that 'an expert report shall be admissible as evidence' and that 'if it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court'. The question of who qualifies as an expert and what qualifies as expertise remains undefined in statute.

Perhaps unsurprising then that expert evidence in this jurisdiction has been described as being admitted 'too readily' and 'with insufficient scrutiny' with a 'laissez-faire' approach (Law Commission 2011; Hodgkinson and James 2020), and these concerns have led to a number of attempts to reform the law relating to expert evidence, with the Law Commission (2011) and later the Forensic Science Regulator (2019) calling for admissibility to be put on a statutory footing. Ward and Fouladvand (2021) alert us to the 'very real' danger of 'unbalanced anecdotal experience being accepted as expertise', warning that courts need to take more seriously the new and more rigorous approach to expert evidence that was supposed to result from s.19A of the *Criminal Practice Directions* originally issued in 2015 (*Amendment No. 11 (2020) EWCA Crim 1347*) (hereafter CPD 2020).

Despite calls for legislation on the matter of expert evidence, in England and Wales common law remains the only source of criteria for assessing its admissibility (for example, *National Justice Cia Naviera SA v. Prudential Assurance Co. Ltd (The Ikarian Reefer)* (1993) 2 Lloyd's Rep 68; *R v. Bowman* (2006) EWCA Crim 417). Indeed, there has been explicit resistance against any moves to impose a standard admissibility test: 'so long as the field [of expertise] is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere' (Munday 2018: 523). There are a number of concerns with this position, which this paper goes on to explore.

Most recently the Forensic Science Regulator (2021b) published an Appendix to its Codes of Practice and Conduct (CPC), setting out to standardise approaches to expressing expert opinion across disciplines. Aside from the codes, the only binding

obligations for experts for both Prosecution and Defence are those set out in Part 19 of the Criminal Procedure Rules 2015 (Amended 2020) (hereafter CrPR 2020) – a statutory instrument enabled by the Courts Act (2003) – and the aforementioned CPD which it supplements.

This paper summarises the requirements laid out in these documents and discusses movements towards standardisation, before illustrating the challenges surrounding the provision of expert evidence in England and Wales with reference to a genuine murder case with which the author was involved in March 2021. The case perfectly illustrated two diametrically opposed understandings of the nature of 'expertise': on the one hand as an art, the result of some supposed innate understanding, and on the other as craft, with an emphasis on the correct application of particular tools and skills to produce entirely replicable results.

The paper concludes with some thoughts on the issues at hand, and suggestions for how the situation might be improved.

The admissibility of expert evidence

Common law holds that expert evidence is admissible if it fulfils the following criteria (CPD 2020):

(i) it is relevant to a matter in issue in the proceedings;
(ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and
(iii) the witness is competent to give that opinion.

The first criterion seems fairly straightforward, dealing as it does with the requirement that expert evidence can only be provided by someone who is an expert in the relevant field (see *O'Brien (Respondent) v. Chief Constable of South Wales Police (Appellant*) (2005) UKHL 26; *R v Barnes* (2005) EWCA Crim 1158). As we shall see, however, the matter of which field is the relevant field is seemingly not clear-cut in all cases. *R v Turner* (1975) 1 All ER 70 provides one of the most widely cited explanations of the second criterion, that being that an expert would be required only where they would 'furnish the court with scientific information that was likely to be outside the experience and knowledge of the judge or jury'.

On the matter of the third criterion, paragraph 19A.4 CPD (2020) encourages courts to enquire into factors around the reliability of an expert and be satisfied that the evidence has a sufficiently reliable scientific basis before admitting it (*R v Dlugosz and Others* (2013) EWCA Crim 2) and also lists a number of factors they **may** take into account to determine this. These include the extent and quality of data upon which the expert relies, the extent to which their methods have been subjected to peer review, and the extent to which their opinion is based on material falling outside their field of expertise (19A.5). CPD (2020) further advises courts to be 'astute to identify potential flaws' and includes among these insufficiently scrutinised hypotheses, flawed data, and relying on inferences or conclusions that have not been properly reached (19A.6).

CrPR 19.2 (3) (d) requires the expert to notify those instructing them, who in turn must notify the court in order to assist in making such an assessment as detailed above, anything 'which might reasonably be thought capable of— (i) undermining the reliability of the expert's opinion, or (ii) detracting from the credibility or impartiality of the expert'

(CrPR 19.3 (3) (c)). This might relate to lack of accreditation, or to a history of inadequate methods or failure to observe recognised standards (CPD 2020 : 19A.7). We return to the obligations of the expert in the next section.

Expert evidence is an exception to the rule that witnesses' testimony must be evidence only of fact and not of opinion (Hodgkinson and James 2020; Forensic Science Regulator 2021b), an exception statutorily preserved in the *Criminal Justice Act 2003* s. 118 (1) 8, which states that an expert witness may 'draw on the body of expertise relevant to his field', i.e., on information provided by others, which under other circumstances would be excluded as hearsay evidence. As Ward and Fouladvand (2021) point out, we can find some courts interpreting 'body of expertise' more broadly than it was in *Dlugosz*, acknowledging that the best informed witnesses will often be people who have gained expertise not through academic or professional training but because their work or experiences bring them into contact with the criminal activity at issue, for example the police (e.g. *Myers v R* (2015) UKPC 40) and – crucially for the purposes of this paper – even people who have gained expertise through a criminal career of their own (e.g. *R v Chatwood* (1980) 1 WLR 874).

The lack of statutory intervention and the insistence that 'no enhanced test of admissibility should be applied' (Munday 2018: 580) has been explained by some as a result of judicial reluctance to identify a suitably recognised body of knowledge before admitting evidence, particularly when some disciplines develop at such an advanced rate. The result of this reluctance has been the admission of non-expert evidence in a range of areas including handwriting analysis (*R v Silverlock* (1894) 2 QB 766) and voice comparison (*R v Robb* (1991) 93 Cr. App. R. 161), and a general acceptance as described above that witnesses who have gained their expertise through advanced familiarity with a topic rather than formal education are entirely capable of fulfilling the required criterion of furnishing the jury with information outside of their knowledge (Ward and Fouladvand 2021; see also *R v Byrne* (2021) EWCA Crim 107).

This leads us to a very specific problem: if a jury have been assessed as incapable of deciding some matter at issue without the assistance of an expert, how are they expected to do so when presented with two alternative expert opinions, particularly when there is no formal regulation of the provision of such evidence? This is a long-discussed contradiction in theory (see Hand 1901), and in practice this exact tension has led to the evidence of experts for both sides being excluded (*R v Edwards* (2001) EWCA Crim 2185). We return to this challenge later.

We must also consider that the jury's level of scientific knowledge may be such as to severely impede its understanding of the expert evidence that is given. The danger is that the jury, lacking confidence in its own abilities to assign the appropriate weight to the evidence it hears, accepts the opinion of the expert who gives their evidence most convincingly, rather than being assisted to reach its own conclusions (Roberts and Zuckerman 2010). This latter point, of course, could arguably be applied to the adversarial system in its entirety, but appears magnified in the context of expert opinion, which may be shrouded in mystery as far as the jury is concerned.

The trend for admitting expert evidence and allowing it to be tested by the usual 'adversarial forensic techniques' also suffers from the drawback that, frequently, the defence does not obtain its own expert evidence in rebuttal of a prosecution expert. Reasons

for this are largely financial – the Legal Aid Agency (2020), on whom many defendants rely for financial support, is bound by the *Criminal Legal Aid (Remuneration) Regulations* 2013 as amended, which sets rates for expert witnesses' payment (interestingly, while 'voice recognition' is listed as a recognised expertise, 'linguistics' does not appear, and the allowable rate for linguists is thus determined on a case-by-case basis). The prosecution is not bound in such a way, having almost limitless resources, and thus many experts find themselves, perhaps understandably, taking on more prosecution work than defence.

Financial constraints are not the only limitation to a defence team's ability to call on the services of expert witnesses. There is also the matter of access; while police forces across the UK have access to the National Crime Agency's (NCA) Expert Ad-viser's database, no register of equal scope is accessible for defence solicitors. There are a number of agencies, such as The Medical Expert Witness Alliance (MEWA)[1], who charge the client a fee on top of that charged by the expert; and there are a number of registers, such as The Academy of Experts[2] and the UK Register of Expert Witnesses[3], which require payment of a fee from the expert themselves, as well as testimonials from previous clients, in order to join. These databases are open for anyone to search. While it could be argued that the requirement for a fee ensures a high-quality membership, it is undeniably something of a barrier as compared to the free-of-charge NCA register, which requires simply a one-off reference and annually updated CV. Thus, many experts rely on word-of-mouth in order to pick up defence work – the case reported on below came my way as a result of the involvement of a cultural scholar with whom I had happened to converse at the end of an academic talk she gave. Had that serendipitous meeting not occurred, and had she not been moved to recommend me on becoming aware of the facts of the case, then the prosecution evidence described below would have proceeded entirely uncontested from a linguistic perspective – as, one presumes, it does in courtrooms across the country on a regular basis.

Obligations of the Expert

According to section 19.2 of the CrPR (2020), an expert must help the court by giving opinion which is (i) objective and unbiased, and (ii) within the expert's area or areas of expertise. The duty overrides any obligation to the party from whom the expert receives instruction and/or payment. General legal obligations of the expert are set out in more detail by the Forensic Science Regulator (2020b).

Drawing on the CPD (2020) and the CrPR (2020) as well as a number of judgments, FSR (2020a) sets out the legal requirements for an expert report in guidance supplementary to its Codes of Practice and Conduct (discussed below). FSR (2020b) notes that while Section 9 of the Criminal Justice Act 1967 details the requirements of a written statement, including the declaration of truth that must accompany all written statements submitted in evidence, there is no statutory prescription for the contents of an expert report. However, CrPR (2020) provides a list of issues that an expert report must cover, including 19.4 (f) requiring the expert to:

- where there is a range of opinion on the matters dealt with in the report —- (i) summarise the range of opinion, and (ii) give reasons for the expert's own opinion',

and (j) requiring that expert reports:

- contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty.

A suggested wording for the statements of understanding and declarations is provided in section 19B of the CPD, and includes, inter alia, a confirmation that the expert has read and complied with Part 19 of CrPR and a confirmation that they have acted in accordance with the code of practice or conduct for experts of their discipline (see also para. 28.2 of the Forensic Science Regulator (2021a: 83). CPD 19B further stipulates that in the case of prosecution witnesses, they must confirm that they have read and followed the guidance relating to disclosure set out in CPS (2019) and complied with their duties under the Criminal Procedure and Investigations Act 1996.

CrPR 19.6 and CPD 19C deal with the phenomenon often referred to colloquially as 'hot-tubbing', whereby at the direction of the court experts instructed by both parties in a trial are required to discuss the issues at hand in order to establish the extent to which they agree and formulate short descriptions of points on which they do not. They are then required to provide a joint statement to this effect.

Let us return now to the matter of expressing one's opinion, as it relates to the expert's obligations to the court. A landmark case in this area was that of *R v Atkins* (2009) EWCA Crim 1876, in which an appeal was brought against conviction on the basis that a facial recognition expert's evidence for the prosecution had been expressed using a sliding scale of propositions – not dissimilar from that set out in Coulthard *et al.* (2017: 197) and adopted by a number of forensic linguists practising around the globe. In *Atkins* the appellants argued that the expert's expressions of likelihood should not have been put before the jury, and that instead they should have been presented with the similarities and differences and left to draw their own conclusions. This position was rejected by the appeal judge, who, although cautioning against numerical expressions of opinion, stated that:

> leaving the jury to make up its own mind as to the similarities and dissimilarities, with no assistance at all as to their significance, would be to give the jury raw material with no means of evaluating it. It would be as likely to result in over-valuation as under-valuation. It would be more, not less, likely to result in an unsafe conclusion than providing the jury with the expert's opinion, properly debated through cross-examination…

He further added that should the expression of opinion be inadmissible it would, in effect, nullify all expert testimony. It would of course be impossible to cross-examine an expert about the significance of certain facial similarities if they had been prevented from providing their opinion on their significance in the first instance. Considered with the point made earlier about jurors' confidence in their abilities to interpret scientific testimony, this represents an important balancing act as far as the presentation of expert opinion is concerned.

In the wake of several high-profile miscarriages of justice in England, including the convictions of the Birmingham Six and the Guildford Four, and those of mothers of babies who had died of Sudden Infant Death Syndrome (SIDS) (Campbell and Walker 2007), the regulation of expert testimony had established itself firmly at the top of the criminal justice agenda by the late 1990s. The Council for the Registration of Forensic Practitioners (CRFP) was established in 1999 (Kershaw 2000) in an attempt to restore public confidence in forensic practice but disbanded following cuts to government funding in

2009. Despite denials from the Home Office, the disbandment was widely regarded as presenting a genuine blow for justice, given the CRFP's role in 'sifting rogue scientists'[4].

Many of the responsibilities of the CRFP then passed to the newly established office of the Forensic Science Regulator (FSR), an independent agency responsible for leading on the development of quality standards and advising providers on matters of compliance. Over the past ten years the FSR has published seven issues of their Codes of Practice and Conduct (CPC) for forensic science providers. The CPC set standards that are to be adhered to by both sides in criminal cases, and despite the FSR's lack of any statutory powers, these are mandatory. From the first issue, the FSR state that 'standards are not intended to stifle innovation' and 'the courts will always be free to consider evidence derived from methods… [where] there simply hasn't been time to include the technique in their scope of accreditation' (Forensic Science Regulator 2011: 2). The FSR is thus clearly cognizant of judicial unwillingness to impose any 'enhanced test of admissibility' as discussed earlier.

One obligation listed in this first outing of the CPC is that an expert should 'seek access to exhibits/productions/information that may have a significant impact on your findings' (2011: 9) and this remains in the most current guidance at time of writing (Forensic Science Regulator 2021a: 19). Further stipulations include taking 'reasonable steps to maintain and develop your professional competence' and to 'act… only within the limits of your professional competence' (Forensic Science Regulator 2021a: 19). The requirements of an expert witness are thus readily available in a range of easily accessible locations. The FSR are also responsible for the latest available guidance specific to expressing evaluative opinion, published as an Appendix to the CPC in 2021 (Forensic Science Regulator 2021b). The document sets out to standardise the provision of expert opinion across disciplines and enhance the transparency and understanding of opinion evidence in the courts, explicitly naming authorship analysis and speech science on its list of scientific areas to which the guidance applies. This appears to be the first formal attempt to regulate forensic linguistic testimony – albeit only two tasks from the vast range that linguists are called upon to engage with – since the *Forensic Linguistics (Standards) Bill* (2016), which did not make it past its first reading in the House of Commons. Forensic Science Regulator (2021b) calls for, among other things, a standard verbal scale of likelihood to be adopted across disciplines.

On the meaning of *killy*: a case study of linguistic expertise

In February 2021 I was approached by a defence solicitor whose client – I later found out – was on trial for murder along with two of his acquaintances. The solicitor asked me to read and respond to a set of three expert reports that had been authored in June, July, and October 2020 by a Mr X, who had been instructed by the police to provide interpretations of a range of material, including music videos, handwritten notes, instant messages, voice messages, and transcribed phonecalls, much of which was in a variety of English that linguists would call Multicultural London English (MLE) or Urban British English (UBE) (see Drummond 2016), but which Mr X consistently referred to in his reports (and later in the witness box) as 'street slang'. 'Slang' is a term that lacks useful definition (Dumas and Lighter 1978) as well as imposing an arguably negative value judgment. Thus, outside of quoting other sources, I will instead make use of the label UBE. The defendants and their associates were also fans, and sometime amateur artists, in the world of drill music: a genre of hip hop characterised by violent lyrical content set to

sparse accompaniment ,which originated in Chicago in 2010, entered the UK via Brixton, South London in 2012, and has established scenes in London and Toronto, among other places in the English-speaking world.

According to the preamble in his report, Mr X's expertise derived from his lived experiences as a member of a street gang some twenty years prior, for which he had spent some time in prison. On release he had begun working in the area of safeguarding, educating both young people and the professionals who work with them on the dangers and warning signs of involvement in gang culture. He had established a charity to carry out such work, and through this made connections with the local police force who made use of his services for training, working with young people, and, it would seem, interpreting the language of communications in suspected gang-related cases. None of the reports contained the statement of understanding and complying with duty to the court, a requirement under CrPr 19.4(j), and certainly did not state compliance with CrPR 19 itself nor with any code of practice, as required by CPD 19B.

The defence solicitor presented me with two tasks: one, to review Mr X's interpretation of a particular word, *killy*, as it appeared in two transcribed phone calls (note these calls had been transcribed by the police and Mr X was not given access to the audio; we will revisit this point later). Mr X had interpreted this word to mean the feeling of wanting to kill. I was to produce a report of my findings to be served in the trial. Secondly, I was asked to examine the remainder of Mr X's reports and provide a review, purely for the use of the defence team. The triangulation of methods I used to address the first of these tasks will be familiar to readers who have encountered the work of Grant (e.g. 2017) in the field of ascertaining meaning in forensic contexts.

The two instances of *killy* on which I was asked to focus were the following, both contained within transcriptions of phonecalls where one party was on remand in prison:

1. [first utterance of the call] *Ay yo yo my killy do*
2. *Calm calm calm. Hey listen man its my fucking killy. I'm gonna call you M innit, I love you man yeah love you my fucking bro. Come on bro ***inaudible*** baboosh.*

With traditional print reference sources on interpretations of 'slang' being of no use in this instance, my first port of call was Urbandictionary.com. It goes without saying that an online reference source comprised solely of community contributions and relying on its membership to 'upvote' and 'downvote' those contributions as the only indicator of their validity is not without its limitations. It is, of course, susceptible to inaccuracy, incompleteness, and potentially even manipulation. Furthermore, it is impossible to determine geographical origins of definitions or their upvotes. Nevertheless, it provides us with a legitimate springboard for deeper analysis. As Grant (2017) points out, the contributors of definitions and votes to such sites can be reasonably assumed to belong to a community of practice who uses the variety; it would be 'wrong to ignore [wikidictionaries'] unmediated connection to language users' (2017: 9).

The top ranked definition for *killy* on Urbandictionary.com at time of writing, with a total of 121 upvotes and just four downvotes, is 'a very close friend that you trust'. The example sentence provided is

J1 is my Killy you know, known man from young still.

The use of *man* as a pronoun (Hall 2020) and the utterance-final *still* (sometimes spelled *styll*) (Denis 2016) tell us that this example is UBE, or at least a West Indian-influenced variety – much like the variety under discussion in this case. This is not an example from some far-removed linguistic variety that is markedly different from that the individuals are using in the questioned materials – it is entirely comparable, and thus relevant to our interpretation.

Some much lower ranking definitions did include a force similar to that which Mr X had attributed: *A feeling of wanting to kill multiple people for being shitbags, but knowing you can't and won't do it* (12 up, 7 down) and *an expressed need or feel to be morbid or kill someone imaginary* (2 up, 5 down). The UK slang dictionary Genius.com provides the further information that while in the original Jamaican patois *killy* refers to a *killer*, it states that in London it is a term most commonly used to refer to *a close friend or gang member*.

Of course, dictionary sources are not enough. The next step was to examine the use of *killy* on Twitter. Rather than focussed explanations of meaning as we see on urbandictionary.com, the instances of the lexical item on Twitter are genuine, naturally-occurring examples of language in use, and thus have privileged status over elicited data (Potter 1997; Johnstone 2000).

Scraping Twitter for mentions of *killy* between the 9th and 17th of March 2021 using QSR NCapture resulted in around 1650 results. A substantial proportion of these were not helpful – either the word was contained in the username, e.g. *emily_killy*, the tweet referred to the Canadian rapper Killy, the Star Trek character Captain Killy, the anime character Killy, the area of Newcastle-upon-Tyne Killingworth, or used *killy* as a portmanteau of the names Kelly Monaco and Billy Miller, onscreen spouses in the US soap opera *General Hospital*, who apparently have a minor online fanbase. Manual removal of such entries left a corpus of 579 tweets, which with the help of WordSmith Tools (Scott 2020) were explored to determine the senses in which the item was being used. The vast majority of the concordance lines represent a definition of *killy* as akin to 'close friend', as illustrated in Figures 1 and 2 below.

```
312     lly Person. Every time I got a trim "eyyy yo my killy the ting sharp...come smoke wid us" Everything
313     ero" My Killy sending them man to the GULAG "My killy sold weed to a pregnant woman when we were 17
314      pretty much all to do with women and kids." My Killy!!!!! B https://t.co/uecFAtxcKh My killy. Tomor
315      pillar of my community. Neighbourhood Hero" My Killy sending them man to the GULAG "My killy sold
316      season. https://t.co/s9FEIojFKw Odegaard is my killy idc fuck Lamela "Oh dear, I gave intel on the
317     uy. More blessings! https://t.co/yBUr8QtLzD "My killy said he needed extra dough brought him onto t
318     all i can associate with killy now It's okay my Killy Laca due to unleash today Kill off killy Kill
319     ds." My Killy!!!!! B https://t.co/uecFAtxcKh My killy. Tomorrow we shine. https://t.co/JU5X0vd2ou M
320     . Tomorrow we shine. https://t.co/JU5X0vd2ou My killy?? https://t.co/JQNicPP1AD My killy?? https://t
321     heanacho scored his first prem hat trick???? My Killy It is interesting that when you first start w
322     guy. More blessings! https://t.co/yBUr8QtLzD My killy my famleee Happy Birthday my guy. More blessin
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Figure 1. Selected 'my killy' concordance lines

```
574           killy killy JOKER Aguero una missed you killy free killy man https://t.co/1p6dwD9T9P free k
575     - Killy Killy https://t.co/R02aumdi9M Prada you killy https://t.co/XurpfrqwLL Preorders for Final
576     e 4ever. I put faith in my killy yeah I see you Killy @AdzChhetz https://t.co/Cwmc9eAg8Y i want to
577      ass https://t.co/DerPnMiX4l" "@joekay love you killy. keep going. " @jsavvv16 Ma killy @julielus
578     uck... lol @rillaSL What did that man do to you killy @rnero_47 happy birthday my killy @rnero_47
579      killy dem sha https://t.co/xWj9SWWDcI Ma young killy Sycho is way too chilly on Drill ? https:/
580     /t.co/tqbSFPWKgH This time last season my young Killy was hooping on loan at Huddersfield...now he
581     Killy's are when it gets real You know who your Killy's are when it gets real You see that group que
```

Figure 2. Selected 'you/young/your killy' concordance lines

Collocations with *famlee* (Figure 1, line 322) and constructions like *you know who your killy's are* (Figure 2, line 581) present a straightforward equivalence between *killy* and *friend*.

So too is there evidence for the other definition discovered on Urbandictionary.com and named by Mr X as the only interpretation, i.e. as an adjective describing the state of wanting to kill, or having a proclivity to do so:

```
29      rs have robbing urges, or Murderers getting all Killy. "@shirtsoty o soco killy https://t.co/s8BOBA3
30      Ah, man, when I see those plaques I just go all killy https://t.co/wVPsAt92cZ Alice hanging out and
31       Vietnam, tried to become "we must be scary and killy", and turned into basic stormtroopers (german,
32      e my chanza getting to heaven through Tirry and Killy's mount of impiety to hear it all, aviary word
33      y killy dat!! "@flamerotted ? ? ? ?perhaps ?and killy too ?| just the way I want it but that part's
34      e is literally kitty, kitty pop, kitty poo, and Killy. I've failed him. More life killy killy https:
35      t'd be nice if men could stop being so rapy and killy. @tyzokz @ameerszn @AspireUnit Cahmon Henry
```

Figure 3. Selected 'all/and killy' concordance lines

Attributing the characteristic to *murderers* (line 29) and the pairing of *killy* with *scary* and *rapy* (lines 31 and 35) clearly demonstrates this adjectival use. However, it should be stated that unlike the tweets that use *killy* to mean *friend*, there is nothing in the tweets using the adjectival *killy* that suggests the authors are part of a community that uses UBE. For this community at least, the overriding definition of the word appears to be akin to *close friend.* This interpretation also fits with the context of the word in the two extracts – following the greeting *ay yo yo* and within an utterance which is clearly designed to bring reassurance – *calm calm* - to the hearer about the speaker's solidarity with them - *I love you man yeah love you my fucking bro.* It occupies a nominal position and the adjectival meaning of *feeling of wanting to kill* simply makes no sense in these contexts.

A few days after submitting my reports and a day before Mr X was due to give evidence, I received via the instructing solicitor a counter-report that Mr X had prepared in response, at the behest of a police officer. In it, he said that he concurred with my opinion that *killy* had the alternative meaning of *close friend.* However, he said that in his original report he had interpreted the word:

> *'as short and brief as possible [the interpretation being sterile and almost binary one to be objective] with impartiality and being as neutral as possible in mind. During giving evidence would have been the correct opportunity and time to expand on the wider meaning as I have done in this report for the Crown and Jury.'* (Mr X counter-report, p.2)

Mr X labeled his original interpretation, *the feeling of wanting to kill*, as 'sterile', 'binary', 'impartial' and 'neutral'. This contrasted with my interpretation, *close friend.* I will leave it to the reader to determine which, if either, of these terms is the more 'neutral'. Mr X also asserts here that his decision to include just one possible interpretation of *killy* in his original report was a justified one, and that he intended to elucidate when he entered the witness box.

Let us remind ourselves of CrPR Part 19.4, particularly bullet (f), which states that an expert's report **must**:

(f) where there is a range of opinion on the matters dealt with in the report—
  (i) summarise the range of opinion, and
  (ii) give reasons for the expert's own opinion;

Coupled with the omissions of compliance statements as detailed above, the lack of any description of the full range of potential meanings of *killy* in Mr X's original report further calls its admissibility into question.

Mr X described my consultation of the sources urbandictionary.com and Twitter as 'laughable' and 'subjective' and suggested that it was my unfamiliarity with 'the gangs and street-based culture' that necessitated my methods. Suffice to say that building and examining a mini-corpus of genuine language use by an online community which includes many members of the speech community under examination is a method that substantially outweighs native speaker intuition in the validity stakes, and one that I would have utilised even had I been fully conversant in UBE.

Mr X's counter-report moves on to cite the work of Hallsworth and Young – after some searching I established this as Hallsworth and Young (2006) (note the requirement set out in CrPR19.4 (b) to give details of literature relied upon and Forensic Science Regulator (2020b) elaboration that this should 'include sufficient detail to enable another expert to identify the relevant document' (para. 10.3.24)) – to explain a typology of urban collectives widely accepted in the criminology community: 'a] peer group, b] street gang and c] an organised criminal network' . He argued that if the group in question is merely a 'peer group', for whom criminal activity is not central to their self-definition, then he concurred with my interpretation of *killy*. If, on the other hand, the group is identified as being a 'street gang', then Mr X disputes my interpretation, and instead favours *killer friend/the feeling of wanting to kill.* This is the first appearance of *killer friend* – up to this point we had only seen Mr X interpret *killy* as *the feeling of wanting to kill.* It appeared to me, and to the defence counsel, that *killer friend* had been added to bridge the gap between Mr X's original interpretation and mine .

Furthermore, the basis of the semantic differentiation between 'peer group' and 'street gang' definitions is unclear, and particularly puzzling given the information provided by Mr X that peer groups 'copy and imitate [gang] culture' – strange that this would not extend to their language use. Moreover, Mr X said that he had no knowledge of the participants or their situation at the time of his analysis – no knowledge that one of the speakers was speaking from prison, where he was on remand having been charged with a suspected gang-related murder. This raised the question of what led him to attribute the 'gang' meaning of the questioned word rather than the arguably more neutral 'peer group' meaning?

The defence team invited me to observe Mr X's evidence, and for three full days I logged in to the Crown Court's online system to hear him being examined, cross examined, and re-examined. In the witness box, Mr X began by explaining that he 'didn't need' to consult any sources in ascertaining the meaning of the UBE items, because it was 'a second language' to him. But it is widely noted in linguistics that native speaker intuition about language is often markedly different from what we can observe in a corpus of actual language use (e.g. Biber *et al.* 1998) – and that is if we accept that he is indeed a 'native speaker'. Mr X was cross examined on the matter of how he keeps his understanding of 'street slang' current, given that his gang involvement dates back some twenty years. His response was that his work with young people and his contact with younger family members enabled this. 'Are your family gang members?' he was asked – his negative response, of course, begging the question of how, if gang and non-gang meanings attached to a particular lexical item are so different, his association with non-

gang member family members could possibly qualify him to comment on the meaning of a word by an alleged gang member.

On the matter of his original interpretation of *killy*, Mr X stated that in his report he had 'tried to keep it vague', planning to elaborate during his oral testimony. It is difficult to see how providing one interpretation of a word and then nine months later (i) conceding it could have a completely unrelated, far less incriminating meaning and (ii) adding a brand new third definition, could possibly be described as 'elaboration'. The opinion had undisputedly been completely transformed.

During his direct examination, the audio recordings of the telephone calls were played to the court. In the transcript of the phone call that began *ay yo yo my killy do*, one party questions the other about whether a particular event has taken place: *you know what I want to talk about. ... is it true*? Receiving an affirmative answer, the speaker, according to the transcript, responds shouting *man fucking get in*. The audio told a different story, which the judge himself pointed out: the speaker clearly responded *my fucking killy, not man fucking get in*. Mr X concurred. If he had had access to the audio, he reiterated, his interpretation would have been different. Mr X argued that this second appearance of *killy* after the revelation of some act, presumably the fatal stabbing at the centre of the trial, lent support to his interpretation *killer friend* (a possible meaning that had not appeared until after Mr X had viewed my report). This reinforces a point made by Grant and MacLeod (2020: 179) about the importance of an expert 'learning to insulate oneself from the broader facts of the case. . . create a deliberate ignorance in which a rigorous analysis can proceed without bias'. I counter-argued, if *killy* can make an appearance both before and after the proclamation then the use of the word is clearly not contingent on that proclamation. Speaker A refers to his friend as *killy* long before there is any acknowledgement that this particular event has taken place. The other point to be made here is that when commenting on linguistic issues for the court, one should always request access to the original audio rather than working from notoriously unreliable police transcripts (see Fraser 2020). As discussed earlier, seeking access to significant products is a requirement of expert witnesses stipulated in FSR CPC (2021a).

As reported in Grant (2017), it requires little expertise to provide a 'plain English' gloss of 'slang' or patois items. As academic linguists we do not necessarily bring knowledge of a specific variety to a case, but a rigorous methodology. In the *killy* case I was not called to give evidence, which would have given me the opportunity to elaborate on my methodology. Instead, defence counsel considered that the jury's response to his devastating cross examination of Mr X would suffice, and the interests of justice (and the public purse) could be served adequately without me.

Conclusions

A widely-cited aim for forensic linguistics is the use of language analysis to 'improve the delivery of justice' (Grant and MacLeod 2020: 180), and I conclude here with thoughts about how we might do so organised around some central questions that have transpired from the current discussion.

Firstly, how can we expect jurors to weigh up not just two contradictory opinions, but two wildly disparate methods for reaching those opinions? How can we expect them to assess the validity of lived experiences as compared to empirical linguistic analysis,

or as I have expressed it in the title of this paper, of expertise as an art: the consequence of a perceived innate ability, or as a craft: the duplicable result of learned skills? Clearly we need to strike the balance between judges' understandable reluctance to assign disproportionate credibility to certain professional organisations and methods, and juries' need for a degree of guidance on what constitutes reliable expert evidence. This question ties back to earlier discussion about how, if a jury has been deemed to require expert testimony to assist with something outside of its normal knowledge and experience, it can possibly make decisions about the reliability of said testimony when they hear it.

We can accept that sufficient expertise can be gleaned from sources other than professional or academic training, while nevertheless maintaining that witnesses claiming to possess such expertise must have their methods scrutinised in the same way as experts who have followed the more traditional route. They must be subject to the same rules, as set out in CrPR (2020) and CPD (2020), as experts such as the many among our readership who have studied to doctoral level, honed their skills over many years, and been part of a global community responsible for the rigorous empirical research that underpins casework of this nature. It goes without saying that there can be no allowances made for experts based on the grounds for their expertise – no easing of their obligations owing to their close working relationship with the police, and judicial scrutiny of all listed expert witnesses is crucial. Such scrutiny could potentially be encouraged through specially developed education schemes, or as recommended by the Law Commission (2011), through published guidelines for the judiciary. As discussed above, Mr X's evidence failed to meet a number of legal requirements, and sufficient critique from the judge may well have led to it being excluded on those grounds.

How can we best strike the balance between assisting the jury in reaching its conclusion while preserving its role as trier of fact? I discussed above about the danger that juries may focus on 'perceived pointers to reliability (such as the expert's demeanour or professional status)' (Law Commission 2011: 4). As experts, we must be careful not to intimidate the jury when our legal obligation is to assist it. This is a phenomenon that barristers are aware of – in the *killy* case defence counsel explicitly stated that he would prefer not to call me, because in his experience jurors tend not to respond well to what they perceive as attempts to 'bamboozle' them.

We have talked about the legal precedent for providing a semantically encoded sliding scale of opinion, and about the formal requirement to do so as set out in FSR 2021b. As Coulthard, Johnson and Wright point out, however, one issue with such scales is that it is impossible to know if the jury are attaching exactly the same meaning to the scales as the expert is; and furthermore, regardless of the expert's tentativeness, the jury ultimately have to make a binary decision about guilt (2017: 198). On this last point, and echoing CrPR 19.2 (1) (a), it is the responsibility of the expert to restrict their opinion to their own area of expertise – which does not encompass the guilt or otherwise of the defendant. For example, in the *killy* case described above, an expert's job is to comment on the likelihood that each of the potential meanings was accurate, given the context in which the word was used – not to select a definition based on one's belief about the speakers' membership of a gang, with the centrality of criminality that that implies. As soon as Mr X's testimony strayed into this arena, it should have been struck from the record.

In the absence of a statutorily imposed test for admissibility it would appear that engaging with judges on the matter of reliability in general, and empirical methods more specifically, would be one effective method for improving the standards of expert testimony in England and Wales. This is an endeavour I hope to embark on with a syndicate of other experts in the near future.

But there is also a wider solution that is the responsibility of all of us, whether or not we undertake expert work. If solicitors, barristers, and most importantly judges are largely unaware of the existence of disciplines like our own, it should scarcely be a surprise that expertise based on highly questionable methods such as those of Mr X is so easily admitted without question, and the threat of miscarriages of justice looms so menacingly. The more visible forensic linguists, cultural scholars, and academics from other lesser-known scientific disciplines are, the more level the playing field becomes for defendants. A concerted attempt by our disciplines to promote our craft in public fora will inevitably lead to information seeping into the psyche of the legal profession, as well as that of jurors who ultimately decide how much weight to assign to the evidence they hear. We must be shameless self-promoters, taking every opportunity we can to publicise our work – not simply in the interests of our disciplines themselves but in order to alert the legal profession to our existence and our capacity to inform their practice. This clearly has the potential to take us leaps and bounds on the journey to improving access to justice.

Notes

[1]https://www.mewa.org.uk/

[2]https://academyofexperts.org/

[3]https://www.jspubs.com/

[4]https://www.theguardian.com/science/2009/apr/05/forensic-science-government-funding

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The development of legal procedures for using a transcript to assist the jury in understanding indistinct covert recordings used as evidence in Australian criminal trials: A history in three key cases

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Abstract. *The use of police transcripts to assist a jury in determining the content of indistinct forensic audio is a cause of concern to many in forensic linguistics. A common recommendation is that the law should make more use of transcripts produced by experts in linguistic science. While this can help in individual cases, it is not a general solution. In fact, it can make things worse instead of better. That is because it fails to take account of legal procedures which are little known in forensic linguistics, and the misconceptions about language that they embody. Previous papers have set out some of the relevant procedures as they currently stand. The present article offers a historical perspective, tracing the development of current procedures, and their misconceptions about language, through three key cases of the 1980s and 1990s which stand as authoritative precedents for Australian legal practice regarding the problematic use of police (and expert) transcripts as assistance in court. The conclusion outlines the solution being pursued by Australian linguists.*

Keywords: *Forensic transcription, forensic phonetics, legal procedures.*

Resumo. *O recurso às transcrições da polícia para auxiliar o júri a compreender o conteúdo de um registo áudio forense indistinto preocupa muitos especialistas na área da linguística forense. Uma recomendação frequente é que a Justiça deveria utilizar mais frequentemente transcrições produzidas por peritos em linguística. Embora isso possa ser útil em alguns casos individuais, não é uma solução transversal. De facto, isso pode, até, ter um efeito perverso, uma vez que não leva em conta os procedimentos legais, pouco conhecidos em linguística forense, e as conceções erradas sobre a linguagem que lhe estão subjacentes. Publicações prévias definiram alguns dos atuais procedimentos relevantes. O presente artigo traça uma perspetiva histórica, acompanhando o desenvolvimento dos procedimentos habituais, bem como os seus pressupostos errados acerca da linguagem,*

através de três casos centrais dos anos 1980 e 1990 que fizeram jurisprudência na prática jurídica Australiana no que diz respeito ao recurso problemático a transcrições da polícia (e de peritos) em tribunal. A conclusão apresenta a solução adotada por linguistas na Austrália.

Palavras-chave: *Transcrição forense, fonética forense, procedimentos legais.*

Introduction

Covert recordings, obtained via hidden listening devices, have been used by police investigating major crimes since the 1970s. Sometimes the recordings go on to be admitted as evidence in the subsequent trial. One problem is that the audio is often extremely indistinct – to the extent the court cannot understand the content without the assistance of a transcript (Fraser 2014). Note that 'indistinct' is a general term used by the law to refer to recordings affected by background noise, poor recording conditions, overlapping speech and/or other factors.

Australian and similar jurisdictions allow the jury to be assisted by a transcript produced by police investigating the case. Scholars of linguistics and phonetics often find this troubling. Reliable transcription of indistinct audio requires independence and specialised expertise. Since police have no relevant training, and are not independent of the case, their transcripts are unlikely to be reliable. However, even an unreliable transcript is liable to 'prime' a jury's perception of indistinct audio, potentially influencing the verdict (for a quick introduction to priming, see Burridge 2017).

For these reasons, linguists often recommend, as I did myself when I first discovered this situation (Fraser 2003), that courts admitting indistinct covert recordings should use transcripts produced by experts in linguistic science.

However, as I have learned in the decades since then (Fraser 2020a), this recommendation is not enough to solve the problem of police transcripts. Paradoxically, it can make things worse. This is because it rests on inadequate understanding by linguists of how the law actually uses transcripts to assist the jury.

Previous articles have sought to promote this understanding by looking in detail at the legal procedures as they currently exist (French and Fraser 2018). The present article aims to deepen that understanding by looking at how the legal procedures came to be the way they are. Note that, while the focus is on Australia, some aspects of the commentary may be relevant more broadly.

Background and overview

Australia is a Commonwealth of six states and two major territories.[1] While each of these is a separate jurisdiction, there are many similarities in how they administer criminal law. All use a jury system, and each has a roughly similar legislative framework (Finlay and Kirchengast 2020). In particular, most have a Uniform Evidence Act[2] which, among many other things, provides for the use of transcripts to assist the jury in understanding the content of indistinct covert recordings (Odgers 2018).

Importantly, interpretation of the legislation depends heavily on case law, via a system strongly influenced by English common law. That means that, in deciding issues such as admissibility of evidence, or procedures for presenting evidence to the jury, each judge refers to precedents set by previous judicial rulings, especially those that

have been upheld on appeal to a superior court in Australia or another country with a similar legal system (e.g. New Zealand, Canada, England). Rulings made by the High Court of Australia having the greatest authority.

Decisions about the use of transcripts of indistinct audio evidence in everyday courtroom situations depend on several key precedents, notably *Menzies 1982* (a New Zealand case), *Butera 1987*, and *Eastman 1997*. The next sections look at each of these authorities in turn. The intention is to bring the attention of forensic linguistics to legal concepts that may seem surprising, counterintuitive or plain wrong from a linguistics perspective, but that nevertheless greatly affect the way transcripts of indistinct covert recordings, whether by police or experts, are used in court.

To that end, each section gives an overview of the case, then draws out important legal principles, and examines them from the point of view of linguistic science.

R v *Menzies* [1982] NZCA 19

Menzies – The case

Menzies was a 1982 appeal to the New Zealand Court of Appeal against a 1981 guilty verdict handed down by the New Zealand High Court.[3]

The 1981 trial was one of the first in the country (indeed in the world) to admit covert recordings as evidence. Since legislation governing the use of hidden listening devices during investigations was new, there had been considerable legal argument over the admissibility of the audio, so one ground of appeal was that the trial judge had erred in admitting the audio itself. However, the appeal court rejected this argument, and it need not concern us further here.

Another ground of appeal, our focus here, was that the trial judge had erred in allowing a transcript to assist the jury in understanding the audio. It is worth looking in more detail at what had happened during the original trial.

It seems the covert recordings were so indistinct that the jury was unable to understand them even after they had been played twice in court. The prosecution sought admission for a transcript to assist them.

This was initially denied by the trial judge, for several reasons. Although this was the first admission of covert recordings, there were precedents for providing a transcript as assistance in other circumstances, for example when the audio was very lengthy, or included speech in languages other than English. However, in those cases, the transcript had been agreed by both parties.

In the present case, the defence did not agree to using the transcript. In that situation, the only way to admit the transcript would have been to call it an expert opinion – and that solution faced two problems.

One problem was that transcription, in general, was not considered by the law to require expertise. Judges in multiple precedent cases had stated that producing a transcript is merely a matter of listening to the audio over and over again. This is something the jury could do for themselves (and the judge was willing to allow the recordings to be played multiple times to enable this) so there was no basis for admitting an expert opinion.

Another problem was that, in this particular case, the transcript offered by the prosecution had been produced by a police officer. In general, police are not allowed to provide an opinion, only factual evidence.

However, after setting out these views in an official 'reasons for ruling', the 1981 trial judge was persuaded to try listening to the audio himself with the assistance of the police transcript. Upon doing so, he found the transcript so helpful that he did indeed allow it to assist the jury, developing some legal innovations (discussed in the next section) to overcome the difficulties referred to in his reasons for ruling.

In doing this, he emphasised that determining the content of the audio was a matter for the jury. He instructed them carefully that they should use the transcript only as assistance, checking it critically against the audio, using ticks and crosses to note the parts they agreed or disagreed with.

This was done, and the jury ultimately reached a verdict of guilty. It is important to be clear that there is no suggestion here that the guilty verdict was wrong or unfair. Plenty of other evidence was heard during the trial, so it is impossible to know what weight the jury gave to the audio evidence. In any case, without access to the forty-year-old recordings and transcripts we cannot know whether the transcript was reliable or not.

Our concern here is purely with the role the decision played in establishing procedures for using a transcript of indistinct covert recordings in future trials. In that regard, the important thing is that the innovative nature of the trial judge's ruling provided grounds for appeal – and the 1982 appeal court upheld his decision to let the jury have the police transcript, endorsing the procedures he had followed in doing so. This enabled the case to be used as a precedent, allowing police transcripts to assist juries in many subsequent trials as admission of covert recordings increased rapidly in New Zealand and Australia.

Since the features of the trial judge's decision that were endorsed by the New Zealand appeal judges laid the foundation for legal procedures regarding use of police transcripts, it is worth setting out some of the legal principles in more detail before considering some of the issues they raise from a linguistics perspective.

Menzies – Legal principles

In his initial rejection of the transcript, the trial judge articulated some very basic principles underlying the legal process in New Zealand, Australia and similar jurisdictions.

One of these is that determining the facts of a case is a matter for the jury, who listen to evidence provided by witnesses under examination by barristers on opposing sides. While the jury are assumed to embody the common knowledge accepted by society as a whole, they can be helped in their determination of the facts by the opinion of an expert witness called by prosecution or defence (and appropriately cross-examined by the other side).

However, an expert opinion is only allowed if it goes beyond what the jury can reasonably be expected to establish for themselves on the basis of common knowledge. Since understanding spoken English is a matter of common knowledge (after all the jury listen to witnesses and others speaking during the trial), it was a small step for the trial judge to decide that it should be up to the jury to determine the content of covert recordings by listening for themselves.

These general principles were strongly and explicitly upheld by the appeal judges before they endorsed the trial judge's decision to allow the jury to be assisted by the police transcript. While they agreed that the trial judge's discovery of the assistance provided by the police transcript required articulation of new principles, it was important that these should sit on top of older principles, and be supported by reference to legal precedent.

For this reason, the police transcriber's ability to provide a transcript was ascribed, on the basis of previous judges' views on transcription, to his having listened to the audio many times.

This made it a very minimal form of expertise, which provided a solution to the problem that only experts can provide opinion evidence. The solution was to recognise the police transcriber as 'a temporary expert in the sense that by listening he had qualified himself as an expert ad hoc' (p.23).

> '[O]n being listened to only once or twice the tapes were unintelligible. It is common ground that this is so. But a police officer who had played them over and over again had thereby acquired a special expertise in their interpretation, enabling him to compile a transcript.' (p.19)

This was the introduction of the term 'ad hoc expert', which has been used for police transcribers ever since, allowing police transcripts to assist the jury in very many cases.

Further, and relatedly, the transcript was not considered evidence in its own right. The audio is the evidence. The transcript is merely assistance to the jury in understanding the evidence. Thus the police transcript does not have to be formally admitted as evidence (in *Menzies* the transcript was not even given an exhibit number, though the appeal judges recommended this should be done in future).

Finally, it may be worth mentioning a legal principle so basic it was not even stated – the judge is the ultimate gatekeeper regarding what evidence is admitted to the jury and how it is presented to them. Judicial decisions regarding admissibility usually consider matters such as whether the evidence is relevant, probative (likely to assist the jury in reaching the right verdict) and not prejudicial (unlikely to bias or mislead the jury).

In this case, the judge took the innovative step of listening personally to audio evidence (in order to evaluate the transcript). It is interesting to note that this step was not explicitly endorsed by the appeal judges. However, it is clear that they not only accepted his right to carry out this evaluation – they also accepted his evaluation without question. It seems they assumed that, as a neutral, responsible listener, he would have formed a reliable opinion as to the accuracy of the transcript as a representation of the audio content.

Menzies – Linguistics commentary

Looking back, it is notable that in all this legal reasoning there was no hint of recognition of linguistic science as a field of relevant expertise (cf. Tiersma 1993). All the judges' decisions were made on the basis of what we might call 'educated common knowledge' about language and speech (Fraser 2018a).

This is understandable. At the time, linguistics was a small and little-known discipline. Research on general transcription was in its infancy (Ochs 1979) and forensic transcription had not even begun to emerge as a specialised field (French 1990; Shuy

1986) – so it is not at all clear what linguists would have said if they had been consulted at the time.

However, we now know that, while educated common knowledge may correct some errors of common knowledge about language (e.g. false etymologies) it retains many misconceptions – nowhere more so than in relation to perception and transcription of indistinct recorded speech (Fraser 2018a).

With the benefit of hindsight, then, it is clear that several of the judges' decisions in *Menzies* were problematic. First, creating a transcript is not a simple secretarial task of listening over and over and writing down what you hear (Haworth 2018). It seems the judges were basing their understanding of forensic transcription on their experience with transcripts of court proceedings. In fact, even the transcription of court proceedings involves far more than listening over and over (Fraser 2021). Transcription of more complex material requires many decisions to be made, as we now know from work in fields like phonetics (Heselwood 2013) and conversation analysis (Sidnell and Stivers 2012). Further, due to the possibility of unconscious bias, it is essential that the transcriber should be independent of the material (Wald 1995). And forensic transcription, where the audio is extremely indistinct and the content is not known, raises yet more complexity (Fraser 2014). So while we cannot know factually how reliable the specific police transcripts used in *Menzies* were, we do know that police transcripts are often wrong in significant ways (French and Fraser 2018).

Second, the instruction that the jury should reach their own conclusion about the audio, using the transcript only as assistance, is unrealistic (Fraser and Loakes 2020). With indistinct audio, a transcript provides far more than 'assistance' that can be accepted or rejected (Fraser and Kinoshita 2021). Listeners' perception can be strongly but unwittingly influenced by a transcript even if it is demonstrably wrong (Burridge 2017) – especially if they follow the transcript closely, for example while 'checking' it with ticks and crosses.

Of course, priming does not affect only juries. Hindsight requires us to respectfully suggest that the trial judge himself was primed by the police transcript, as he progressed from finding the audio unintelligible to accepting the content suggested by the transcript (at least enough to allow it to assist the jury).

In saying this, it is important to emphasise there is no suggestion that the trial judge was biased. On the contrary, it is clear his intention was to follow the law with fairness to all parties. Priming is not the same as bias. It affects even neutral, responsible listeners, including experts in linguistics and phonetics (the latter may be less susceptible but are certainly not immune).

Indeed, priming is not in itself bad. Priming with a reliable transcript is helpful and often necessary for perception of indistinct audio (Fraser and Loakes 2020). The problem is that priming with an unreliable transcript can cause listeners to hear, confidently, words that aren't in fact there. As we now know, personal confidence is a poor guide to accuracy of perception; and even if listeners reject particular words their understanding is still liable to be influenced by them. That is why, though we can't say for sure that the 1981 police transcript was unreliable, we can be certain that a judge's listening is insufficient to confirm it as reliable (Fraser 2018a).

Of course, the 1981 trial judge was unaware of all this, as were most people at the time. His listening gave him sufficient confidence in the transcript to decide it should be allowed to assist the jury (with the instruction to use it only as assistance). And his confidence, in turn, gave the appeal judges sufficient confidence to endorse his decision.

I hope it is clear there is no sense of blame in this account. Everyone at the time did what anyone at the time would have done. Equally clearly, however, the *Menzies* judges' decisions required correction to avoid problems that would inevitably arise from using them as a precedent guiding judges in the many future trials where covert recordings were admitted. Unfortunately, however, far from being corrected, subsequent rulings resulted in their further endorsement, and adaptation to cover a wide range of scenarios.

Butera v DPP (VIC) [1987] HCA 58

Butera – The case

Butera was a 1987 appeal to the High Court of Australia, against a 1985 guilty verdict in the Supreme Court of the Australian state of Victoria. Again, the trial involved indistinct covert recordings, this time in multiple languages (the quality of the recording can be gauged by the observation that there seems to have been uncertainty over whether some of the content was in Thai or Malay).

In this case, there was no legal issue regarding the use of transcripts. As mentioned earlier, the admission of audio featuring languages other than English was one of the situations in which judges in previous trials had recognised the need to provide a transcript to assist juries in understanding the content. Of course, these 'transcripts' were really translations. However, such translations were (and are) typically called transcripts by the law (see further discussion below).

In earlier trials, a single transcript/translation had been read out as the jury listened in court. In the 1995 trial, however, the audio was so indistinct that there were competing translations (interestingly, both provided by the prosecution). Rather than simply reading a single agreed version to the jury, it was necessary to read multiple transcript/translations, then have each translator explain the merits of their own version under examination by barristers on opposing sides.

Recognising that it was very difficult for the jury to follow this kind of argument via oral testimony, the trial judge allowed them to be provided with written versions of each witness's translation as an aid to their memory of what had been read out – an 'aide memoire'.

Use of an aide memoire in this way may seem uncontroversial now, but at the time it was a topic of considerable contention. Up until the 1980s, it had only rarely been permitted to provide juries with transcripts even of the court proceedings they had personally sat through. The thinking had been that providing a written version, while it might assist their memory, also risked distorting their experience by tending to emphasise aspects that they might otherwise have paid less attention to.

By the time of the 1985 trial, there had been precedents allowing transcripts of complex court proceedings to be given to the jury under certain circumstances. Here, however, the trial judge went beyond providing court transcripts to providing the translations themselves. For this reason, when the jury returned a guilty verdict, it was appealed all the way to the High Court of Australia, on the grounds that the trial judge had erred in allowing the written translations to be given to the jury.

The High Court justices[4] upheld the trial judge's decision to allow the jury to have the transcripts/translations as an aide memoire – and in doing so upheld the guilty verdict. Again, it is important to emphasise there is no suggestion here that the guilty verdict was in any sense inappropriate – and certainly no suggestion that the High Court justices were wrong in upholding the trial judge's decision to allow written versions of the transcripts/translations to be given to the jury.

The reason the decision is relevant for our purposes is that in upholding the trial judge's decision to allow the written transcripts/translations as an aide memoire, the High Court also endorsed several aspects of the *Menzies* appeal court ruling regarding the use of police transcripts. This had the effect of greatly strengthening the legal innovations of *Menzies* – including its concept that a police transcriber was an 'ad hoc expert', and its procedures for allowing police transcripts to assist juries in determining the content of indistinct forensic audio, which came to be applied routinely in very many cases.

This effect is interesting given that *Butera* involved no police transcripts or ad hoc experts (translators are considered genuine, not ad hoc, experts). The case turned solely on whether the jury should have been allowed to have the translations as written texts rather than oral testimony. The next section reviews the legal principles that enabled a High Court decision allowing juries to have written translations as an aide memoire to be extended to allow them to have police transcripts of English language.

Butera – Legal principles

In order to decide the question before them (whether the trial judge had erred in admitting the translations as an aide memoire), the High Court justices naturally turned to relevant precedents.

Since there were few previous decisions that related directly to admission of transcripts/translations of indistinct forensic audio, they cast a wider net to include apparently similar cases involving transcripts of other kinds of material, such as court proceedings, or indistinct forensic audio in English. The latter of course included the *Menzies* appeal ruling of five years earlier, which they cited with approval – adding the authority of the High Court of Australia to that of the Supreme Court of New Zealand.

In coming to a decision on the *Butera* case itself, the High Court justices also found it necessary to clarify a range of issues regarding the legal status of an audio recording used as evidence in court. They agreed, again with reference to numerous previous rulings, that a recording should be considered as a kind of document – not in the modern sense of a text written on paper but in the etymological sense of something from which information could be derived. This put audio recordings in a category that contained not just written texts but also photographs.

One special feature of recordings that required their consideration was that, unlike a photograph or written text, a recording does not yield its information simply by being looked at. Rather it is necessary to 'prove' the contents of the tape (again 'prove' is used in its etymological sense of 'demonstrate', 'establish' or 'lay out for all to see'). This, they decided, could be done either by playing the recording on a suitable device, or by providing a transcript.

This decision then raised the issue of the status of the transcript so used, with respect to the recording. The High Court justices agreed that a transcript was not equivalent to

the tape, nor was it a copy of the tape; rather it was a representation of the contents of the tape.

This made it, in their view (and following a number of precedents), a secondary form of evidence, equivalent to a chart or schedule used to summarise complex numerical data. Although producing a transcript required no great expertise, meaning that the jury could in principle do it for themselves, there was some effort in listening over and over again. So as a matter of convenience it was acceptable to provide a prepared transcript to assist their perception as they listened to the indistinct recording, thus saving them the time that would be needed to make their own.

Of course, when recordings featured languages other than English, an actual transcript was of no use to the jury, so there was no need for a transcript in the original language to be produced. All that was needed was the translation into English – which, as we have seen, was called a transcript.

This blurring of the distinction between a transcript and a translation had several important effects in the law. One was that, following the High Court's reasoning that the transcript/translations allowed by *Butera* should be deemed an 'aide memoire' (similar to a transcript of court proceedings), police transcripts also came to be called an aide memoire (even though of course in that situation the transcript is an aid not to memory but to perception – and, as we have seen, the 'aid' it offers can be highly misleading). On that basis, the instruction that the jury should use a police transcript only as assistance came to be called 'the aide memoire instruction'. These terms, and the concepts behind them, remain in common use to the present day.

Butera – Linguistics commentary

Again, the High Court ruling in *Butera* is notable for its complete lack of reference to linguistic scholarship. And again this is understandable with regard to transcription. As we have seen, at this time research even on general transcription, let alone transcription of indistinct forensic audio, was just emerging.

With hindsight, however it is clear that producing a reliable transcript of indistinct audio is just as problematic for languages other than English as it is for English. Indeed, the quality of a translation into English is severely limited by the quality of the transcription in the original language: the best translation will be misleading if it translates words that were not actually spoken.

This raises questions about the view that a transcript in the original language is unnecessary since it can't be used by the jury. The latter of course is true – but even if the jury cannot directly use a transcript in the original language, the opposing side should surely be given the opportunity to ensure the translator is working from a reliable transcript (Gonzáles *et al.* 2012). It also makes a strange contradiction with the expectation that the jury will somehow be able to determine which of the competing translations is a better representation of the audio content.

Further, calling a translation a 'transcript' glosses over the complexities of translation itself. The High Court justices seem to have assumed that, once a transcript is available, even if only notionally, translation is a simple mechanical transduction which translators get either right or wrong[5]. This misconception seems more surprising than misconceptions about forensic transcription. By 1987, translation studies was well established as a discipline (Munday 2016) with good recognition that, even with the source

text clearly specified, translation is a complex, context-sensitive process in which nuanced differences of opinion are possible.

We must also respectfully note that the High Court justices' discussion of the status of tapes and transcripts is rambling and poorly informed, embodying a number of misconceptions. For example, invoking the etymological sense of 'document' (covering anything from which information can be derived) ignores the special status of language as a shared symbolic system with significant social and cultural dimensions – which by 1987 had been well established for many decades by the disciplines of semiotics, semantics and philosophy of language. Conflating a recording and a written text further glosses over important differences between spoken and written language, also well established at the time (Chafe and Danielewicz 1987).

Despite these problems, and more, the concepts about transcription and translation embodied in *Butera* not only went unchallenged, they received the imprimatur of the High Court of Australia. This gave them an impact extending well beyond the situation for which the trial judge's original ruling was challenged (providing a written translation to the jury as an aid to their memory). Most importantly for the present discussion, they became the basis for routine provision of a police transcript to assist the jury in cases with indistinct forensic audio in English.

Uniform Evidence Acts

The Uniform Evidence Acts (UEA) sought to harmonise legislation governing the admission of evidence in criminal trials across the various Australian states and territories (Judicial College of Victoria 2014). After many years of complex negotiation, the Commonwealth Act was enacted in 1995,[6] with NSW enacting its Uniform Evidence Act the same year, and most other states following over subsequent years.

This gives the force of legislation to several of the concepts outlined above. For example, in relation to covert recordings, the UEA dictionary defines a document as 'anything from which sounds, images or writings can be reproduced', while Section 48 establishes a recording as a document whose content can be proved by playing the recording on a suitable device or by 'tendering a document that is or purports to be a transcript of the words'.

More directly related to police transcripts, Section 79 states, in part: 'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'. The opinion rule referred to is given in Section 76 'Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed'.

Together, these rather cryptic clauses state the general principle, outlined earlier, that while most witnesses, including police, are limited to providing factual evidence, opinions can be offered by expert witnesses who can back up those opinions on the basis of their specialised knowledge.

In relation to present concerns, police transcribers are considered to have 'specialised knowledge' of the audio by virtue of having listened to it many times. That means there is no difference in principle between police ad hoc expertise and genuine expertise in linguistics and phonetics. Indeed the term 'ad hoc expert' has no official

standing, though it is still used informally (and I will continue to use it here, precisely to distinguish police transcripts from transcripts by genuine experts).

It is notable, however, that police transcribers are not mentioned specifically anywhere in the UEA. That means that the application of Section 79 in relation to police transcripts relies wholly on case law. *Butera* remains a key authority, frequently referenced for legal concepts such as 'ad hoc expert', 'aide memoire', the aide memoire instruction – as well as for general ideas related to the status of recordings and transcripts, notably the concept that a transcript is secondary evidence provided merely as assistance. However, detailed practical procedures for how police transcripts should be presented in court were established by another appeal ruling, which also established procedures for presentation of expert transcripts.

Eastman v The Queen [1997] FCA 548

Eastman: The case

Eastman was a 1997 appeal to the Federal Court of Australia against a guilty verdict in a 1995 trial in the Supreme Court of the Australian Capital Territory. The 1995 trial was one of the first major trials to deal with indistinct forensic audio under the Uniform Evidence Act. It had been an extremely complex and contentious trial, five years in preparation, and involving many then-new types of forensic evidence, as well as a long series of extremely indistinct covert recordings (the complexities are greatly simplified here; more detail is provided in Fraser, "The Eastman transcripts: An unfortunate precedent?", to appear).

One important development, in relation to the present topic, was that, in addition to the police transcripts provided by the prosecution, both sides also provided transcripts by genuine experts in phonetics or speech science – the prosecution seeking to add credibility to the police version, the defence to oppose it.

The contentious nature of the trial meant that multiple aspects of the provision and use of all transcripts, police and expert, were challenged during the 1995 trial, resulting in explicit rulings by the trial judge on a wide range of topics. These rulings were then further challenged via the 1997 appeal process – resulting in endorsement by the appeal court. This established *Eastman* as a key precedent for handling police and expert transcripts, which has been followed in numerous subsequent cases as admission of covert recordings has burgeoned.

Eastman – Legal principles

The *Eastman* appeal upheld and endorsed all the decisions and reasoning in *Menzies* and *Butera*, with additional explicit detail regarding several aspects that until then had been tacit. One example was the concept that if the police transcript was erroneous it should be an easy matter for the defendant to provide the words that were really spoken – meaning that failure to do so gave implicit support to the police version. Unfortunately, while this may sound like common sense to non-specialists, a number of factors mean it can actually be surprisingly difficult, even when the police transcript truly is wrong, for a defendant to provide an alternative that is more convincing to the court than the police version is (Fraser 2020a). In addition, it is a general principle of our law that it is up to the prosecution to prove their evidence is valid, not the defendant to prove it is wrong.

Eastman also gave explicit recognition to the practice started in *Menzies*, whereby a challenge to the police transcript resulted in the judge listening personally to ensure it was not potentially misleading or prejudicial – before leaving determination of the content to the jury, under the aide memoire instruction. As in *Menzies*, the fact that the trial judge had listened personally and accepted the police transcripts was taken as confirmation by the 1997 appeal judges that the transcripts were reliable enough to be given to the jury under the aide memoire instruction.

With regard to expert transcripts, the *Eastman* procedures made clear that it was the police transcripts that were to play the principal role in assisting the jury. Expert opinions, if offered, were merely alternatives for the jury to consider – even when, as in this case, the prosecution's own expert disagreed substantially with the police version (while also accepting a number of incriminating sections – see further discussion below). The procedures also privileged the police version in multiple ways (discussed further in Fraser, to appear). As an example, the police transcript was provided first to the jury, who followed it as the audio was played, while expert opinions were discussed afterwards, via oral examination of the experts.

It is interesting to notice that the judges continued to assert that police transcribers' 'ad hoc expertise' derived from their having listened over and over – even though all the experts made clear they also had listened many times – as well as bringing their expert analytic skills to the task.

Eastman – Further developments

Despite being upheld by the 1997 appeal ruling, the 1995 guilty verdict continued to be contested through various channels. In 2012, a major inquiry was commenced, and looked into all aspects of the trial. The 2014 report of the inquiry upheld most of the previous judicial decisions, including the admission and use of the audio and transcripts.

However, serious flaws were uncovered regarding some of the other forensic evidence, creating a catalyst for major reforms in the forensic sciences (Maxwell 2019). More importantly, the review concluded that these flaws had created a miscarriage of justice. Mr Eastman was released after 19 years in prison. Eventually a retrial was ordered. The 2018 retrial found Mr Eastman not guilty, and he was awarded more than $7,000,000 in compensation for wrongful conviction and imprisonment.

Crucially for the present discussion, preparation for the 2018 retrial revealed that the police transcripts used during the 1995 trial had been substantially misleading (even more so than had been demonstrated by the phonetics experts at the time, as discussed below). This of course casts yet more doubt on the outcome of the 1995 trial. Far more importantly, it casts doubt on the procedures the 1995 trial had established to ensure the jury was not misled by an unreliable transcript – and on the endorsement of those procedures by the 1997 appeal.

Eastman – Linguistics commentary

As we have seen, the 1995 trial was the first in which both sides used transcripts from genuine (as opposed to ad hoc) experts. By this time, forensic transcription was beginning to be established as a specialised area of practice in linguistic science. However, it was still seen as a branch of applied phonetics rather than a branch of linguistic science in its own right (see Fraser 2020a). In particular, the effect of priming on the perception of experts was not fully understood.

For example, the 1995 experts produced their own transcripts by editing the police version. This was common and expected practice in forensic transcription at the time, assumed to be merely a time-saving measure. Interestingly, late in the trial one of the experts came to suspect that editing the police transcripts had influenced his perception, and reported this in court. However, he did not have a body of research to refer to and his concerns were dismissed. Now of course it is recognised that editing existing transcripts is not good practice – indeed preparation for the 2018 trial made clear that all the 1995 experts' transcripts had been influenced by the police transcripts (despite having noted many substantial errors in them).

More importantly, the 1995 experts had limited understanding of how their opinions fitted into the overall trial process. For example, the prosecution expert, who had found many errors in the police transcripts, nevertheless accepted, in response to one in a long series of questions posed to him in the witness box, that listening to the tapes for many hours had qualified the police transcribers as ad hoc experts – presumably not recognising how this answer might affect development of Australian legal procedures.

While the experts all disagreed substantially with the police transcripts, they also disagreed with each other. This is inevitable with extremely indistinct audio. The problem is, such disagreement gives the law the impression that the experts' opinions are no better than anyone else's. More importantly, the few areas where experts appeared to agree with police (often due to editing) were taken as support for the police transcripts overall. The effect was, paradoxically, to increase, rather than diminish, the trial judge's, and appeal judges', acceptance of the police version.

By the time of the 2018 retrial, forensic transcription was starting to be recognised as a topic of research in its own right. Among other developments, a detailed Australian case study had demonstrated that the procedures arising from the cases discussed here are incapable of protecting juries from being misled by an inaccurate police transcript (Fraser 2018a).

For this and other reasons, in the 2018 *Eastman* retrial, both prosecution and defence were at pains to demonstrate that their experts had not been inappropriately primed.[7] This meant that many of the explicitly incriminating parts of the original police transcripts were omitted from the prosecution versions. The few that remained were opposed by the defence – and presumably rejected by the jury, since they reached a verdict of not guilty.

What is most important, for present purposes, is that preparation for the 2018 retrial showed unequivocally that the police transcripts used in the 1995 trial had been highly misleading – presumably contributing at least in part to the acknowledged wrongful conviction of Mr Eastman. This is surely incontrovertible evidence that the procedures used in the 1995 trial, endorsed by the 1997 appeal, and followed as a precedent in numerous trials since then, are incapable of protecting juries from misleading transcripts.

Unfortunately, however, the fact that the 1995 police transcripts had been unreliable was not officially recognised by the judge the 2018 retrial (which in any case was not an appeal capable of becoming an authoritative precedent). Thus the law has made no moves to amend the procedures endorsed by the 1997 appeal ruling. To the contrary, these flawed procedures continue to be used in large numbers of trials around the country, creating actual and potential unfairness in the Australian criminal justice system.

This is a major problem in urgent need of a solution. The next and final section briefly considers the question of what solution to aim for, and how linguistic science can help in achieving it. The first step is to specify the problem accurately.

Towards a solution

Specifying the problem

From a linguistics perspective, the concept of police transcribers being ad hoc experts is clearly wrong. Any ability police may have to hear more than others do, in audio related to their cases, comes not from listening over and over again, but from their contextual knowledge of the case. While this contextual knowledge can be helpful in particular instances, it is also liable to mislead, as we have seen.

An obvious solution, commonly recommended by linguists, is to ensure that transcripts by independent experts in linguistic science are made available to the jury. However, the case of *Eastman* demonstrates that, even if genuine experts are employed, misleading transcripts can still be provided as 'assistance' to the jury, where, due to the power of priming, they are likely to create a false impression of the audio content.

It seems the key factor is not who creates the transcripts, but who evaluates the transcripts to ensure they offer reliable assistance to the jury's perception. Under current procedures, as we have seen, evaluation relies heavily on lawyers and judges gaining a sense of personal confidence in the police transcript by checking it against the audio. While these procedures were established in good faith using knowledge available at the time, it is now known that this sense of personal confidence is highly unreliable.

An even more important factor is who decides how the transcripts should be presented to the jury, especially in situations where there are multiple competing versions for them to consider. As we have seen, current procedures, designed by judges on the basis of educated common knowledge, as well as reference to legal precedents, privilege a police transcript even if (as in *Eastman*) a well-qualified expert on the same side has shown it to be unreliable.

Under these circumstances, simply calling for increased use of expert witnesses can exacerbate rather than cure existing problems. That is why Australian linguists have chosen to take a different approach.

The Australian approach

It is essential that all indistinct forensic audio admitted in Australian criminal trials should be accompanied by a reliable transcript (Fraser 2020a).

By 2017, Australian linguists had recognised that achieving this required change to legal procedures, especially those based on the fundamental misconceptions that creating a transcript of indistinct forensic audio requires no expertise beyond listening over and over, and that in any case the transcript is merely 'secondary evidence', an 'aide memoire' that a jury can use 'only as assistance'.

They raised a 'call to action' which resulted in a working party of judges holding a consultation with representatives from linguistics and law enforcement – and concluding that the linguists had raised issues in need of investigation. As a result, The Research Hub for Language in Forensic Evidence was established at The University of Melbourne (Fraser 2020b).

The Hub has two main aims. The first is to assist in bringing about appropriate changes in legal procedures (Fraser 2018b). This is clearly a difficult task given the long-standing nature of the procedures, but some slow progress is evident.

The second aim is to create an accountable, evidence-based process for preparing reliable transcripts. This means recognising forensic transcription as a specialised area of expertise, similar to forensic pathology or forensic fingerprint analysis. These fields do not rely on individual experts claiming personal knowledge and experience. Rather they employ accredited practitioners to follow evidence-based methods established via collaborative expert research. It is time that forensic transcription was treated as a dedicated field of expertise in the same way (Fraser 2020a).

Conclusion

The fact that Australian law allows police transcripts to assist the jury in determining the content of indistinct forensic audio used as evidence in criminal trials is a major problem that clearly arises from misconceptions within the law about the nature of speech and speech perception, especially how a transcript affects listeners' understanding of indistinct recorded speech.

Solving the problem requires linguists not just to teach legal professionals about our subject but also to learn more about how the law works, both in principle and in practice, especially practice that takes place 'behind the scenes' (Fraser 2020a). It is hoped that the present review of three historical cases offers some assistance in achieving this.

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Notes

[1]There are also eight smaller territories which we set aside here.

[2]Each state has a slightly different version, and some use a different system – but these details are not relevant to the present discussion.

[3]In New Zealand, the High Court is lower than the Supreme court, while in Australia Supreme Courts are lower than the High Court – which is the highest court in the land.

[4]Note that one of the five justices dissented, arguing that the transcript/translations might indeed have tended to mislead because they did not include notes about the arguments raised against the translation of certain expressions.

[5]Note that the dissenting justice had a more nuanced view of translation.

[6]The Australian Capital Territory and Northern Territory were covered by the Commonwealth Act until they enacted their own in 2011.

[7]For reasons peculiar to this case, police transcripts were not used in the 2018 trial. Rather the 1995 prosecution expert produced updated transcripts.

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Additions, Omissions, and Transformations in Institutional 'Retellings' of Domestic Violence

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Abstract. *In this paper we examine how UK police officers investigating domestic violence (DV) make a formal written case to Crown Prosecutors. Using rarely accessed 'management guidance' reports (MG3 forms) we analyse how police officers' written contributions appeal to relevance and how they can 'nudge' prosecutors towards particular methods of case disposal, specifically, the 'Simple Caution'. We propose that linguistic strategies can reduce the likelihood of convictions, and we raise serious concerns about the impact of police officers' institutional 'retellings' in the pursuit of justice.*

Keywords: *Charging decisions, Domestic Violence, Relevance, Simple Caution.*

Resumo. *Neste artigo analisamos como os agentes policiais no Reino Unido em casos de investigação de violência doméstica (VD) contribuem formalmente por escrito para o trabalho dos procuradores públicos. Utilizando relatórios de "orientação de gestão" aos quais raramente alguém acede (formulários MG3), analisamos de que modo os contributos por escrito dos agentes policiais fazem um apelo à relevância e de que modo podem 'orientar' os procuradores para determinados métodos de disposição do caso, especificamente a "c aução simples'. Propomos que as estratégias linguísticas permitem reduzir a probabilidade de condenação, e identificamos sérias preicupações sobre o impacto dos "recontos" institucionais dos agentes policiais na administração de justiça.*

Palavras-chave: *Decisões acusatórias, Violência Doméstica, Relevância, Caução Simples.*

Introduction

Whilst many aspects of the United Kingdom's Criminal Justice System (CJS) are accessible to the public, much of the prosecution process takes place away from public view. Clearly the nature of police work and the ingenuity of the criminal fraternity mean that restricting public access to investigations is sensible if prosecutions are not to be compromised. Once a prosecution and any other process that might arise from it are complete, however, the arguments for continuing to restrict access become less compelling. Research into policework and adversarial justice continues to show (e.g. Drew

1990; Jönsson and Linell 1991; Drew and Heritage 1992; Sacks 1995; Rock 2001; Komter 2002, 2006; Haworth 2020; MacLeod and Haworth 2016; Heffer 2010; Lynn and Lea 2012) there are considerable benefits to be had when process and practice are subjected to external analysis. If police and prosecutors are to retain the confidence of the public they serve, it is important that what they do, and how, is open to scrutiny.

To date, an increasing body of work has made some of these processes more transparent. For example, research into investigative interviewing (Malsch *et al.* 2018; Milne and Poyser 2017; Poyser and Griffiths 2013; Fisher *et al.* 1987; Soukara *et al.* 2009) has led to the development of new and advanced interview techniques and praxis (Griffiths *et al.* 2011; Clarke and Milne 2001; Milne and Bull 1999; Fisher *et al.* 1987; McGurk *et al.* 1993). Additionally, forensic linguists have analysed the discursive goings-on in police interactions with suspects. These range from initial calls to emergency services (Traynor, forthcoming) to the police interview (van Charldorp 2014, 2018; Komter 2012) and the evolution and construction of suspects' statements (Rock 2001; Linell 1998; Jönsson and Linell 1991; Komter 2006; Haworth 2017). Other studies have examined the institutionally inflected tellings and retellings of witnesses' stories in their (police-authored) statements (Coulthard 1994, 2002; Hillsborough Independent Panel 2012; Canning 2018, 2020) and exposed patterns of institutional manipulation in police evidence-gathering. Researchers have also examined discursive practices within the courtroom (Solan 1993; Cotterill 2002; Solan and Tiersma 2004; Shuy 2006; Haworth 2020; Heffer 2010; Ingrids 2014). Collectively, this research shows that how police officers report at issue events on official judicial documents can influence recipients' evaluations of such reports, and to a lesser extent, case outcomes. Having acknowledged this body of work, there remains a lack of transparency in what it is that police officers 'do'. This paper aims to address this lacuna by casting a discursive, rhetorical, and linguistic eye over one of the most important but rarely examined prosecution processes: namely how police officers make their case to Crown Prosecutors for charging advice.

In understanding how officers make their case we pay particular attention to the narrative trajectory of key prosecution texts, specifically the 'Manual of Guidance' report (known as the 'MG3 Report') to 'Crown Prosecutor for Charging Decision' (Home Office 2020: 9). We argue that through a process whereby at issue events are repeated and reformulated (Linell 1998), a series of 'additions, omissions, and transformations' (Bartlett 1932) occur that can significantly alter the detail and reception of the events in question. A tangible consequence of this, we will suggest, is that it can orient police officers and prosecutors to a preferred lenient judicial outcome or method of disposal.

Throughout this paper we focus on cases involving Domestic Violence (DV) from the England and Wales jurisdiction of the UK. It remains a sobering fact that for all the measures implemented by police and the criminal justice system over the last twenty years, the number of DV crimes reaching UK courts is dwindling. In 2010, when our data was collected, the number of DV incidents logged with the Devon and Cornwall police was 6295 (FOI request, June 2020). By 2019 this had increased to 15,260 recorded DV incidents. Figure 1 below shows the yearly increase from 2010.

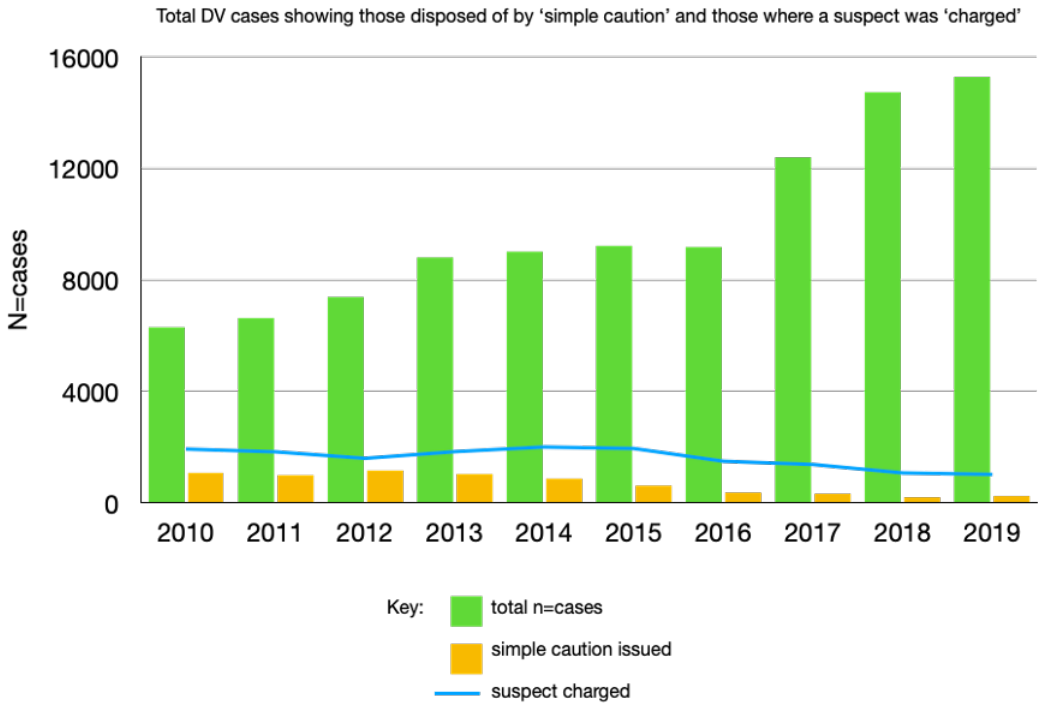

Figure 1. DV cases between 2010 and 2019 with 'charged' and 'cautioned' outcomes.

The graph shows the number of cases is rising but the charging rate is falling. In 2010, only 31% of cases (1,921 cases) out of a total of 6,295 cases resulted in a suspect being charged and 17% (1,063 cases) were disposed of using a 'Simple Caution'. The UK Home Office (Home Office 2008) defines a 'Simple Caution' as a formal warning given by police to offenders and aims to 'deal quickly and simply with less serious offences where the offender has admitted the offence', and to 'divert offenders where appropriate from appearing in the criminal courts' (Home Office 2008: 1).[1]

In 2019, of the 15,260 cases of DV dealt with by Devon and Cornwall police in England, only 7% (1,014 cases) resulted in a suspect being charged with an offence. In the same year, 2% (246 cases) were disposed of using a Simple Caution. In 2014, a change was made to how outcomes of DV cases were recorded, and new categories were introduced, including: 'Named Suspect Identified: Vic[tim] Supports Action Evidential Difficulties', which includes 'cases where the suspect has been identified, the victim supports action, the suspect has been circulated as wanted but cannot be traced and the crime is finalised pending further action' (Home Office 2019: 10), and 'Named Suspect Identified: Eviden[tial] Difficulties Vic[tim] Not Supporting Action', where the 'victim does not support (or has withdrawn support from) police action' (Home Office 2019: 10; FOI request, June 2020). These changes, presumably introduced for clarity, reflect the particular difficulties DV crimes pose for police. In 2019 these categories accounted for the outcomes of 19% (2,876 cases) and 56% (8,548 cases), respectively (a total of 75% or 11,424 cases). As more cases are disposed of under these outcome categories than any other, it now means that the simple caution is only one of several out-of-court preferred options for disposal. We propose that the specific issues identified in this paper offer some explanation for the decline in charging decisions and an increase in out-of-court

disposal of cases. Our findings demonstrate the need for greater external scrutiny of policing and prosecution processes in DV cases.

The data: Police prosecution files

The material analysed for this paper was obtained by the first author in 2010 for the purposes of examining both the spoken and written police discourse of police officers in Devon and Cornwall, England. At the time of the data collection, the first author was a serving police officer working as a specialist Domestic Violence Investigator. His 'insider status' provided rare access to what police and prosecutors regard as confidential and sensitive material (Lynn and Lea 2012; Lea and Lynn 2012).

Eighteen crimes of DV were recorded in two adjacent areas within the same police force in 2010 in one calendar month. All eighteen cases were disposed of by way of a Simple Caution. Of the eighteen cases, 4 case files could not be located, and one other had no MG3, leaving 13 cases for analysis. The stage of the judicial case building process we focus on is the point at which the case is referred to the Crime Prosecution Service (CPS) for a charging decision. Figure 2 shows the full trajectory of DV cases through the judicial system.

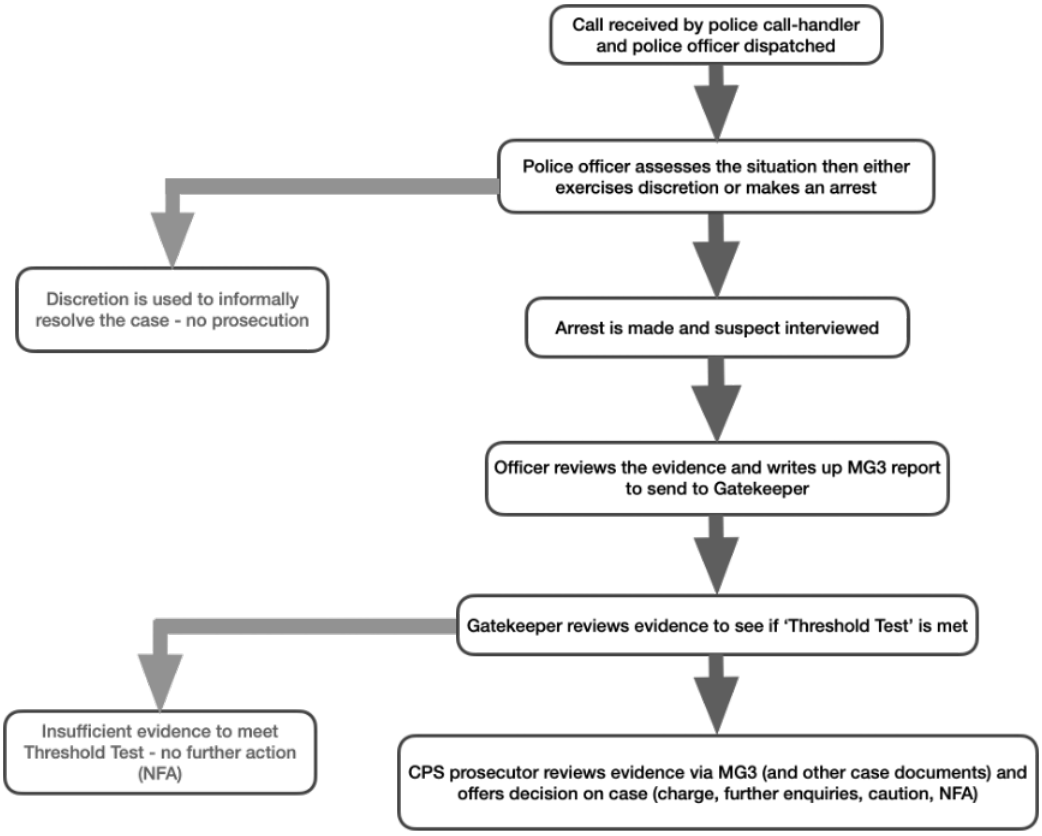

Figure 2. The DV case trajectory.

Personnel involved throughout this process include the police officer assigned to the case, otherwise known as the Officer in the Case (OIC), the Gatekeeper, and the Crown Prosecution Service. Gatekeepers are usually Sergeants or higher ranked officers (both active and retired) and their role is to cast a qualitative eye over the file compiled by the

OIC and make recommendations regarding charging or other types of disposal before the OIC approaches the Crown Prosecution Service (CPS). In essence, this is a peer review process.

Police working culture

Before moving on to the methodology, it is important to provide some detail about the working culture and 'lived ideologies' (Billig *et al.* 1988) of police and prosecutors as these offer insights into what Voloshinov (1987) calls 'the extra verbal situation', essentially, the pragmatic discourse situation in which a given utterance occurs. An extensive corpus of high-quality research on police officers and policing has consistently pointed to expediency and pragmatism as ideologies that typify police occupational culture (Skol-nick 1966; Graef 1989; Manning 2008). These ideologies are seen as central to getting the job of policing done because successful police careers are, for the most part, built on results which include arrests, detections, or successful prosecutions (Reiner 2000; Stephens and Becker 1994; Chambers and Millar 1983). This research also makes clear that within police culture the ethos of 'crime fighting' is considered the 'raison d'etre of policing' (Waddington 1999: 23). For those who eye the police service as a potential career, there is no doubt the lure of danger, excitement, and the exercise of power that necessarily goes with 'thief-taking' is what draws many into the police fold (Holdaway 1983). The irony here is that the same research also demonstrates how the reality of day-to-day policing is actually rather different (Banton 1964; Rubenstein 1973; Manning 1977; Chatterton 1983). Indeed, Chan *et al.*'s (2003) study found that police work was 'more routine and less diverse than expected' (p. 208) and that officers spent most of their time doing paperwork and 'covering their arses' rather than 'catching criminals' (p. 209). When police officers are able to focus their efforts on 'crime fighting. . . most of the time, discretion is exercised in favour of non-enforcement' (Waddington 1999: 5).

What these and other studies highlight well is that policing is an occupation fraught with contradictions and the notion of 'discretion' is itself a 'politically contested term' (Wood 2020: 134). For a public service fashioned along military lines, and where notions of discipline and authority are woven into an overly complex hierarchical rank structure that is 'blame orientated' and 'punishment centred' (Waddington 1999), it may surprise many to know that officers who work on the front line routinely operate in ways that differ from how senior officers expect them to operate (Reuss-Ianni and Ianni 1983). The presumption on the front line is that once officers gravitate to the senior ranks they become 'management cops' rather than 'street cops' (Reuss-Ianni and Ianni 1983: 251). The point we are making here is that regardless of motivation, the operational reality is that police rank-and-file are sufficiently autonomous that they can and do subvert the policy doctrines and operational edicts of senior officers (Punch 1985; Gelsthorpe and Padfield 2003; Smith *et al.* 2005). What this means in real terms is that the lowest tier of the police organisational hierarchy effectively has the most infl uence over policing policy (Punch 1985).

A second point that follows directly from the first is that success in subverting the will of senior officers depends on being sufficiently skilled to do it in ways that are not obviously contentious or questionable – no easy task given that all officers begin their careers as Constables. Additionally, when 'working the street' officers routinely interact with people who may be 'angry, dishonest, aggrieved or otherwise disgruntled' (Lynn and Lea 2012: 365). The work, then, is not just highly interpersonal, but is also frequently

messy, in that there may be no clear-cut way to deal with the issue at hand in a way that satisfies all concerned (Skolnick 1966; Westley 1970; Holdaway 1983; McNulty 1994). Kemp *et al.* (1992) capture this dilemma well in noting that 'officers are often unable to anticipate whether a certain course of action will be regarded as commendable or subject to condemnation' (p. 121). As a result, officers soon learn to be mindful of what they do and how they do it. And it is for this reason that the 'cover your arse' mentality features in just about everything police officers do (Chan *et al.* 2003; van Maanen 1973; Punch 1985). But while it is one thing to 'know that' the lived experience of policing shapes the occupational practice of officers, it is quite another to 'know how' (Ryle 2000) these practices actually operate in plain sight. One of the advantages of applying a linguistic analysis to police work, is that the 'how' can be made visible.

Context of the MG3 reports

There is no set format for constructing an MG3. However, headers on the form invite the OIC to summarize the case for the reviewers, which necessarily entails selection and omission for 'gist'. In effect, then, the MG3 is oriented towards making a case, explicitly or implicitly, for a particular outcome, and it is safe to assume that inclusions are constrained along these lines. Once OIC's believe they have collated a relatively complete picture of the at issue event, the case is then prepared for the Gatekeeper (and Prosecutor). At this point, the event has gone through a few retellings (e.g. witness statements, police interviews), and will be retold again on the MG3 form. This process of 'retelling' is problematic. Frederic Bartlett's innovative work on *Remembering* (1932) demonstrated that in telling and retelling a story, speakers engage in 'repeated reproduction' (p. 63), an interpretive and subjective process that results in additions, omissions, and transformations. The upshot of this, he found, was that it tended to result in 'stereotyped and conventional reproductions which adequately serve all normal needs, though they are very unfaithful to their originals' (Bartlett 1932: 55). Bartlett's work has particular relevance in the high-stakes environment of policing. The administrative work police do has repeated reproduction at its core, no more so than in the trajectory noted above (Figure 2). Our analysis of the MG3 forms allows us to track this process and to make it visible; in other words, the contributions from the various personnel in the chain (Figure 2) permit an analysis of the additions, transformations, and omissions as well as a consideration of their material effects on case outcomes.

Methodological approaches to 'doing' policing

Drawing on Bakhtin (1986), Lea and Lynn (2012) posit three 'speech genres' as characterising (in part) what it is that police officers 'do' when they do policing: the 'genre of the "real" victim' (2012: 3097) whereby police present male suspects as the having been wronged in some way; the 'genre of impartiality' by which officers' reports present 'a version of events that both manages their own stake and accountability and attributes blame and responsibility' (p. 3098); and the 'genre of credibility', whereby officers' 'credit' or 'discredit' individuals (p. 3100) particularly through linguistic strategies such as 'category entitlements' (Sacks 1995; Edwards 1991).

In what follows, we develop this notion of the 'speech genre' into an archetypal narrative construct in the policing context. Specifically, we focus on the archetypal construction of the 'real victim' which we argue relies heavily on 'doing credibility' and more subtly, on 'doing impartiality' (Lea and Lynn 2012). Our methodological approach

combines critical discourse analysis (Billig *et al.* 1988; Fairclough 2001) with relevance theory (Sperber and Wilson 1986; Wilson and Sperber 1993, 2002, 2004; Clark 2013) in considering the ideological implications of what is stated or explicated on the one hand, and what is unstated or implicated on the other. In order to account for the pragmatic context of what Fairclough calls 'unequal encounters' (2001: 36) in terms of power, we also consider Goffman's notion of 'footing'. We will present linguistic strategies used by police officers in constructing a 'real victim' narrative and argue that such strategies consistently function to align the ideological position of the investigative institution with the male suspect. In order to understand how these subtle strategies influence decision-makers, we present patterns of pragmatic inferencing that officers rely upon (and that Gatekeepers and CPS 'take up') in order to successfully communicate the suspect as the 'real victim'. Our intention is to show that how police present the various participants and their actions in the at issue event conveys a deeply ingrained culture within the police about whether domestic violence is criminal and whether or not they consider the suspect and/or victim culpable. We argue that what officers select for inclusion and how they choose to report their selections exposes their (institutional) ideological positioning on domestic violence cases. The next section discusses the MG3 corpus in detail and aims to make the positioning of the institutional actors more visible.

Footing

All the OIC's contributions to the MG3s in the analytical sample were written in a dry, third person, passive voice: 'the police were called', 'It is alleged…', 'it was explained that…'. The use of this 'reported style' of writing creates the impression that the author of the text (the OIC) is merely the medium or animator through which events are set out. Writing in this way fosters the notion that what is reported is simply that which 'unproblematically and inescapably follows' (Gilbert and Mulkay 1984: 56). Such style is indicative of 'police-speak' (Fox 1993) and a particular narrative style that police officers routinely use when writing MG3s (see Lea and Lynn 2012). This is achieved in the preceding examples through 'footing' (Goffman 1981) 'it was explained' in which the reporting verb affords the OIC distance from the proposition offered. The 'pursuit' of impartiality or neutrality (Clayman 1992: 169) is an active accomplishment of various occupations. Police officers learn early in their careers that they must appear impartial even though, in practical terms, they are always agents of the prosecution. In reporting descriptions, claims, and specific incidents and events, speakers and writers (whether they know it or not) attend to their discursive 'footing'. They do so by making it clear that what is being reported either was or was not seen or heard by the authors of the text. In so doing, police officers display an implicit awareness that they are accountable for what they say.

Additionally, footing can be employed to weigh or upgrade the facticity of a 'reported' event or happening. This can be achieved not just by what is said, but by whom. For a variety of reasons, certain groups or individuals are imbued with situated ethos and can speak with greater authority and credibility than others. It is a 'category entitlement' (Sacks 1995) of police officers that they are understood to be honest and trustworthy. They are also recognised as professional witnesses trained in observation and investigation. Therefore, the authority of the person whose talk or information is being 'reported' (either as a direct quote or as gist) is important because it can make a positive difference to its persuasive force. An extract from our dataset shows this nicely:

> 'PC D, the arresting officer, **noted** a red mark to the side of C's throat' (MG3 1, our emphasis).

Here, PC D's tacit authority and expertise as a police officer validates the claims made by C that some injury was sustained by C (the complainant in this case). PC D's authority on this occasion is bolstered by the OIC's addition of the label 'arresting officer,' which further implies he had a reasonable suspicion as to how C's injury was sustained and by whom, which also justifies why he made an arrest.

Alternatively, footing can also be used to undermine the authority of an account. An author or speaker can introduce uncertainty about an event by the way they report another's speech:

> '[Victim] contacted the police in relation to an **allegation** of Harassment against her ex-partner …' (**MG3 2**, our emphasis)

> 'In interview K claims that he returned home to find A and B smoking weed …' (**MG3 3**, our emphasis)

To 'claim' or 'allege', especially when it comes from a police officer (in this case the OIC), can, as Clayman concluded in his research, 'actively shape the course of the debate without entering it as a participant' (1992: 177).

The (broadly) tripartite arrangement of MG3s also functions rhetorically. The MG3 below is one of the briefest, consisting of four sentences, numbered for clarity:

> **MG3 4:** (1) [Suspect] was involved in a verbal altercation with his partner [Victim] regarding her going out and him holding the baby.
> (2) During this argument [Suspect] slapped [Victim] once across her left cheek causing reddening.
> (3) During interview [Suspect] made a full and frank admission to the offence, stating he had 'lost it', he also expressed regret.
> (4) [Suspect's first name] has no previous convictions and has not been arrested before.

There are effectively two sections to this short narrative. The first section, sentences 1–2, synthesizes the witness statement into gist – a succinct easily readable 'police version' of events from an observer's (in this case, the suspect's) viewpoint. The second section (sentence 3–4) summarizes the suspect's account and concludes with an assertion of the suspect's lack of offending history. This is, perhaps, not surprising as in the police world 'full and frank' admissions are actively sought (and are supposed to be mandatory if a Simple Caution is to be issued). Lastly, MG3 accounts generally conclude with a short sentence or paragraph outlining the suspect's offending history, or lack of it. Brief as this example is, it is typical of the way OIC's summarize the at issue event.

From a rhetorical perspective, two things stand out from MG3 (4) above. First, in paring down the aggrieved person's witness statement to gist, the whole event is glossed and de-contextualized. Second, the MG3 goes to the Gatekeeper as a presentation of 'facts' that 'speak for themselves' (Perelman and Olbrechts-Tyteca 2000: 17). This is problematic as Gatekeepers and CPS prosecutors do not tend to raise questions about what has been omitted, added, or transformed, and although they are privy to the witness statements and interview data that comprise the full case files, few appear to go beyond the MG3 when making charging decisions. The MG3, therefore, remains the most authoritative document at the decision-making stage of the prosecutorial and policing process.

The following sections examine the relevance of what is stated on the MG3 record and how this may impact its interpretation.

Relevance Theory

In their seminal work on relevance, Sperber and Wilson (1986) argue that 'human cognition is geared to the maximisation of relevance', which is to say that when we are engaged in conversation (or other discourse forms) with an interlocutor we expect that what they say is to be understood as maximally relevant. In other words, we are driven by coherence or a need to make sense of whatever we encounter (Wilson and Sperber 2004: 608). Following Graef (1989), Wilson and Sperber (2004: 607) agree that 'utterances raise expectations of relevance'. This means that when we receive an input or 'stimulus' (Wilson and Sperber use the example of a guest positioning an empty glass on the host's table to signal that they would like a drink) we connect it to 'background information' to 'yield conclusions that matter' to us (p. 608). Ideally, and for efficiency, we aim to gain something informative or relevant from our interlocutor without investing too much processing effort ourselves. As Clark notes, 'our inferential systems are set up so as to maximise the cognitive effects we can derive' (2013: 107). Wilson and Sperber call these 'positive cognitive effects' which is to say they make a 'worthwhile difference to the individual's representation of the world' (2004: 608). To take the example of wanting that drink, the empty glass stimulus connects to the host's background information which may include at least the following: a schema for enjoying a drink with friends, what they know about hosting a social gathering and what that entails (i.e. ensuring that everyone who would like a drink has one without them having to ask for a refill), knowing that if a guest directly or overtly has to ask for a refill that that may constitute a 'face-threatening act' (Brown *et al.* 1987) for both parties and also knowing that both parties wish to avoid threats to 'face' in polite society, and so on. The host then interprets the stimulus (the positioning of the empty glass) to conclude that the guest would really like that drink topped up and promptly goes and does it. In so doing, the host recognises the intention of the guest (to communicate something with the stimulus) but the guest also recognises that the host will recognise their intention in order for the stimulus to have the desired communicative effect.[2]

Like the stimulus of the empty glass, what officers write on police reports functions as an 'ostensive stimulus' and as such bears relevance to the job in hand. The information contained therein must either be relevant or be made relevant by those to whom they address if the OICs' intended meanings are to be understood[3]. Following Sperber and Wilson (1986), we argue this process invokes (and relies upon) a range of assumptions, commonplaces, and deductions in order to reach conclusions that influence charging decisions. Deductions are often implicit in MG3 reports. This is especially true regarding blame. The OIC can choose what to add or omit and how to describe the events and participants, but in spite of being invited to do so they rarely explicate how charging decisions should go (for the OICs may be unwilling or unable to make their intentions explicit – we return to this later). Instead, they are implicitly packaged.

The MG3 data

The MG3 reports reproduced below recast the male perpetrator in the role of 'real victim' to varying degrees. All identifying information has been redacted, and the participants

are referred to as 'Suspect', 'Victim', and 'Witness' respectively in place of their actual names. Sentences are numbered throughout for ease of reference.

The 'real victim' archetypal narrative is achieved in a number of ways in our corpus, and each can be employed as a single strategy or multiple strategies and can combine or overlap. The strategies for doing the 'real' victim are mitigation, diversion, and victim-blaming and are outlined below:

1. mitigating the suspect's role in the at issue event by:
    (a) downgrading or 'explaining away' the negative behaviours of the perpetrator
    (b) upgrading the positive behaviours of the perpetrator
2. diverting narrative attention to elicit pathos for the suspect by:
    (a) foregrounding the emotional toll of the accusation on the suspect
3. blaming or undermining the actual victim by:
    (a) recasting the actual victim in a negative light
    (b) presenting the actual victim as culpable (e.g. causing the suspect's behaviour)
    (c) undermining the credibility of the actual victim

As stated, there is overlap between the strategies and it is often the case that by recasting the suspect as the 'real' victim that the *actual* victim is undermined as a result. Conversely, when c) is invoked, the suspect is sometimes simultaneously cast as the 'real' victim. In our corpus of 14 MG3 case reports, 9 reports cast the suspect as 'real victim' by eliciting pathos and 7 of these simultaneously blame or undermine the actual victim and mitigate the suspect's criminality. In addition, 3 cases focused the narrative attention only on mitigating the suspect's criminality, while 2 focused exclusively on blaming the actual victim. The following diagram shows the distribution and overlap of strategies:

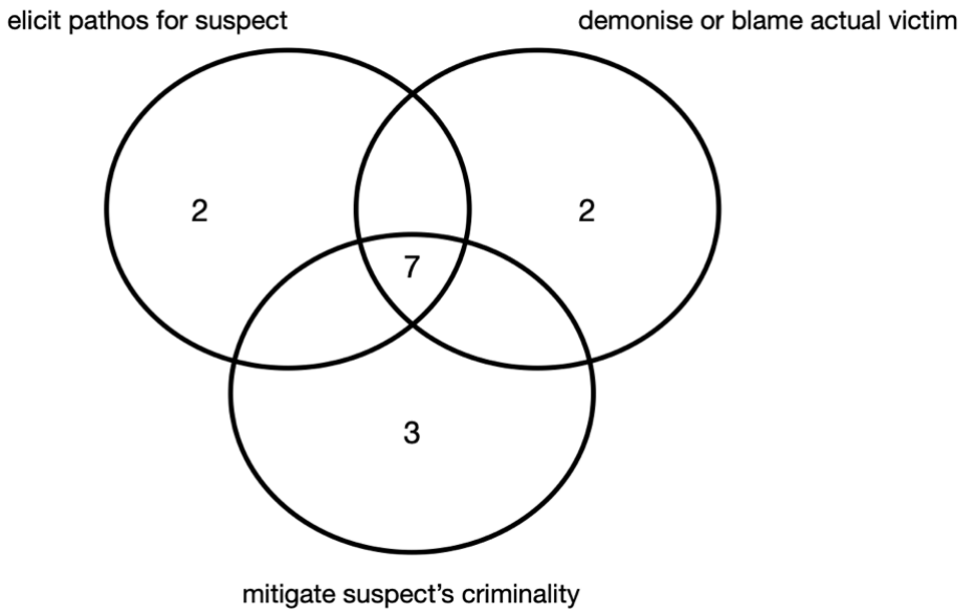

Figure 3. Distribution of cases that employ 'real victim' narrative strategies.

The following section analyses how these strategies are manifestly presented and made relevant in MG3s.

Victim-blaming, or undermining the actual victim

In their work on relevance, Sperber and Wilson write that '[e]very utterance conveys a *presumption of its own optimal relevance*' (1986: 266–78, our italics). This means that while officers utterances or reports are not maximally relevant, their inclusions are optimally relevant in the context and so some decoding will necessarily take place. This can be seen in the following MG3 5 report in which the actual victim is undermined, and the suspect is presented as the 'real victim'. The case concerns a female ('aggrieved') who has called the police to report a domestic assault.

MG3 5: OIC reformulation

1. Police were called to [redacted address] after a call from A/P ['aggrieved person'] Ms [Victim] to say she was being assaulted.
2. Upon arrival, [Suspect] was seen to be standing over Ms [Victim] in the caravan.
3. Mr [Suspect] was arrested assault ABH as Ms [Victim] had a small cut to her finger.
4. During interview [Suspect] denies assaulting Ms [Victim] he states that they both suffer from mental health problems and are both alcoholics.
5. They had both been drinking that evening.
6. He also states that Ms [Victim] is not taking her medicine and becoming increasingly paranoid and aggressive.
7. He believes the relationship is over and is prepared to move back to [redacted] to dissolve the relationship.

When police arrive they witness the suspect 'standing over her'. Her only reported injury in line 2 is something she invariably 'has' and not presented as something *done* to her. It is prefaced by the report of the suspect's arrest which is causally linked to the cut finger through the connective 'as' (line 3). The juxtaposition of the clauses either side of the 'as' imply a disproportionate relationship in that a 'small' cut to the finger seems a minor reason to 'arrest' the suspect. This generates pathos for the suspect. Line 6, 'He [suspect] also states that Ms [Victim] is **not taking her medicine and becoming increasingly paranoid and aggressive**' (our emphasis), has no explicit evidential relevance to the case yet an expectation of relevance obtains to make its inclusion cohere in the context. The connective 'and' steers the receiver to interpret the 'becoming…aggressive' as causally connected to the 'not taking…medication' in order to yield an interpretation that is 'consistent with the principle of relevance' (Wilson and Sperber 1993: 7). In other words, the OIC's inclusion of seemingly unrelated information in lines 4–6 raise 'expectations of relevance' that are 'precise enough, and predictable enough, to guide the hearer towards the speaker's meaning' (Wilson and Sperber 2004: 607). The CPS receiver, then, can recognise the OIC's intention to communicate something of relevance (known in relevance theory as the 'communicative intention'). As Clark puts it, 'once an addressee has recognised that a particular act is an ostensive one, then the presumption of optimal relevance guides the addressee in interpreting that act' (2013: 113). That interpretation draws on relevant background information and the addressee can readily conclude the following (the parenthetical statements explicate the attendant

implicatures): that the victim made an unsubstantiated claim to assault (she may have been confused/drunk/erratic/paranoid) under the influence of alcohol (so her 'will' is adversely affected) during a period where she is becoming increasingly unstable (and so cannot be a credible witness) through a refusal to take medication (she is irresponsible).[4] The inclusion of the victim's 'aggressive' behaviour can then be read as a justification or explanation for the criminal behaviour of the 'real victim' (the suspect) by way of provocation (scapegoating). In the context of the arrest and pending charging decision this is potentially the most 'precise' and accessible interpretation with the greatest positive effects for the CPS, for the minimum effort, 'in a way the speaker [the OIC] could have seen' (i.e. 'predictable') (Wilson and Sperber 1993: 7). What is happening here is that the OIC has effectively blamed the victim and scapegoated her as embodying the loquacious female stereotype. Presenting her in this way invokes a 'stock story' narrative of the 'scold', a Medieval stereotype in which women were punished for 'verbal violence' (Ingram 1994; Taylor 2004; Jones 2006: 101) that included challenging established patriarchal authorities. Essentially, the term and the crime which it signified punished women simply for speaking up. The 'scold' charge (both legal and social) carried with it 'undertones of violence and uncontrolled rage' (Ingram 1994: 51). Scapegoating the victim, however, is contentious and so the proposition cannot be explicated. Therefore, it is mediated through the suspect ('he states') which allows the OIC to include the contentious information in his report without being responsible for it and by extension responsible for undermining the victim.

Shifting blame to the actual victim occurred in 9 cases in our corpus. One such case, MG3 7, is reproduced below and contains not only the MG3 report, but a signed witness account MG3 7(a) and Gatekeeper's decision MG3 7(b). This allows us to examine the transformations, additions, and omissions throughout the full discursive trajectory of the case. In this case, the charge against the suspect is 'common assault' and the victim is the suspect's wife. The first text is the victim's account written up by the OIC and signed by the victim. The victim did not want to make a full formal statement. Her account was recorded by the OIC as follows:

Witness account for MG3 7(a): Mitigating the suspect's role and eliciting pathos for the suspect

1. She said that she had gone into the male's [her husband's] bedroom to see what he was doing and he became aggressive and threw the computer equipment at her.
2. This included a keyboard which had struck the female on the top of her leg.

Although this is the victim's account it has been formulated by the OIC in the third person and so not a faithful transcription of the victim's words, but a 'transformation' of sorts (Bartlett 1932). The first notable point is the grammatical distance between the suspect's action ('threw' line 1) and the 'crime-constituting' event ('struck' line 2). The 'keyboard' in line 2 is the sole agent – it, not the suspect, strikes the victim so the suspect's agency is obscured (see Canning, under review). Moreover, the connective 'and' functions to relate 'she had gone into the…bedroom to see what he was doing' with the suspect becoming 'aggressive' and throwing the 'computer equipment'. The victim is perceived as behaving intentionally and this is 'encode[d]…more explicitly' through the circumstantial component 'to see what he was doing' (Edwards 2008: 179).

Having already formulated the witness's account, the OIC reformulates it for gist in MG3 7:

MG3 7

1. She stated her husband (the DP) [detained person] had thrown a computer keyboard at her which had struck her on the thigh causing injury.
2. He states she came up and he was perhaps a little agitated as he was tired and swung the computer around catching her on the leg.

Contrast the intentionality of the victim in MG3 7(a) with the lack of intentionality of the suspect in MG3 7. Here, again, the suspect-as-agent is obscured as the 'keyboard' does the damage (MG3 7 line 1). The 'computer equipment' in the witness's account is omitted, reduced instead to a single 'keyboard' in the OIC reformulation. The crime itself is now mitigated. Moreover, an 'excuse' that appeals to 'biological drive' (Scott and Lyman 1968) is offered for the suspect's aggression in line 2 'he was perhaps…'. The sentence-initial positioning of this information frames the assault that follows through a more pathetic lens. It is, as Scott and Lyman in their taxonomy of 'accounts' call 'a sad tale' (Scott and Lyman 1968: 52) designed to neutralise the suspect's incriminating behaviour. Additionally, the comparatively inoffensive 'agitated' is hedged with the modal marker 'perhaps' and its intensity is scaled back with 'a little'. The rationale for his 'agitat[ion]' is provided '**as** he was tired', making the causal connection explicit. This is uncontentious (people get agitated when tired) and so the inference is unproblematic. What is problematic is the assault that occurs next, which, in the OIC reformulation has been mitigated significantly: 'threw' (high-intentionality) has been substituted by 'swung' (low-intentionality), 'struck' (high-force and high-intentionality) has been reduced to 'catching' (low-force and low-intentionality) and the present continuous tense of the verb 'catching' implies an ongoing movement suggesting that the victim's leg was not the intended target, but rather, her leg interrupted the trajectory of the keyboard (indeed, he merely swung it 'around', not 'at'). All of this is framed through the grammatically foregrounded explanations which combine 'excuses' and 'justifications', which typically 'concede the presence of the basic elements but deny liability on independent grounds' (Austin 1961: 9). This is achieved in this case by appealing to biological drive (tiredness), 'scapegoating' (the victim interrupted his attempt to sleep 'to see what he was doing'), and an appeal to 'sad tales' or pathos. Together these can be read as providing 'reasonableness' (see also Edwards 2008: 183) for the suspect's behaviour, thus further mitigating the *at issue* event. The acceptance of this reasonableness depends on the receiver of the OIC's text making the causal connection between tiredness and agitation, but crucially, its success in achieving leniency through early disposal depends on the OIC knowing that the receiver will recognise the OIC's intention to communicate relevant information in supplying it.

For this particular DV case, we have access to the Gatekeeper's full comments and decision:

MG3 7(b): Gatekeeper's comments

1. In interview D/P admits that he was tired and agitated and was trying to sleep.
2. An argument develops between himself and his wife resulting in him picking up the computer and swinging it towards his wife.

3. He is suitable for diversion by way of a caution.
4. He has no previous cautions or convictions.

Interestingly, the gatekeeper defers to the suspect's interview and not the victim's account in summing up the gist of the case (line 1). This frames the narrative pathetically and garners sympathy for the suspect. The use of the verb 'admit' (1) implies cooperation and thus raises the ethos of the suspect through implicit positive appraisal. Having said that, what he is 'admit[ting]' to is not contentious. In line 2, the gatekeeper notes that 'an argument develops' which 'results' in the assault. Nowhere in the victim's account nor in the OIC's reformulation is there any mention of an 'argument' or 'arguing'. This is 'addition' (Bartlett 1932), a rather insidious 'gap-filling' exercise by the gatekeeper to provide an explicit reason for the suspect's assault. By presenting the scenario of an 'argument' the gatekeeper attributes culpability to both the suspect and victim for precipitating the assault. The gatekeeper then attributes this mutually culpable argument as directly 'resulting' in the suspect's actions. The actual victim has been recast as 'scold' and provocateur. The description of the suspect's actions is itself problematic, particularly regarding verb choice: he 'pick[s]' up the computer (non-contentious) and 'swing[s]' it 'towards his wife' (line 2). The computer (not the 'keyboard') makes no contact with the victim and the choice of 'swing' may be echoic (the OIC uses it) but it nonetheless reduces the intentionality of the act.

Lines 3-4 are where relevance comes into play. Line 3 functions as a conclusion derived from 1-2. Given that an admission is required for a simple caution to be administered, the use of 'admit' in line 1 can be interpreted as satisfying this legal criteria ('suitable', line 3) or a kind of 'point to prove' (Calligan 2000). However, as stated above, what the suspect is 'admitting' to is merely being 'tired and agitated', not the criminal offence of 'assault'. Nonetheless, line 4 provides the 'explanation' for the conclusion and justification for the caution. The explanation in line 4 alludes to what Pomerantz (1986) calls an 'extreme case formulation' where the persuasive force of a claim rests on making a case for all (e.g. 'he was away all of Sunday') or nothing (e.g. 'he never goes out on Sundays') in order to 'legitimis[e] claims' (passim), actions, or decisions. If a person does not regularly do something morally or legally damning, then including or alluding to this information can negatively influence and thus dissuade the receiver from leniency when deciding on a particular charging decision (which is why cross-examination in UK courts forbids raising past transgressions as this can negatively influence the jury). In this case, the Gatekeeper's 'no previous…' assertion directs the decision towards leniency. The CPS will make this contribution in the MG3 relevant drawing from their cognitive environment to deduce that the suspect's behaviour in this case is a one-off, or 'odd' (in Pomerantz's terms), and as such, 'may or ought to be dismissed' (Pomerantz 1986: 223). Which it was.

As can be seen in Figure 3, seven of the cases we studied constructed a 'real victim' narrative archetype by employing all three primary strategies: a) mitigating the suspect's role, b) eliciting pathos for the suspect, and c) blaming the actual victim. One such case (MG3 8) is outlined below in which it is the CPS input that employs the above strategies. The prosecutor's evaluation of the evidence is equally bleak. The case is an intra-familial assault by a stepfather (Suspect) on his stepdaughter (Victim), witnessed by his other daughter (D). The suspect denies assault in his police interview but admits to 'grabbing a hold of her'. Both women are adults and had gone to the stepfather's house

at his request so the victim could remove her property from his address. D went with her sister because both were concerned that 'something might happen'. The prompt for the victim having to remove her possessions from the family home is an alleged prior assault by her on the suspect's mother (her grandmother): that alleged assault was being dealt with separately by other officers. The evidence for suspect's assault on his step-daughter was perceived by the OIC and the Gatekeeper to be 'good' and the case against him 'strong'. The Gatekeeper concurred. The prosecutor's reformulation of the event into gist is skeptical from the start and is framed proleptically to forestall objections:

MG3 8: CPS input

1. Alleged assault on [Victim] who has been summonsed [sic] to her stepfather's home to collect her belongings, he having heard she has assaulted his mother'.

The opening words 'Alleged assault' immediately crank the inference-making machine into action by questioning the veracity of the stepfather's assault on his stepdaughter. There is no such modality in the prosecutor's closing observation 'she [victim] has assaulted his mother' (our emphasis). This latter 'assault' is alleged and unproven, yet is presented here as a 'categorical commitment' (Fairclough 2001: 107) to the epistemic truth of the proposition. However, it hints at an 'explanation' that mitigates the suspect's *at issue* behaviour. The use of 'summonsed' to describe why the victim and her sister have gone to the stepfather's house invokes parental authority and by extension a not uncommon family scenario or 'unhappy incident' (Pomerantz 1978): naughty child (or step-child in this instance) is chastised for striking grandmother, child dislikes being chastised and retaliates. Unlike most other MG3 accounts, this domestic assault is not treated as a discrete, episodic event but presented instead as a series of alleged events that are connected or made relevant by the CPS. The victim, like many other women in domestic violence cases, has her status as the 'real victim' questioned. By retelling the *at issue* event in this way, the accusations against the suspect are more easily undermined.

The prosecutors opening gist is followed up by a stark assessment of the 'Evidential Criteria':

MG3 8: CPS input continued

2. Not met.
3. This is an acrimonious split between [Victim's] mother and Mr. [Suspect].

Victim herself is facing investigation for using violence on Mr. [Suspect's] mother resulting in quite serious injuries.

4. D does not see the beginning of the incident.
5. In light of his previous lack of previous, her alleged violent behaviour, there is no prospect of conviction.

Line 3 purports to offer grounds as to why the case fails the 'evidential test' and invokes a 'stock narrative' of 'marriage breakdown' and 'parental loyalty' as grounds for explaining away the suspect's actions. In line 3 the *at issue* event is collapsed via nominalisation (Fairclough 2001) as an 'acrimonious split' (recall that this process also characterises the 'argument' in the Gatekeeper's input to MG3 7) and introduces a further participant (the victim's mother) who is effectively extraneous to the assault case. The only mention of the victim is in line 4 where she is introduced as 'violen[t]' having caused 'quite serious'

injuries to the suspect's mother. The evaluative adverb and adjective 'quite serious' amplifies the victim's negative behaviours by bringing in an unrelated and unproven case against the victim. Line 5 dismisses the evidential value of the witness. Line 6 functions as a conclusion and the relevance of the previous sentences ties cohesively to this conclusion. Therefore, the CPS input fulfils all three strategies for recasting the suspect as the 'real victim': the prosecutor mitigates the suspect's culpability for the assault by dismissing the witness and providing 'grounds' for the suspect's behaviour; the victim is blamed by her foregrounded alleged and unproven (anterior) assault on the suspect's mother. This *ad hominem* argument is fallacious, but nonetheless simultaneously undermines the victim's complaint. Finally, the prosecutor elicits pathos for the suspect by invoking the familial 'assault' against the suspect's mother. None of this amounts to 'evidential criteria'; in fact, the only evidential issue referred to is that 'D does not see the beginning of the incident'.[5]

Conclusion

Our analysis has shown that an awareness of Voloshinov's 'extraverbal situation' (1987), essentially the discursive context in which the discourse or text is created, is essential in understanding how and why meanings are made in discursive interactions between witnesses, suspects, police, and prosecutors. Linguistic (both semantic and pragmatic) choices are rarely random and police officers, perhaps more so than other conversationalists, are aware of how accountable they are for what they do or do not say. While we do not assert 'intent' on the part of the OIC in our analysis (language is not a 'telementational' process (Harris 1981) or a method of 'psychological divining' (Ryle 2000)), we do argue for a degree of conscious awareness on the part of the police that what is 'deemed ostensibly mere "description" of actions and events can be constructed to gen-erate specific implications. . . concerning blame' (Edwards and Potter 1992: 51). These implications can be understood by recourse to relevance.

In summarizing the input of the OIC into the MG3 process, it is clear that reformulating and distilling events, witness statements, and suspects' accounts to gist results in a considerable amount of evidential detail being glossed, excluded, or reworked. The palpable drama and fear present in many of the witness statements is lost in the OIC's version of events. Particularly in cases involving assault or damage the frenetic and almost synchronous evolution of the action and behaviour in question (which is often well-captured in witness statements) is, in the MG3, reduced to a series of short, discrete, and clinically measured episodes. The overall effect is to minimize and sanitize the at issue event. Our analysis has explicated institutional ideologies about who is to blame in cases of domestic violence. It is our contention – and our deep concern – that what has been presented in these MG3 reports ultimately steers decision-makers to a particular outcome – one that is manifestly lenient towards abusive males, principally by shifting the blame away from the suspect and/or undermining the female victim. We are equally concerned that such strategies may also characterise the discursive handling of crimes of rape and sexual violence (see Haworth 2017; MacLeod 2020).

In weighing the seriousness of a criminal offence decision-makers and advocates always allude to the 'reasonableness' of an act in the specific circumstances, an important concept in the adversarial legal system. For instance, when considering violent acts, an unprovoked assault or battery becomes less 'reasonable' than one that has been provoked in some way. Our analysis has shown that reasonableness is consistently offered

with low levels of explicitness (more inferential than ostensive) in OIC, gatekeeper, and CPS contributions, and that these often implicit appeals to reasonableness become the argument upon which a more lenient decision is primed (see also Sudnow 1965). We have also shown that officers use both footing and appeals to relevance to mitigate their accountability for contentious propositions (i.e. that female victims are culpable (e.g. MG3 2, 3, and 4), that male suspects are not 'particularly' culpable (e.g. MG3 2) and that ultimately, 'not everything that is linguistically communicated is linguistically encoded' (Wilson and Sperber 1993: 6).

Finally, the judicial process itself makes the progression to court challenging in cases where the 'complainant' (in DV cases) does not support the prosecution (see Cretney *et al.* 1994). Unfortunately, alternatives to Charge or Simple Caution in domestic abuse cases are limited. Penalty notices (PNDs) are not appropriate and Conditional Cautions, which do offer a potentially fruitful alternative, were at the time these MG3s were written, not an option in domestic violence cases. Presently, the Conditional Caution still remains a restricted alternative for DV crimes. It is hardly surprising then, given the particular challenges domestic abuse crimes pose for police and prosecutors, that the Simple Caution and other out-of-court disposals retain their allure as key methods of 'resolution'. Indeed, concluding our analysis we cannot escape the feeling that rather than being an alternative to prosecution many police officers and Gatekeepers appear to regard them as the default-option.

Notes

[1]A Ministry of Justice review of 'simple cautions' was conducted in 2013 and replaced its predecessor (Home Office 2008). At the time of the 2013 review, the simple cautions required that 'the offender must admit guilt' (Ministry of Justice 2013: 10). At the time of the data collection, the Home Office guidelines required the OIC to ask 'Has the suspect made a clear and reliable admission of the offence either verbally or in writing?' (Home Office 2008: 1) in order to satisfy the criteria for administering a simple caution. The current guidelines (issued in 2015) define a simple caution as 'a formal warning that may be given by the police to persons aged 18 or over who admit to committing an offence ("offenders"). The Simple Caution scheme is designed to provide a means of dealing with low-level, mainly first-time, offending without a prosecution (2015: 4). Admission, therefore, has consistently been a precondition for simple cautions.

[2]Of course, there may well be another intention in positioning the empty glass in front of the host – perhaps the guest is signalling that they are leaving. In this case 'other things being equal' (Wilson and Sperber 2004: 609), deducing the correct understanding of the stimulus requires a little more processing time to bypass the most likely. This latter scenario requires the host to carry on with the comprehension process beyond the point by which 'expectations of relevance are satisfied' (613) in order to interpret the stimulus as maximally relevant.

[3]We use 'intention' here and throughout to refer to the 'key idea' in relevance theory that 'the communicator has an interpretation in mind which justifies the expenditure of effort involved in arriving at it, i.e. which provides enough cognitive rewards for it to be worth expending the mental effort involved in reaching it' (Clark 2013: 7).

[4]Note, however, that the suspect who has also been reportedly drinking (line 5) has his account accepted uncritically.

[5]A second statement taken from D in an effort to rebut this apparent evidential weakness revealed that she was 'sorting out articles in a drawer in the mantelpiece. Out of the corner of my eye I saw [Suspect] move quickly towards [Victim] and grab hold of one of her arms …'. Interestingly, The No Further Action (NFA) recommendation made by the prosecutor in this case was challenged by the OIC and the Gatekeeper and was escalated via a Detective Inspector to be reassessed by the CPS. The Detective Inspector's thorough reading of the case file showed not only the contextual and evidential value of a comprehensive witness statement, they also confirm as a proof procedure that all the statements and

paperwork in the file had not actually been read. The Detective Inspector points out to the CPS that the suspect does have previous convictions, albeit from some time ago, one of which was for assault.

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Feigned incompetence: The pitfalls of evaluating *Miranda* comprehension in non-native speakers of English

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Abstract. *In 1966 the US Supreme Court ruled that custodial suspects should be advised of their rights, including the right to silence and the right to an attorney, before questioning begins. If they waive their rights and the defense can prove that they did not do so voluntarily, knowingly, and intelligently, their confession may be excluded from the evidence. Judges consider many factors in their decisions on motions to suppress, including expert testimony. In this paper, I discuss a case where two experts evaluated language proficiency of the same suspect and arrived at radically different conclusions regarding her ability to understand the warnings. I will show why one assessment was superior to the other, but the true significance of the case is in showing that a dialogic approach to delivery of the rights can reduce linguistic guesswork and help safeguard the integrity of the investigation and due process.*

Keywords: *Miranda warnings, non-native speakers of English, evaluation of Miranda comprehension, feigned proficiency, intentional underperformance.*

Resumo. *Em 1966, o Supremo Tribunal dos EUA decretou que os suspeitos sob custódia tinham de ser aconselhados sobre os seus direitos, incluindo o direito ao silêncio e a um advogado, antes de iniciar o interrogatório. Se eles dispensarem os seus direitos e a defesa conseguir provar que essa dispensa não foi voluntária, consciente e feita de forma inteligível, a sua confissão pode ser excluída como prova. Na sua decisão para excluir a prova, os juízes ponderam diversos fatores, incluindo o testemunho pericial. Neste artigo, discuto um caso no qual dois peritos avaliaram a competência linguística da mesma suspeita e chegaram a conclusões radicalmente opostas relativamente à sua capacidade de compreender as advertências. Como revelo, uma das avaliações apresenta uma qualidade superior à outra, mas a verdadeira relevância do caso reside na sua capacidade de mostrar que uma abordagem dialógica na garantia dos direitos permite reduzir as conjeturas linguísticas e ajudar a salvaguardar a integridade da investigação e processual.*

Palavras-chave: *Advertências de Miranda, falantes não-nativos de inglês, avaliação da compreensibilidade da Miranda, competência simulada, fraco desempenho intencional.*

Introduction

In March 2016, Joseph and Iryn Meyers of Steuben County, NY, were charged with murder, arson, conspiracy and insurance fraud.[1] Following their arrest, Joseph invoked his right to silence. His wife Iryn, a 37-year old native of the Philippines, talked to the police in the presence of her public defense attorney but without an interpreter. Seven months later, a new defense attorney hired a consultant to test Iryn Meyers' English and filed a motion to suppress her self-incriminating statements due to insufficient language skills. The DA office retained their own language expert and in February 2017 the two experts faced each other in open court.

The matter at the heart of the pretrial hearing was the constitutional privilege against self-incrimination, the Fifth Amendment. In 1966, the US Supreme Court ruled that suspects in custody should be advised of their rights, including the right to silence and the right to an attorney, before questioning begins. Once informed, they can relinquish their rights, "provided the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 1966: 444), that is "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran v. Burbine*, 1986: 421). If the prosecution fails to establish that the defendant waived their rights voluntarily, knowingly, and intelligently, their self-incriminating statements will be suppressed. The hearing, therefore, had two related aims: (a) to determine whether Iryn Meyers had sufficient English skills to understand the rights delivered during custodial interrogation; (b) to decide whether she needed an interpreter to participate in the court proceedings. The latter task seemed straightforward, but how could the court decide on Iryn's comprehension during the interviews that took place nearly a year ago?

Evaluation of *Miranda* comprehension in non-native speakers of English

In one of the most linguistically sophisticated opinions on the issue, Judge Jerome Tao of the Nevada Court of Appeals acknowledged that:

> Questions relating to the admissibility of a confession rendered by a non-native English speaker during a custodial police interrogation are ones that the courts of this state are encountering with increasing frequency. During a single shift, a police officer in Nevada may encounter a variety of different languages and dialects, and court-certified interpreters may not always be readily available to assist the officer whenever an interrogation is necessary. At the same time, there appears to be a dearth of published precedent from the Nevada Supreme Court to guide trial courts and police officers in handling such interrogations (*Gonzales v. State*, 2015).

The challenges are not unique to Nevada. The *Miranda* decision offered no guidance on how to secure understanding of rights by people like Ernesto Miranda, 'an indigent Mexican' with limited English skills. Half a century later, delivery of the warnings to people who speak limited English is still a challenge for law enforcement, and the failure to understand the rights is commonly raised in pretrial hearings and post-conviction appeals. To decide whether a speaker of English as a second language (L2) waived his or her *Miranda* rights knowingly (i.e. with an understanding of the nature of the right),

intelligently (i.e. with a full awareness of the consequences of the decision to abandon it) and voluntarily (i.e. as a product of a free choice), judges examine the totality of the circumstances.

The starting point is usually the six-prong test outlined by the Ninth Circuit court in the *United States v. Garibay* (1998) which considers the following: (1) whether the defendant signed a written waiver; (2) whether the defendant was advised of the rights in his or her native tongue; (3) whether the defendant appeared to understand their rights; (4) whether the defendant was assisted by an interpreter; (5) whether the rights were explained individually and repeatedly; and (6) whether the defendant had prior experience with the criminal justice system. Yet "questions relating to the admissibility of confessions by non-native English speakers are far too complex and fact-specific to pigeonhole into any single legal test, even one with six elements," argues Judge Tao (*Gonzales v. State*, 2015). To make an informed decision, judges scrutinize recordings of custodial interrogations, which are becoming fairly commonplace in the USA (between 2003 and 2017, the number of states that mandate recording of custodial interrogations increased from 2 to 25, while other states implemented statewide recording without a legal requirement, cf. Bang *et al.* 2018). Courts also consider the defendant's age, mental health, intelligence, education, literacy, length of residence and employment history in the United States, and the testimony of police officers regarding their communication with the defendant.

To support their arguments, prosecution and defense may add the testimony of friends, work colleagues and expert witnesses. The most common experts in language hearings are court-certified interpreters familiar with the defendant's native language and law enforcement practices in their country of origin. If the defendant is a juvenile or a person with developmental disabilities, cognitive deficits, or mental health problems, the parties may bring in psychologists. Psychologists have long argued that members of vulnerable populations may sign documents whose content and consequences they do not understand out of fear, deference to authority, compliance, or mistaken belief that silence equals guilt (Goldstein and Goldstein 2010; Leo 2008; Winningham *et al.* 2018). To evaluate *Miranda* competency of vulnerable persons, they may use the *Miranda Rights Comprehension Instruments* (MRCI), developed by Grisso (1998) and revised by Goldstein and associates (2012), or assessment tools and procedures developed by Rogers and associates (Rogers and Drogin 2019). Unfortunately, the usefulness of these assessments with L2 speakers is limited because they are normed with native, i.e. first language (L1), speakers of English and presuppose a certain level of English ability.

The evaluation of non-native English speakers is usually carried out by linguists familiar with assessment of *L2 proficiency*, a concept that encompasses an overall level of ability and ability to use speaking or listening skills in different tasks (Ellis 2008). To evaluate these abilities, linguists have a choice of standardized tests, such as TOEFL/iBT, IELTS, and CaMLA, and global assessment instruments, such as the SPEAK test and the Oral Proficiency Interview of the American Council on the Teaching of Foreign Languages (ACTFL) (2012). The assessment follows standard steps: (a) elicitation of adequate language samples (test answers, essays, oral interviews); (b) analysis of the samples according to established standards and rubrics, and (c) evaluation of the results with the focus on functional abilities and inferences about past performance (Eggington and Cox 2013; English 2021).

The accuracy of the expert's conclusions depends on: (a) the adequacy of the sample; (b) the validity and reliability of the instrument; (c) a match between the instrument and the purpose of assessment. Unfortunately, in the case of *Miranda* comprehension, there is no match. Unlike the MRCI that assess *Miranda* comprehension directly, L2 proficiency assessments were created for different purposes and the mismatch compromises both validity and reliability of the assessment.

Validity is undermined by the inferential nature of the process and the fact that there are no empirical studies linking *Miranda* comprehension to specific levels of L2 proficiency. In the only empirical study to date, Pavlenko and associates (2019) asked L1 (n=41) and advanced L2 (n=59) speakers of English, all of them university students, to listen to and paraphrase fairly standard warnings. The findings revealed that the right to an attorney was correctly paraphrased by 100% of L1 speakers and only 51% of L2 speakers. The other rights were more challenging, as seen in the paraphrases of the free access to an attorney (98% correct vs. 7% correct), the right to silence (95% vs 24%), the right to have an attorney present during questioning (88% vs. 10%) and the right to exercise these rights at any time (98% vs. 20%). More disconcertingly, some advanced L2 speakers constructed alternative interpretations (e.g., 'the right to have a lawyer present' was interpreted as 'the right to have a lawyer in prison') and still rated themselves high on comprehension. These findings remind us that listening comprehension is not just a bottom-up process of matching sound to meaning – it is also a top-down process, in which L2 learners make inferences, using their background knowledge (Ellis 2008). They also show that speakers with low L2 proficiency are unlikely to understand their rights unassisted, and that even advanced L2 proficiency does not guarantee comprehension of the *Miranda* warnings.

The fact that the purpose of L2 proficiency assessments is to infer past performance also compromises reliability. The first threat to reliability is the time gap between the time of the interrogation and the time of assessment, conducted months and sometimes years after the fact. The reason is simple: protracted stay in English-speaking correctional facilities may improve L2 speakers' skills and by the time of the evaluation, their proficiency and mastery of legal terminology may be higher than at the time they first heard their rights.

The second threat to reliability is intentional underperformance. Standard proficiency assessment is based on the assumption that test-takers are committed to doing their best. This assumption is commonly borne out in immigration, workplace and citizenship testing but in *Miranda*-related assessments it does not hold: if the defendant is deemed to have sufficient proficiency to understand their rights, their self-incriminating statements may be used against them in court. As a consequence, some may downplay their English skills or pretend they don't speak English at all (English 2021). What this means is that forensic linguists, similar to mental health experts, should always consider the possibility of underperformance.

To increase validity and reliability of forensic assessment, English (2021) recommends using two sets of language samples: (a) data from in-person assessment and (b) recordings and/or transcripts of police interviews (for published analyses of police interviews as L2 proficiency data, see Dumas 2020; Pavlenko 2008). The case of Iryn Meyers, where two linguists examined her English proficiency using different methods and then

testified in open court, offers a useful comparison of the pros and cons of different approaches.

Assessment of Iryn Meyers' English proficiency by Expert A

Expert A, hired by the defense attorney to evaluate Iryn Meyers' English skills, had extensive experience in foreign language proficiency assessment in the USA and abroad but no prior experience with *Miranda*-related assessments. To evaluate Mrs. Meyers' proficiency, Expert A chose the Interagency Language Roundtable (ILR) scale, used by the federal government for grading language proficiency of Foreign Service agents.[2] The ILR scale is divided into six levels, from Level 0 No Proficiency to Level 5 Functionally Native Proficiency. In the opinion of Expert A, to follow court proceedings, Mrs. Meyers needed ILR Level 3 General Professional Proficiency, which encompassed the following skills:

> (a) the ability to speak the language with sufficient structural accuracy and vocabulary to participate in most conversations on practical, social and professional topics;
> (b) the ability to discuss particular interests and special fields of competence;
> (c) the ability to understand the essentials of all speech, including technical discussions within a special field.

The assessment was conducted by Expert A in jail and described in the report entitled "Language Assessment for Mrs. Meyers." To determine whether Iryn Meyers could understand basic queries and use basic tenses, such as Simple Past and Past Progressive, Expert A began his evaluation with small talk about her background. To assess her familiarity with Present, Present Progressive, Simple Past and Past Perfect tense, he asked 12 prepared questions about her native Philippines. To evaluate her vocabulary and fluency, he asked her to describe 9 photographs, ranging from landscapes and cityscapes of the Philippines to the country's president, an approach consistent with methods typically used in face-to-face assessment (Dumas 2020; English 2021).

Iryn Meyers did not respond to most questions, such as how long she had been incarcerated, how many languages there were in the Philippines, or if there were any places she would recommend to a prospective visitor. She also failed to identify the map of the Philippines and did not name its capital or her hometown. An inquiry about local food elicited minimal replies: *rice, fish.* Asked about the weather and the rainy season, she nodded and moved her thumb and index finger together. When Expert A asked *a little?* she echoed *a little.* Asked about her best friend, she responded *Say it again.* Expert A then rephrased the question: *Did you play with anyone growing up in the Philippines?* Her response was: *You mean go to work?* Asked whether a picture of a church represented an office building, she replied *Yes, office.* Shown the picture of the president of the Philippines, she did not respond. Asked whether it was her brother, she said *yes.* Asked to name letters, she used C for S and failed to name O.

These responses led Expert A to conclude that Iryn Meyers could understand infinitives and follow simple imperatives, such as *sit* or *give*, but did not understand complex sentences or Past and Future tenses. Her speaking skills, in his view, were limited to minimal replies in Simple Present, albeit in "good American accent." Her inability to name all letters, to recognize the map and the president of the Philippines and to name

the country's capital, led Expert A to surmise that Mrs. Meyers had limited deductive reasoning and little formal education.

To complete his assessment, Expert A interviewed the correctional facility officer present at the evaluation. The officer opined that Mrs. Meyers was usually more "talkative" and mentioned the fact that she wrote and received letters from her American husband. Asked to show her mail, she returned with two letters: one in her native language and one in English. Perusing the English letter, Expert A noticed complex constructions, such as *voluntary statements freely given.* He then asked if she wrote this letter. She said that the letter was written by her cellmate: *Neely write.* Based on the complexity of the language, Expert A concluded that the letter "would have been impossible for Mrs. Meyers to have written" (Report by Expert A, 11/7/2016). The report ended with the following conclusion:

> Mrs. Meyers is a 0+ language learner: It is my professional opinion that Mrs. Meyers is neither able to comprehend legal jargon nor able to express her opinions and desires beyond the most basic of terms. Mrs. Meyers is well below the ILR3 required to understand the proceedings. She will require an interpreter. (Report by Expert A, 11/7/2016).

The corollary of this conclusion was the defense argument that Iryn Meyers, a native speaker of Cebuano, did not have sufficient English proficiency to understand the *Miranda* warnings and to waive her right to silence knowingly and intelligently.

Assessment of Iryn Meyers' English proficiency by Expert B

Expert B, retained by the DA's office, also had extensive experience with proficiency assessment: as Director of the International Teaching Assistant (ITA) program at her university, she supervised administration of SPEAK tests and the training of test raters. More pertinently, she conducted research on comprehension of *Miranda* warnings by non-native speakers of English, taught a forensic linguistics course and carried out previous assessments of *Miranda*-related proficiency. After reviewing the findings of Expert A, Expert B asked the DA's office to ask Iryn Meyers to fill out a Language Learning Questionnaire on her own, without the time pressures of an in-person interview. Once again, Mrs. Meyers provided minimal answers, e.g.:

> Question 2. What languages did you use in your childhood, before you went to school? What did you speak at home?
> Written answer: *Im not home Im in Bath jail, I am Pilipino.*
>
> Question 4. What languages did you use with your friends outside of school?
> Written answer: *Mama, Papa, sisters, brothers, kids.*
>
> Question 8. Do you regularly speak any other languages besides English and if so, when and with whom?
> Written answer: *What do you mean*

These answers were consistent with the findings of Expert A but inconsistent with the totality of the circumstances: Iryn Meyers attended college in the Philippines, met her future husband on-line, corresponded with him in English via e-mail, had lived in the US for nearly a decade, worked as a nursing aide, passed a civil service test in English and conversed without an interpreter with her husband, friends, work colleagues, defense attorneys, insurance agents and police investigators. Treating her underperformance as

intentional, Expert B decided to forego in-person assessment. To evaluate Iryn Meyers' proficiency at the time of the interrogation, she applied a previously developed methodology (Pavlenko 2008) to the following data set:

(a) Steuben County *Miranda* warnings form;
(b) two audio-recorded police interviews of Iryn Meyers, conducted on March 21 and March 30, 2016, and one video-recorded interview preceding a polygraph test conducted on April 5, 2016 (a total of 15 hrs), complete with transcripts;
(c) an audio-recorded interview with an insurance investigator on March 4, 2016 (3 hrs), complete with a transcript;
(d) Iryn Meyers' answers on the written civil service test taken on February 6, 2015.

This data set has several advantages over language samples obtained through face-to-face assessments, the greatest of which is the match between the purpose of assessment and performance context, i.e. police interviews. The validity and reliability of the assessment are further enhanced by (a) a much greater amount of language evidence (18 hrs vs. 10-30 minutes); (b) the diversity of the settings (insurance interview, police interview, polygraph test, civil service test); (c) the presence of several interlocutors, some of them unfamiliar to Iryn Meyers; and (d) a variety of topics and tasks, which included argumentation, narration, direction-giving, map reading and following written instructions.

Analysis of the Steuben County *Miranda* warnings form

To establish proper benchmarks, Expert B began with an analysis of the linguistic complexity of the warnings. The Steuben County *Miranda* warnings form reads as follows:

> I have the right to remain silent, and I do not have to make any statement if I don't want to.
>
> If I give up that right, anything I do say can and will be used against me in a court of law.
>
> I have the right to have a lawyer present before making any statement or at any time during this statement.
>
> If I should decide I do want a lawyer and I cannot afford to hire one, a lawyer will be appointed for me free of charge and I may have that lawyer present before making any statement.
>
> I also understand that I have the right to stop at any time during this statement and remain silent and have a lawyer present.
>
> I fully understand these rights, and at this time I agree to give up my rights and make the following statement.

The Flesch-Kincaid readability formula assesses these warnings as 67.3 Plain English on the scale from 0 Professional to 100 Very easy to read, and their grade level as 9.8.[3] This is not surprising, in light of the fact that these six sentences contain 145 words and 35 clauses. Each sentence has an independent clause, such as *I have the right*, or *I fully understand*, and at least four embedded clauses, among them conditional clauses (e.g., *if I give up that right*), infinitive clauses (e.g., *to remain silent*), a subjunctive clause (*If I should decide*), prepositional phrases (e.g., *before making any statement*), and clauses introduced

by *and* (e.g., *and I do not have*) and that (e.g., *that I have the right*). To understand them, the listener/reader needs to get to the last clause while keeping in mind the preceding ones. The deepest level of embedding, nine layers, is observed in sentence four:

If I should decide
I do want a lawyer
and I cannot afford
to hire one,
a lawyer will be appointed
for me
free of charge
and I may have that lawyer present
before making any statement.

The understanding is further complicated by passives (e.g., *a lawyer will be appointed*), impersonal constructions (e.g., *anything I do say*), and low-frequency terms, such as *afford*. The length and complexity are challenging for all but are particularly detrimental for reading and listening comprehension of L2 English speakers (Pavlenko *et al.* 2019). On the positive side, comprehension is facilitated through (a) the visual arrangement of the written form, where individual statements are separated by spaces (in custodial interrogation, literate suspects are often given the text to follow while it is read by the officer and Iryn Meyers was asked to read and sign the written waiver); (b) replacement of the second-person pronoun you, common in *Miranda* warnings, with the first person *I*, which makes the warnings more immediate and relevant; (c) replacement of *attorney* with the higher-frequency term *lawyer*, and, most notably and commendably, (d) substitution of the abstruse collocation *waive rights* with a straightforward sentence *At this time I agree to give up my rights*.

To understand these warnings presented orally and in writing, an L2 speaker of English requires at least an Intermediate High level of proficiency (American Council on the Teaching of Foreign Languages (ACTFL) 2012). If the warnings are presented only orally, newcomers unaccustomed to spoken English and unfamiliar with the criminal justice system may fail to understand them even if their overall L2 proficiency is evaluated as advanced (Pavlenko *et al.* 2019). At the same time, proficiency is not an immutable entity that determines understanding. Comprehension is a joint discursive accomplishment, whereby investigators may complicate understanding by reciting the rights too quickly and/or trivializing them (e.g., Pavlenko 2008) or facilitate it by presenting the rights orally and in writing and by scaffolding understanding with comprehension checks, repetition, reformulation, explanation, and elaboration (e.g., Dumas 2020).

Analysis of Iryn Meyers' English proficiency at the time of the interviews

The aim of the analysis was to match Mrs. Meyers' performance with the rubrics of a global assessment instrument, the *ACTFL Proficiency Guidelines*, developed in the 1980s, in response to dissatisfaction with the ILR scale. A federally-funded project, the guidelines have undergone four decades of extensive testing, elaboration and revision, and are widely used in federal programs, such as Peace Corps, and foreign language education.[4] The latest version, the *ACTFL Proficiency Guidelines* (2012), distinguishes between five levels of proficiency – Novice, Intermediate, Advanced, Superior and Distinguished –

with the first three subdivided into Low, Mid and Advanced. To find a match, Expert B listened to the recordings several times, making partial transcripts and taking notes, with the focus on linguistic issues pertinent to comprehension of *Miranda* warnings and participation in court proceedings:

(a) **functional ability**, i.e. ability to effectively perform communicative tasks crucial for participation in court proceedings, such as narration, description and argumentation;
(b) **syntactic complexity**, i.e. complexity of the grammar produced and understood by Iryn Meyers, with particular attention to tense and aspect, embedded clauses, and passive and impersonal constructions, common in court proceedings and the waiver form;
(c) **lexical diversity**, i.e. diversity of the vocabulary produced (active) and understood (receptive) by Iryn Meyers, with particular attention to clarification requests and ability to infer meanings and to appropriate legal terms and use them in contextually appropriate ways;
(a) **fluency**, i.e. ability to produce uninterrupted fluid speech at a reasonable pace; and disfluency, i.e. instances of miscommunication, requests for linguistic assistance, extended silences and monosyllabic replies to questions requiring extended answers, all of which may be indicative of insufficient language proficiency and the lack of comprehension;
(b) **conversational strategies**, i.e. ability to take active part in the conversation, evident in clarification requests, comprehension checks, circumlocution, and other strategies used to manage conversations, signal confusion and clarify misunderstandings;
(c) **listening comprehension**, i.e. ability to follow conversation at a normal speech rate, comprehend facts presented in oral discourse, make inferences, and to reuse, appropriately, words and phrases used by the interlocutors;
(d) **reading**, i.e. ability to follow written instructions, understand narrative and descriptive texts and respond to questions.

Then, Expert B matched her linguistic findings to the ACTFL rubrics until she found the most conservative match in each case (in a choice between Low and Mid-Intermediate, for instance, a conservative assessment favors Low Intermediate proficiency).

Iryn Meyers' speaking proficiency

To evaluate speaking proficiency, crucial for participation in court proceedings, Expert B assessed Iryn Meyers' performance on five rubrics, starting with Rubric 1 Functional ability. Recorded interviews showed that Mrs. Meyers communicated in a clear participatory manner and offered coherent and vivid narratives of her life in the Philippines and her struggles upon arrival in the USA, detailed descriptions of the trips made to the house of the victim and clear rationales for her life choices, such as changing jobs. Communicative tasks she performed included argumentation, narration, description, direction-giving and reading of maps and plans. As seen in Table 1, she had sufficient linguistic resources to express assumptions, certainty, concern, opinions, sarcasm and hypotheses involving other people's actions and states of mind.

	Examples from the interviews on 3/4/16, 3/21/16, 3/30/16, 4/5/16
Communicative tasks	
Argumentation	I didn't see him lighting the torch so I cannot really assume that he put the thing on fire, do you know what I mean?
Description	He is standing in front of the sink… You see the maple tree, right? The sink is facing in the same direction
Narration	When we got the vehicle, so we park his, he park his truck in the house, in Joe's house, and then he went in my car because he said: "Let's go to David's house",,, and then we get to David's house… he said to me "Go get your stuff!"
Expressive functions	
Assumption	so I am assuming he light the house on fire but I didn't see it
Certainty	I am pretty sure that he did it… I am confident that he did it
Concern	I was worried about [him] hurting me
Opinion	Why do you go, in my own personal opinion, why do you go to someone's house with a torch in your hand? What is your plan?
Sarcasm	My underwear just walked into your drawer then?
State of mind	But I cannot imagine that you guys didn't see the video

Table 1. Iryn Meyers' functional abilities.

This performance was evaluated as consistent with the Mid-Advanced speaking level:

> Speakers at the Advanced Mid-sublevel are able to handle with ease and confidence a large number of communicative tasks. They participate actively in most informal and some formal exchanges on a variety of concrete topics relating to work, school, home, and leisure activities, as well as topics relating to events of current, public, and personal interest or individual relevance. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 6)

In terms of syntactic complexity, Mrs. Meyers displayed mastery of all major time frames necessary for coherent narration and description. Her understanding of the nuances of tense and aspect is evident in such restatements as *I am trying…I am not trying, I did try my best, I tried my best…* (Interview 21 March 2016, 54:54) and *I would love to cooperate, I've been cooperating.* (Interview 21 March 2016, 1:50:20). As seen in Table 2, her narratives displayed skillful uses of prepositions, coordination, subordination, direct and indirect speech, passives and imperatives, and her arguments show mastery of conditionals, hypotheticals, impersonal constructions, negation, rhetorical questions, inversion and modality, including verbs that serve to express possibility, probability, necessity, permission and obligation. At times, she omitted verbal inflection (e.g., *pick up* instead of *picked up*) and substituted irregular past tense with present tense (e.g., *light* instead of *lit*). This pattern of residual errors, known as *fossilization*, is common in L2 speakers and is not a direct marker of proficiency (cf. Ellis 2008; Han 2004).

	Examples from the interviews on 3/4/16, 3/21/16, 3/30/16, 4/5/16
Tense and aspect	
Simple Present	My husband has big dreams, that's all I know
Present Progressive	I am trying to think I am just guessing, he is standing at the sink No, no, no, I am lying
Present Perfect	It's been in my car for a month I've been married to the fucking bastard for ten years
Present Perfect Progressive	I've been thinking about it I've been cooperating […] has been stealing money from him I've been telling the truth
Simple Past	*Regular verbs*: asked, carried, charged, closed, co-signed, deducted, denied, dislodged, followed, hopped, looked, occupied, opened, parked, surrendered, stopped, texted, tried, unloaded, walked *Irregular verbs*: ate, bought, came, drove, got, had, left, said, saw, told, took, was, went, woke up
Past Progressive	I was driving; I was staying; I was waiting; we were hoping *Past plans*: He was just gonna pocket the money
Habitual past	I used to work at the school as a janitor
Future with auxiliary verbs 'will' and 'going to'	This is the third statement I am gonna make, I'll lay down my cards I am gonna miss my lunch again! I am gonna burn this house down We are gonna be in deep shit
Future Progressive	I'll be staying at Joe's house
Syntactic structures	
Conditionals and hypotheticals	If you burn the house down, where are you gonna live? If I pass the polygraph, can you make me a good deal? If he cannot get up, if he can't escape, then he is gonna burn When I get out of jail, will I be able to work or am I gonna be a welfare recipient?
Embedded clauses	I was hoping and praying that he would burn the house down so that I could renovate the house. I don't want his lawyer to know that I am giving a statement.
Indirect speech	So I said I'll be staying at Joe's house for probably um five days
Inversion	I said: "Holy shit, what did I get myself into?"
Impersonal constructions	Whoever you talked to, they are lying
Modal constructions	I would love to cooperate Joe said we should burn down David's house
Negation	I've never used it before I am not protecting him, I am not protecting me either
Passive constructions	He was hospitalized
Rhetorical questions	How in the hell did I carry a torch?

Table 2. Iryn Meyers' mastery of English syntax and tense and aspect system.

On Rubric 2, Syntactic complexity, this performance was evaluated as Mid-Advanced:

> Advanced Mid speakers demonstrate the ability to narrate and describe in the major time frames of past, present, and future by providing a full account, with good control of aspect. Narration and description tend to be combined and interwoven to relate relevant and supporting facts in connected, paragraph-length discourse. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 6)

Vocabulary-wise, Iryn Meyers favored high-frequency generic terms but a close analysis of the recordings revealed that she had an impressive active lexicon, which included low-frequency words and financial and legal terms used in contextually appropriate ways.

	Examples from the interviews on 3/4/16, 3/21/16, 3/30/16, 4/5/16
Phrasal verbs	burn down, clean up, cover up, get in, get out, get up, hook up, kick in, pick up, pay off, roll up, roll down, screw up, turn around, wake up, walk in *Example of use in context*: Because we were gonna cover up
Low-frequency verbs	accomplish, blame, charge, confront, co-sign, cooperate, deduct, deny, dislodge, interrupt, hoard, occupy, pinpoint, pound, quote, renovate, smash, snuggle, surrender, steal, transfer, unload *Example of use in context*: But how can you pinpoint that he did it?
Low-frequency adjectives and adverbs	blurry, confident, confused, cooperative, doubtful, filthy, flammable, foggy, intimidating, isolated, livable, mentally challenged, odd, trashed *Example of use in context*: I am a battered wife.
Financial terms	assessment, bank account, beneficiary, bill, charge, check, claim, collateral, contract, co-sign, credit card, deductible, deny, donate, down payment, estate, financially, homeowner's policy, life insurance, loan, mortgage, paycheck, prepaid, property, purchase, renter's policy, taxes, welfare *Example of use in context*: They don't have a renter's policy but they have a homeowner's policy.
Legal terms	adultery, alibi, argument, arson, assault, attack, attorney, bail, birth certificate, bruise, charge, contract, cooperate, evidence, felony, fraud, green card, healthcare proxy, incident, jury, lie detector, misdemeanor, polygraph, probation, proper burial, recipient, represent, search warrant, statement, surrender, trespassing, trial, vehicle, witness *Examples of use in context*: He should plead guilty That's his cover story for an alibi Are you gonna bail me out?

Table 3. Iryn Meyers' active lexicon.

On Rubric 4, Lexical diversity and fluency, this lexicon was evaluated as Mid-Advanced:

> Their vocabulary is fairly extensive although primarily generic in nature, except in the case of a particular area of specialization or interest. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 6)

This evaluation, however, may have been too conservative because Iryn's performance also displayed features characteristic of Advanced High level, such as attention to shades of meaning and lexical precision, seen in such statements as *We didn't really plan it, we just talked about it* (Interview 30 March 2016, 15:00) or *I think it's a recliner, but don't quote me on that… it's a long one, so better couch, right?* (Interview 21 March 2016, 22:00).

Faced with accusations and unexpected questions common in police interviews, Iryn Meyers used a wide variety of conversational strategies, some of which bordered on aggressive, e.g., *Do I have to repeat it again?!* (Interview 21 March 2016, 5:40;06), *Can you just ask me questions instead of staring?* (Interview 30 March 2016, 1:16:53), *Are you confused? Would you like me to make it clear?* (Interview 30 March 2016, 20:43), *You really screwed up* (Interview 30 March 2016, 1:42:00). She also refused to answer some questions, e.g., *I just don't wanna talk about it* (Interview 30 March 2016, 3:40).

	Examples from the interviews on 3/4/16, 3/21/16, 3/30/16, 4/5/16
Acknowledgment	So, yup, thanks for reminding me.
Assertion	I am telling the truth right now as you can see, I am trying. I am very very cooperative.
Circumlocution	and the one tote it's in my… what do you call that? You know that back that opens in your car to put groceries in? … trunk!
Comprehension checks	In my own opinion, I think he was downstairs because where are you gonna get cobwebs, you know what I mean?
Confirmation checks	Colostomy is like like the poop, right? To make sure, the kitchen it's kind of like foggy… What's foggy, it's kind of like smoke, right?
Conversation management	Can we start now? So, what's your question? So, where are we now? Why are we having this conversation? Can I interrupt you for a moment?
Differentiation	It smelled like wood, it didn't smell like gas. That window is not really isolated.
Emphasis	I **wasn't** in the house, I was hearing the conversation, I was in my car…
Mitigation	I think it's a recliner, but don't quote me on that…
Requests	I'm gonna need a map. Can you just remind me? So can you help me get out here?
Self-correction	We had pig roast, oh pot roast.

Table 4. Iryn Meyers' conversational strategies.

On Rubric 3, Dealing with linguistic challenges and unexpected turns of events, and Rubric 5, Conversational strategies, Iryn Meyers was situated between Mid-Advanced and Superior levels. To remain conservative, Expert B assessed her as Mid-Advanced:

> Advanced Mid speakers can handle successfully and with relative ease the linguistic challenges presented by a complication or unexpected turn of events that occurs within the context of a routine situation or communicative task with which they are otherwise familiar. Communicative strategies such as circumlocution or rephrasing are often employed for this purpose. The speech of Advanced Mid speakers performing Advanced-level tasks is marked by substantial flow. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 6)

Together, the evaluations on individual rubrics placed Iryn Meyers' speaking proficiency at the level described by ACTFL as Mid-Advanced:

> Advanced Mid speakers contribute to conversations on a variety of familiar topics, dealt with concretely, with much accuracy, clarity and precision, and they convey their intended message without misrepresentation or confusion. They are readily understood by native speakers unaccustomed to dealing with non-natives. When called on to perform functions or handle topics associated with the Superior level, the quality and/or quantity of their speech will generally decline. (ACTFL Proficiency Guidelines, 2012: 6)

Iryn Meyers' listening proficiency

The recordings showed that Iryn Meyers was comfortable with formal and colloquial speech at normal conversational rates. The legal terms used by her defense attorney and police investigators included *alibi, arson, bail, consent, discovery process, felony murder, grand jury, plea bargain, polygraph, prosecutor,* and *indictment.* The only time she asked for a clarification was as follows: *What is defendant?* (Interview 21 March 2016, 4:57:45). On several occasions, she interrupted investigators or finished their sentences for them, e.g.:

> Investigator: *How did it come how did it come that you…*
> Iryn Meyers: … *purchased* (Interview 3/4/16, 1:13:37)

	Examples from the interviews on 3/4/16, 3/21/16, 3/30/16, 4/5/16
Abstract questions with embedded clauses	*Investigator*: You know how serious this is, I don't know if you get the concept of this. *Iryn Meyers:* I did get the concept. *Investigator*: Did you withhold any information from us the last time that we talked? *Iryn*: I did not tell you about Joe telling me that David wouldn't wake up
Colloquial questions	*Investigator*: Did Joe have money troubles? *Iryn Meyers*: If we are talking about financially….
Financial questions	*Investigator*: How many loans do you have over $ 1,000? *Iryn*: I don't have loans, I have an overdraft! *Investigator*: It's my understanding and you can tell me if this is true, the property on New Galen Road, did you own that property? *Iryn*: I owned that property but I give him life use of the property.
Legal questions	*Investigator*: Do you know what the consequences are of murder? *Iryn*: You go in jail. *Investigator*: How long? *Iryn*: Thirty five years.

Table 5. Types of questions to which Iryn Meyers responded promptly and accurately.

The complexity of the questions Iryn Meyers responded to promptly and accurately is not surprising: L2 speakers commonly understand structures more complex than the ones they produce. This performance placed Iryn's listening proficiency at the Superior level:

> At the Superior level, listeners are able to understand speech in a standard dialect on a wide range of familiar and less familiar topics. They can follow linguistically complex extended discourse such as that found in academic and professional settings, lectures, speeches and reports. Comprehension is no longer limited to the listener's familiarity with subject matter, but also comes from a command of the language that is supported by a broad vocabulary, an understanding of more complex structures and linguistic experience within the target culture. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 16)

Iryn Meyers' reading proficiency

To evaluate Iryn Meyers' reading proficiency, Expert B analyzed her answers on the civil service exam for nursing aides in facilities for mentally disabled patients. The cover page

shows that Iryn started at 8:20 AM and finished at 9:39 AM, which makes for 1hr 19 min, half the time allocated for the test (2.5 hrs). The analysis of the questions answered correctly (78%) showed that Iryn could follow written instructions, process paragraph-long texts, use basic arithmetic, understand time schedules and supply inventories, figure out mileage and balance bank accounts. She also demonstrated an ability to judge the factual nature of individual statements, keep track of people and actions, and respond to hypotheticals, such as *What should you do?*

An analysis of the lexical content of correctly answered questions revealed understanding of medical, emotional and professional vocabulary, including low-frequency terms, compound nouns and adjectives, such as *abuse*, *agitated*, *assistance*, *criminal behavior*, *daydreaming*, *depressed*, *disappointed*, *disturbance*, *dizzy*, *emotionally-disturbed*, *excitedly*, *legally old enough*, *mentally confused*, *mental retardation*, *privacy*, *privileges*, *range of motion exercises*, *refusal*, *resident*, *recreation*, *sexual intercourse*, *supervisor*, *transfer*, and *violent*. The fact that she passed the test by answering 78% of the questions correctly in half the allocated time suggests reading proficiency consistent with 10th grade and Mid-Advanced level on the ACTFL scales:

> At the Advanced Mid sublevel, readers are able to understand conventional narrative and descriptive texts, such as expanded descriptions of persons, places, and things and narrations about past, present, and future events. These texts reflect the standard linguistic conventions of the written form of the language in such a way that readers can predict what they are going to read. Readers understand the main ideas, facts, and many supporting details. Comprehension derives not only from situational and subject-matter knowledge but also from knowledge of the language itself. Readers at this level may derive some meaning from texts that are structurally and/or conceptually more complex. (American Council on the Teaching of Foreign Languages (ACTFL) 2012: 22)

Iryn Meyers' understanding of the *Miranda* warnings

While the analysis of Iryn Meyers' proficiency suggested that she should have been able to understand the Steuben County *Miranda* warnings, Expert B didn't have to rely on inferences. The recordings of the three police interviews captured the delivery of the warnings. The first interview began with the investigators announcing that they would now read Iryn her rights, to which she responded: *I know my rights* (Interview March 21, 2016, 1:22:00). The fact that the interview was conducted in the presence of her defense attorney suggests that she did indeed know – and exercise – her right to an attorney. When investigators asked her about the consequences of murder, she responded *You go in jail* (Interview March 21, 2016, 1:38:00).

In the second interview, on March 30, 2016, Iryn was asked to read each *Miranda* statement out loud and to initial each one. She also had a long discussion with the investigators on the merits of private attorneys vs public defenders. In the third interview, on April 5, 2016, she was advised of her rights once again prior to the polygraph test. Since she had already been advised and was assigned an attorney, it would have been tempting for the investigators to treat the *Miranda* warnings as a formality on this occasion. Instead, the investigator (I) re-tested her comprehension by making Iryn Meyers (M) restate the rights in her own words.

Transcript 1

01	I:	I gotta go through a couple more things here:↑
02		that I have to get out of the way↑
03		and we can talk freely OK? ((open gesture with both hands)) so (.)
04	M:	((nods))
05	I:	((Starts filling out the paperwork)) This is the *Miranda* warnings again but I do it a little different when we are in this type of setting (.) OK?
06		I'm ask you/I'm gonna ask you some questions ((enunciates very precisely)) (.)
07		whatever you tell me I'm gonna write it down (.) OK?
08		So the time now is gonna be: (.) twelve oh one pm ((writes down))
09		((stops writing, turns to M)) When can you have an attorney?
10	M:	When?
11	I:	When can you have an attorney?
12	M:	When I needed it↓
13	I:	When you need it?
14	M:	Yeah::
15	I:	When I needed it?
16		So basically you can have an attorney any time that you want one (.) any time you want an attorney ((open gesture with both hands)) =
17	M:	= oh no when I get in trouble↑
18	I:	So when can you have an attorney?
19		What would be your answer to that question?
20	M:	When you get in trouble?

21 I: Well (.) I would say (.) I'd say any time you want one

22 M: Oh ((laughs)) any time if you want one↑

23 I: So: when can you have an attorney?

24 M: Any time if you want one! ((laughs))

25 Thank you for helping me! ((giggles))

26 See: I am not that good↑

27 I'm not a good liar either↑

28 I: Can you have an attorney any time that you want one including right now?

29 M: Right now? Yes↓

30 I: Can you use my telephone (.) free of charge (.) to call an attorney?

31 M: Yes↓ ((nods))

32 I: What will happen if you want an attorney but you can't afford one?

33 M: The state will offer it to you↓

34 I: The state will appoint one?

35 M: Aw: yes↑ ((nods enthusiastically))

36 I: I'll put "The state will offer it to you"↓ ((writes down))

37 I: Do you have to answer even one of my questions or say anything to me at all?

38 M: No↓

39 I: If you start to answer my questions and then decide that you wanna stop can you stop any time that you want?

40 M: I don't know? ((looks at the investigator))

41 Yes ((giggles)) (.) are you OK?

42 I: Yeah: you don't … you don't have to talk to me if you don't you do not have to talk to me at all OK?

43 This is completely voluntary

44 Do you understand that if I am called into court to testify about what both you and I say that I will be placed under oath and I will tell the truth?

45 M: Yes↓

46 I: Would you want me to tell the truth or would you want me to lie?

47 M: I want you to tell the truth↓

48 Lying does not help you↓

49 I: Do you understand that I will tell the complete truth regardless of whether it helps/helps or hurts the police or helps or hurts you? ((points to her)) Yes?

50 M: Yes↓

51 I: Now that you know all of your rights do you wish to continue with this polygraph?

52 M: Yes ((nods))

53 I: What I need you to do is to look down through that to make sure that's what we talked about

54 what I wrote down is what you told me

55 put your initials at the bottom if you agree with the front page and then read the back of it ((gives her the pad with the document and a pen))

56 M: ((takes the pad, looks at it)) So: how long you are doing this one?

57 I: What's that?

58 M: How long you've been doing this one?

59 I: This? Some many years↓

60 M: So, if I have a felony charge↑ =

61 I: = Hold on (.) hold on (.) let's get this out of the way first ((both laugh))

41 Yes ((giggles)) (.) are you OK?

42 I: Yeah: you don't … you don't have to talk to me if you don't you do not have to talk to me at all OK?

43 This is completely voluntary

44 Do you understand that if I am called into court to testify about what both you and I say that I will be placed under oath and I will tell the truth?

45 M: Yes↓

46 I: Would you want me to tell the truth or would you want me to lie?

47 M: I want you to tell the truth↓

48 Lying does not help you↓

49 I: Do you understand that I will tell the complete truth regardless of whether it helps/helps or hurts the police or helps or hurts you? ((points to her)) Yes?

50 M: Yes↓

51 I: Now that you know all of your rights do you wish to continue with this polygraph?

52 M: Yes ((nods))

53 I: What I need you to do is to look down through that to make sure that's what we talked about

54 what I wrote down is what you told me

55 put your initials at the bottom if you agree with the front page and then read the back of it ((gives her the pad with the document and a pen))

56 M: ((takes the pad, looks at it)) So: how long you are doing this one?

57 I: What's that?

58 M: How long you've been doing this one?

In her analysis of the interaction, Expert B examined the delivery of the warnings by the investigator and understanding of individual rights by Iryn Meyers. She found the delivery to be consistent with an active dialogic approach, advocated by proponents

of police reform (e.g., Domanico *et al.* 2012; Ferguson 2012) and the recommendations outlined in the *Guidelines for communicating rights to non-native speakers of English in Australia, England and Wales, and the USA* (Communication of Rights Group 2015). To ensure Iryn Meyers understood her rights and the consequences of waiving them, the investigator asked comprehension questions (lines 9-11, 18, 23, 28, 30, 32, 37, 39, 44, 46, 49) and when she displayed hesitation or incomplete understanding (lines 12, 40), he rephrased statements and offered further explanations and clarifications (lines 16, 21, 34, 42-44).

The analysis of Iryn's restatements showed that she understood her right to an attorney (lines 12, 17, 20, 22, 24), the right to have an attorney present at the interrogation (lines 24, 29, 31), the right to have an attorney provided for free (lines 33, 35) and the right to silence (line 38). When she displayed hesitation regarding her right to stop talking at any time (line 40), the investigator provided further explanations (lines 42-44), emphasizing the negative consequences of her decision that could potentially *hurt* her (line 44) (as seen in Table 1, *hurt* was a verb she used appropriately in context). Then, he gave Iryn the statements he wrote down and asked her to read them and, if she agreed, to initial the bottom of the page. To give Iryn sufficient time to process the information, he temporarily left the room.

Together, the analyses of the delivery of the *Miranda* warnings and of Iryn's speaking, listening and reading skills led Expert B to conclude, with a reasonable degree of certainty, that Iryn Meyers waived her *Miranda* right to silence knowingly and intelligently (the determination of voluntariness is up to the judge and beyond the scope of L2 proficiency assessments).

Discussion and conclusions

At the pretrial hearing in February 2017, the judge determined that Mrs. Meyers had sufficient English proficiency to understand her rights and did not require an interpreter to follow court proceedings. In August 2017, after three hours of deliberations, the jury found Iryn Meyers guilty of murder in the second degree, two counts of arson, conspiracy, insurance fraud, and a false written statement made to the New York State Police. Tried separately, Joseph and Iryn Meyers received identical sentences – 23 years to life in state prison.

Yet, the case did not end there. Following her conviction, Iryn filed an appeal *pro se*, i.e. representing herself. One of her complaints involved ineffective counsel who didn't challenge the voluntariness of her statements on the grounds that she didn't have sufficient English. The Court of Appeals did not find that the attorney – or the trial court – acted in error:

> the parties fully litigated the issue of defendant's understanding of English during a pretrial hearing on defendant's request for an interpreter and the evidence presented therein – which presumably would also have been presented at trial if the court had permitted defendant to challenge the voluntariness of her statements on the ground that she did not sufficiently understand English – established that defendant was proficient in and understood English. (*People v Meyers*, 2020)

The case has several lessons for forensic assessment of *Miranda* comprehension of non-native speakers of English. To begin with, it shows that face-to-face assessment isn't

necessarily reliable and should be used in conjunction with analyses of recordings of police interviews and other types of contemporaneous data, ranging from test performance to texts, e-mails and letters known to have been written by the defendant. The preference in such analyses should be given to recordings of the delivery and the uptake of the *Miranda* warnings.

More importantly, the case illustrates best practices in securing understanding of the rights by non-native speakers of English, namely:

(a) dual presentation of the warnings, orally and in writing;
(b) asking the custodial suspect to read each warning out loud and to initial each one;
(c) adoption of the in-your-own-words requirement, whereby the custodial suspect is asked to restate each right in their own words;
(d) simplified waiver statement *I agree to give up my rights*;
(e) acknowledgment of the importance of the *Miranda* warnings, evident in the investigator's question "Do you understand that I will tell the complete truth regardless of whether it helps or hurts the police or helps or hurts you?"
(f) electronic recording of custodial interrogation, including the delivery of the rights.

At present, dual presentation and recording of custodial interrogation are fairly common in the USA (cf. Bang *et al.* 2018) but the in-your-own words approach is not. Opponents of the dialogic approach are concerned that it may obstruct police work, yet the same concerns have been voiced about recording and the *Miranda* at large and neither prediction came true: an estimated 80% of adult suspects still waive their rights and talk to the police (Domanico *et al.* 2012; Leo 2008). The dialogic delivery is unlikely to reverse this trend, driven by police interrogation tactics and the suspects' need to find out what they are accused of and share their own version of the events. What the dialogic approach promises to do is reduce the time and costs spent on post-conviction litigation and to ensure that when the issues are litigated, court decisions rely on more accurate data (Domanico *et al.* 2012; Ferguson 2012).

In interviews with L2 speakers of English, the dialogic approach has three added benefits. To begin with, it scaffolds understanding for people who may be less familiar than L1 speakers not only with legal terms and complex structures but with the workings of the legal system and cultural assumptions underlying *Miranda* warnings (Pavlenko *et al.* 2019). Secondly, it reduces the guesswork regarding the need for an interpreter: if the custodial suspect is unable to restate the rights in their own words, a professional interpreter should be brought in and the procedure repeated anew (Communication of Rights Group 2015). Thirdly, while the procedure may increase reliance on interpreters, it has potential to reduce the number of overturned convictions and post-conviction appeals involving flawed delivery of the *Miranda* warnings to L2 English speakers (e.g., *Commonwealth v. Vargas*, 2018; *Khalil-Alsalaami v. State*, 2020). A few extra minutes spent on dialogic delivery – and, if need be, the wait for an interpreter – are not too high a price to pay for safeguarding both the integrity of the investigation and the due process.

Notes

[1]The victim was 60-year old David O'Dell, a mentally disabled man, who was a long-time friend of Joseph Meyers and an employee of his garage. In 2015, the couple offered him $ 8,000 for his house. O'Dell, who had little understanding of real estate, signed the deed over to Iryn. The only payment he received was $ 400 and permission to stay in the house without paying rent. Iryn also moved in, ostensibly as his unpaid caregiver, and then purchased three insurance policies – a homeowner's policy in her own name, a renter's policy where she didn't disclose her ownership and a life insurance on O'Dell – with herself as a beneficiary for a total of $ 145,000. On February 14, 2016, Joe and Iryn arrived at the house and found David asleep. Joe bashed him with a hammer. Then, they poured diesel fluid, ignited the fire and fled. After the fire subsided, the first responders found a charred body of David O'Dell. The autopsy revealed that David was alive when the fire began and died of smoke inhalation. Suspecting that the fire was not accidental, investigators reviewed the footage recorded by Joe Meyers' own video surveillance and saw the couple making several trips to the house, in the hours before the fire, bringing in Iryn's belongings. One video showed Iryn carrying a propane torch. Confronted with the evidence, Iryn turned on her husband and offered several accounts of the crime, pinning the blame on Joseph. The pretrial hearing, discussed here, was open to the public, and the investigation and trials of Joseph and Iryn Meyers were widely covered in the media, the *Anthology of True Crime* book series and documentary TV series *Deadly women* (season 12, episode 10 *The takers*) and *Snapped: Killer couples* (season 12, episode 9 *Joseph and Iryn Myers*). Given this public exposure, I did not hesitate to use their real names. Readers interested in hearing Iryn Meyers' English can watch *Killer couples* – the episode, available on the NBC website and on Youtube, features segments of the same recordings I analyzed.

[2]For more information on the ILR scale, see https://www.govtilr.org/Skills/IRL\%20Scale\%20History.htm

[3]For more information on the Flesch-Kincaid readability formula, see https://www.webfx.com/tools/read-able/flesch-kincaid.html

[4]For more information on the ACTFL Proficiency Guidelines (2012), see https://www.actfl.org/resources/actfl-proficiency-guidelines-2012

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Commonwealth v. Vargas, 104 N.E. 683, 93 Mass. App. Ct 1114 (2018) [language issues, along with questions re warning of immigration consequences, warranted evidentiary hearing, where the defendant sought to withdraw guilty plea]

Gonzales v. State, 131 Nev. 481, 489 (2015) [discussing increasing need for police to deal with suspects with limited English (489); here, incriminatory statements given by defendant during custodial interrogation showed sufficient knowledge of English and were thus admissible]

Khalil-Alsalaami v. State, 472 P. 3d 60 (Kansas 2020) [trial counsel provided prejudicial ineffective assistance in stipulating to *Miranda* issue despite evidence of the defendant's limited English]

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

Moran v. Burbine, 475 U.S. 412 (1986)

People v. Meyers, 182 A.D. 3rd 1037, 1041 (N.Y. 2020)

United States v. Garibay, 143 F 3rd 534, 536 (1998)

Práticas de Análise em Linguística Forense

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Práticas de Análise em Linguística Forense
Anna Carolina Land, Bruno Deusdará, Monica Azzariti &
Morgana Pessôa (Orgs.) (2020)
Rio de Janeiro: Cartolina

A relação entre a linguagem e o direito tem cada vez mais despertado o interesse de pesquisadores de diferentes áreas de investigação no Brasil, com múltiplos objetos e distintas abordagens teóricas e metodológica. Nesse cenário, a Linguística Forense tem se fortalecido enquanto espectro amplo que abarca diversas ações de pesquisa e intervenções práticas nos contextos jurídico, judicial e forense brasileiro. O livro objeto desta recensão é resultado desse momento. Os capítulos que integram a publicação apresentam ao leitor um índice representativo de temas candentes na relação entre a linguagem e o direito, tanto no aspecto investigativo, como no aspecto aplicado às situações reais no judiciário.

Já na apresentação da obra, intitulada *Linguística Forense: novas aplicações e desafios no contexto da Língua Portuguesa*, Rui Sousa-Silva parte do caso de Timothy Evans, do caso de Derek Bentley e do caso de Ted Kaczynksi – conhecido como "Unabomber" – para demonstrar que, desde a década de 50, já se podem observar contribuições da análise linguística forense para a administração da justiça. Com base em Sousa-Silva e Coulthard (2016), o autor chama a atenção para os dois sentidos que a linguística forense pode assumir: o sentido lato, que contempla a análise escrita da lei, a interação verbal em contextos legais e a linguagem como prova; e o sentido estrito, que limita a linguística forense à linguagem como prova. Sousa-Silva ressalta o significante desenvolvimento da área no contexto da língua portuguesa, na última década, com destaque para a formação da Associação de Linguagem e Direito (ALIDI), para a criação desta revista internacional

bilíngue *Language and Law/Linguagem e Direito*, resultado da parceria entre a Universidade Federal de Santa Catarina (UFSC) e a Universidade do Porto, e para as atividades de ensino promovidas por essa Universidade portuguesa, que, além de oferecer disciplinas em linguística forense no Mestrado em Linguística, no Doutorado em Ciências da Linguagem e em cursos relacionados às ciências forenses mais "tradicionais", também dispõe de um Curso de Especialização em Linguística Forense, apoiado pela Associação Portuguesa de Ciências Forenses. O autor aponta para o futuro promissor da área nos países de língua portuguesa, para o que é necessário o aumento de pesquisas e de publicações, pautadas no rigor científico, e da interação com as instituições da justiça.

O primeiro capítulo, *"Vai ter visita na casa?": a reclamação em cascata no âmbito da Mediação familiar judicial*, de Paulo Cortes Gago e Maria de Lourdes Pereira, a partir da Análise da Conversa Etnometodológica, analisa dados reais de fala-em-interação em contexto de conversa institucional, especificamente de mediação familiar judicial num caso de divórcio. Com foco na descrição da ação do tipo reclamação, os autores identificam a anatomia do conflito que denominam reclamação em cascata, entendida como uma reclamação gerada a partir de outra reclamação. Gago e Pereira concluem que a análise empreendida permite observações sobre a interação entre pais divorciados em situação de conflito relacionado aos filhos e sobre a atuação de quem está na mediação do conflito, o que contribui tanto para descrever a competência interacional de mediadores como para a construção de ferramenta voltada ao treinamento desses profissionais.

No segundo capítulo, *Ângela Maria Mendes de Almeida: análise de uma decisão judicial que a torna duplamente vítima de tortura da ditadura militar de 1964*, Virgínia Colares analisa recurso extraordinário interposto contra acórdão do Tribunal de Justiça do Estado de São Paulo, no caso de Ângela Maria Mendes de Almeida, docente exonerada da Universidade de São Paulo (USP) à época da ditadura. Com base em pressupostos da análise crítica do discurso (ACD), a autora identifica nos fragmentos analisados marcas textuais que indicam violação do princípio da fundamentação jurídica das decisões, uma vez que o pedido da parte impetrante se baseou na anistia constitucional e o órgão julgador fundamentou sua decisão em súmula do Supremo Tribunal Federal (STF). Segundo Colares, tal decisão teve impacto político afeto aos direitos humanos, impondo à docente retorno à exceção que vivera durante a ditadura militar. A autora constata que a análise crítica do discurso jurídico, empreendida sobre o documento jurídico, permite observar assimetrias de poder e conclui pondo em questão o peso que a jurisprudência tem na fundamentação das decisões judiciais no ordenamento jurídico brasileiro.

O terceiro capítulo, *Estratégias de disputa e sustentação de posição argumentativa na mediação familiar: uma análise semântico-cognitiva*, de Naira Velozo e Marllon Carvalho, analisa excertos de sessão de audiência de mediação em processo de regulamentação de visitas, do corpus Interação em Contextos Institucionais, também utilizado por Gago e Pereira. A partir da Teoria dos Espaços Mentais (Ferrari 2009) e da Teoria dos Modelos Cognitivos Idealizados (MCIs) (Lakoff 1987; Ferrari 2011), Velozo e Carvalho objetivam investigar os mecanismos cognitivos que subjazem os estágios de disputa e de sustentação da posição argumentativa, com o propósito de oferecer contribuição para o trabalho dos mediadores nas audiências. Com as análises, os autores observam que o MCI sociocultural e o MCI biológico fundamentam as etapas de disputa de posição argumentativa, enquanto que processos cognitivos de ativação e desativação de relações vitais baseiam as estratégias de sustentação de posição argumentativa. Concluem evidenciando a con-

tribuição da análise na indicação de caminhos para a atuação do mediador no sentido da facilitação da realização de acordos nos processos judiciais.

No quarto capítulo, *"A parte autora vem à presença deste douto juízo, clamar por justiça": a configuração do ethos do enunciador no gênero jurídico petições judiciais*, Douglas do Carmo Araújo analisa quatro Petições Iniciais mobilizando o arcabouço teórico da Teoria Semiolinguística de Análise do Discurso (Charaudeau 2015). Com essa perspectiva, seu objetivo é mostrar a estrutura do ethos do enunciador desse gênero e as estratégicas de elaboração de face adotadas pelo sujeito da linguagem. Com foco na análise da parte "dos fatos" das petições analisadas, o autor identifica o processo de evitação como uma das formas de elaboração da face e o uso das estratégias de polidez e de cortesia. Segundo sua conclusão, é possível identificar assimetria entre os sujeitos da linguagem nas peças analisadas.

O quinto capítulo, *"Geralmente mulher é cozinheira e homem é chef né?": o sexismo no judiciário brasileiro refletido na cozinha profissional*, de Amanda Costa Pinto, propõe-se articular as noções de estigma e de face para refletir sobre o sexismo implicado na construção de estereótipos aliados à inefetividade da igualdade jurídica. A autora analisa excertos de episódio do programa Masterchef Profissionais, da Rede Bandeirantes de Televisão, e identifica a presença de estigma e do trabalho da face na interação. Conclui afirmando que o estudo de face é fundamental para a compreensão do processo de estigma social, cuja reversão depende de luta constante na direção da equidade de gênero.

No sexto capítulo, *"Ele não é vagabundo não": os imaginários sociodiscursivos presentes no depoimento de uma testemunha em um crime de homicídio cometido por policiais*, Allyson Afonso Alves Pereira toma para análise depoimentos de testemunhas no inquérito policial que investigou um crime de homicídio cometido por policiais da Polícia Militar de Minas Gerais. Com base na Teoria Semiolinguística de Análise de Discurso (Charaudeau 2006, 2007, 2008b,a), o autor identifica que, nos imaginários sociodiscursivos que estruturam o sujeito comunicante analisado, a violência e o desrespeito aos direitos humanos têm tolerância e reforço, a depender da camada social. Sustentado em Michel Foucault (1979), conclui que é necessário dar continuidade a trabalhos que contribuam para a desconstrução de discursos que potencialmente funcionem como práticas de opressão.

O sétimo capítulo, intitulado *Discursos de redução da maioridade penal em tempos de biopoder*, de Jordana Lenhardt, apresenta resultados de pesquisa no Sistema de Documentação e Informações Legislativas da Câmara dos Deputados do Brasil sobre propostas de alteração do artigo 228 da Constituição Federal brasileira, que dispõe sobre inimputabilidade penal para menores de 18 anos. Em diálogo com a obra de Michel Foucault (1987; 1999; 2006), a autora focaliza a análise de trechos da justificação da Proposta de Emenda Constitucional 171/1993. Conclui afirmando que os discursos criminalizam o menor e produzem dominação e exploração e que o biopoder suporta e é suportado por um conjunto de interesses vinculados a determinado grupo dominante.

No oitavo capítulo, *O fantástico direito de família: uma análise do discurso jurídico retratado pela mídia televisiva*, Arthur Emanuel Leal Abreu dispõe-se a analisar a representação do ambiente forense na série "Segredos de Justiça", protagonizada pela personagem de uma juíza de vara de família e exibida no programa "Fantástico", na Rede Globo de Televisão, no ano de 2017. O autor restringe a análise ao episódio "Safadinha 22".

Com as análises pautadas nos *ethé* de credibilidade propostos por Patrick Charaudeau (2011), o autor identifica na série uma representação acertada do direito e do contexto forense. Segundo ele, tais parâmetros permitem observar que a imagem da magistrada representada no seriado é adequada e transmite credibilidade do Poder Judiciário. A partir dos *ethé* de identificação, Abreu observa a aproximação entre a protagonista e os telespectadores, o que provoca, segundo o autor, a simpatia entre quem assiste ao seriado e o Poder Judiciário. Conclui afirmando que as séries televisivas têm potencial para introduzir imagens do direito e de seus atores entre o público leigo, razão que justifica maior cuidado com a linguagem e com a construção dos personagens.

No nono capítulo, intitulado *A retórica do crime organizado: argumentação em cartas de ameaça do PCC e do Comando Vermelho*, de Welton Pereira e Silva, impõe-se o objetivo de analisar como se dá, nas cartas que visam ameaçar o interlocutor, a argumentação de sujeitos que se identificam como integrantes de facção criminosa. Lançando mão, principalmente, da Teoria Semiolinguística do Discurso, de Patrick Charaudeau (2010; 2012; 2015), e da retórica aristotélica (Aristóteles 2005), o autor mobiliza as noções de *logos*, *pathos* e *ethos*. Observa, nos excertos analisados, características comuns às cartas das duas facções em questão, como a criação do *ethos* da virtude, em que as facções se colocam contra o sistema prisional, opressões e as condições precárias dos presídios, de argumentos pautados no logos, de causa e consequência, e de argumentos patêmicos para a produção do medo. Segundo o autor, pesquisas como a proposta, inscritas na Linguística e na Análise de Discurso, podem contribuir significativamente para os estudos da Segurança Pública e da Criminologia e fortalecer o caráter interdisciplinar desta disciplina. Conclui salientando que os conhecimentos produzidos têm potencial, inclusive, para auxiliar na compreensão no crime como fenômeno social e concepção de políticas de segurança pública.

Encerrando o livro, em *A retórica no tribunal do júri: ethos e pathos como estratégia de persuasão*, Anne Morais, Marcelo Nogueira e Breno Gaspar tomam pressupostos da Retórica para analisar o *ethos* e o *pathos*, enquanto dois tipos de persuasão, em sessões de julgamento do Tribunal do Júri. Os autores destacam, sob o aspecto quantitativo, que determinados *ethos* e *pathos* têm mais incidência no discurso de promotores e defensores, como o *ethos* do juiz, o *ethos* discursivo e projetivo e o *ethos* das testemunhas, e o *pathos* de medo e de indignação. Concluem ressaltando que os estudos da Retórica Clássica são importantes para mostrar que os recursos retóricos identificados ainda são utilizados no judiciário e defendendo a relevância de estudos focalizem detidamente os atores da cena comunicativa instaurada em sessões de júri.

O livro contempla, portanto, temas que alcançam objetos de interesse com contribuições tanto para a pesquisa como para a aplicação na relação entre a linguagem e o direito. A obra evidencia que a análise da fala-em-interação tem relevância da temática diante das novas tendências processuais no direito brasileiro, favoráveis à redução de litígio e à composição das partes em acordos de conciliação e mediação, por exemplo. De outra parte, também aponta para a importância do estudo do discurso, da argumentação e da retórica em múltiplos contextos jurídicos, sob diferentes marcos teóricos e metodológicos, indicando inclusive potenciais impactos na efetividade de direitos humanos e na concepção de políticas públicas.

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O complexo, o simples e o simplório em Linguística Forense

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Manual Básico de Linguística Forense: Da Análise do Discurso ao Perfilamento em Investigações Criminais
Leonardo Vichi (2021)
Rio de Janeiro: Apheratz, 2 ed.

Apresentação do livro

Em *Manual Básico de Linguística Forense*, o autor Leonardo Vichi é claro em definir o objetivo "despretensioso" da obra: "ser uma porta de entrada àqueles que querem começar a se enveredar no caminho dos Estudos da Linguagem e da Linguística Forense" (p. 14). Esse mesmo objetivo limitado é reforçado no último parágrafo do livro:

> Este livro não possui a pretensão de ser mais do que ele é, um manual básico, portanto, deve ser considerado em seu aspecto introdutório, voltado para o leitor leigo que queira conhecer mais este universo que é muito mais amplo do que cabe aqui nesta obra (p. 115).

De fato, se me for permitido fazer uma Análise do Discurso de um livro que se propõe a ensinar Análise do Discurso, esse objetivo didático e simplificador está claro linguisticamente na constante utilização de conjugações e referências em primeira pessoa do plural e segunda pessoa do singular (com o pronome 'você', como típico do Português brasileiro). Essas marcas linguísticas formulam o discurso como uma conversa informal entre leitor e autor e fazem o texto, embora escrito, se aproximar de um tipo de atividade (Levinson 1998) mais ligado à oralidade (como uma aula), por oposição a um tipo de atividade mais ligado à escrita, como um artigo acadêmico ou um livro-texto – estes últimos frequentemente utilizando construções impessoais e referências em terceira pessoa (Marcuschi 2010; Chafe e Tannen 1987).

Apesar de curto (115 páginas), o livro se organiza em quatro partes, ainda que numere apenas três delas. Numa primeira parte, não numerada, incluem-se os prefácios, uma introdução e cinco pequenos capítulos que se propõem a introduzir e definir brevemente conceitos de base: "discurso" (p. 19-23), "Análise do Discurso" (p. 25-7) e "linguística forense" (p. 29-40).

Na parte seguinte, numerada como "Parte 1", o título é "Aspectos teóricos da Análise do Discurso e da linguística forense". Nessa parte, o livro se propõe a aprofundar os conceitos apresentados na parte introdutória e operacionalizá-los para o uso na análise dos dados de linguagem com os quais se depara o linguista forense. Nessa parte, são apresentados temas como o campo da linguística aplicada (p. 47-9), (duas) vertentes da Análise do Discurso – nomeadamente, a Análise do Discurso Francesa ("AD Francesa") e a Análise Crítica do Discurso ("ACD") (p. 49-51), e o que o livro chama de "fundamentos" e "dimensões" da linguística forense (p. 53-5).

Na sequência, numerada como "Parte 2", o livro se propõe a mostrar como os conceitos definidos na parte introdutória e explicados/aprofundados na Parte 1 podem ser utilizados para analisar dados reais de linguagem em contextos forenses. Essa parte é intitulada "A metodologia da Análise do Discurso da linguística forense" e trata de temas como "o emprego da análise do discurso" (p. 62-7), "ferramentas do linguista forense" (p. 77-80) e "limites do emprego da linguística forense" (p. 80-83). Além disso, essa parte introduz o estudo de caso que será feito na parte seguinte, ao apresentar a técnica que o livro chama de "perfilamento linguístico básico" (p. 83-93).

Finalmente, nessa parte seguinte, que é a última, numerada como "Parte 3", e cujo título é "A linguística forense na prática—Estudo de caso", o livro se propõe a colocar tudo junto, num estudo de um caso real sobre um homicida em série em Goiás por volta do ano de 2012. O autor do livro não atuou no caso, nem nenhum linguista forense, ao que consta. Porém, houve o envio de uma carta anônima à Polícia de Goiás, que o livro utilizou para fazer uma demonstração do "perfilamento linguístico básico" retrospectivamente, e com o autor dos homicídios já identificado, preso e condenado pelo Sistema de Justiça Criminal – ao que parece, utilizando outras provas e técnicas de investigação.

Um capítulo de conclusão fecha o livro, com o chamamento a "um pensamento que direcione o desenvolvimento da Linguística Forense no Brasil" (p. 115).

(Alguns) méritos e (muitos) problemas do livro

O livro tem o mérito de ser bem escrito e de ter um propósito claro e transparente. O uso das referências em primeira pessoa do plural, alternando para segunda do singular (com o pronome "você") dão um tenor fluido e despretensioso à obra e a tornam agradável de ler.

Há, porém, dois grandes problemas sistêmicos com o livro, que se evidenciam e se relacionam com diversos problemas pontuais. O primeiro problema sistêmico é a premissa de que o livro parte. A necessidade de uma obra didática sobre linguística forense derivaria do fato de que

> a esparsa e insuficiente literatura disponível em língua portuguesa não [seria] adequada a esse público [composto por policiais federais, polícias técnicas, diretores de teatro, médicos, jornalistas e linguistas que frequentariam o curso de formação em Análise do Discurso e Linguística Forense que vem sendo oferecido pelo autor na forma livre] (p. 13).

O mesmo diagnóstico é feito no último parágrafo do livro:

> Espero que esta obra tenha sido útil para despertar sua atenção para este campo, que, hoje, precisa de muitos profissionais que se dediquem à sua ampliação e divulgação, em especial no Brasil, onde quase nada existe a seu respeito (p. 115).

Não deixa de ser impressionante que uma obra que conta com menos de 20 referências bibliográfica se sinta confortável para fazer uma afirmação tão forte sobre o estado da arte de um campo tão vasto e com tantos profissionais dedicados como a linguística forense no Brasil.

Seja como for, o diagnóstico está evidentemente errado. De fato, não existem manuais ou livros-textos em Português sobre linguagem e direito/linguística forense. E, de fato, mesmo em Inglês, existem, provavelmente, não mais do que cinco, incluindo o mais famoso deles, originalmente escrito por Malcolm Coulthard e Alison Johnson (Coulthard e Johnson 2007) – que o livro que resenho inclui na bibliografia, porém cita uma única vez (p. 54).

Porém, a forma primordial de produção e divulgação do conhecimento em linguística forense, um subcampo relativamente recente da linguística aplicada, vem sendo através de revistas acadêmicas especializadas – como esta e sua "prima" mais velha, a *International Journal of Speech, Language and the Law*, obras coletivas em colaboração de pesquisadores e livros de linguistas forenses, retratando casos em que trabalharam, e derivando questões teóricas e ferramentas analíticas desses estudos (cf., para exemplos recentes deste último tipo de publicações, Heydon 2019 e Queralt 2020).

Em Português, além dos artigos que vêm sendo publicados nesta revista, temos várias obras coletivas que resumem pesquisas tanto no uso de linguagem como evidência em casos forenses, como no estudo da linguagem que ocorre em contextos forenses (Dayane C. de Almeida *et al.* 2020; Coulthard *et al.* 2015; Colares 2016; Rosalice Pinto *et al.* 2016; Sonia Bittencourt Silveira e Tânia Guedes Magalhães 2008; Sônia Bittencourt Silveira *et al.* 2015). Nessas obras, inclusive, constam apanhados mais gerais sobre o campo e suas bases ontológicas e epistemológicas, de modo que um manual de linguística forense bem feito é sempre bem-vindo, mas não por uma suposta "insuficiente literatura" brasileira sobre o campo.

O que me leva ao próximo problema geral com o livro de Vichi. A preocupação didática converteu uma simplificação inevitável para manuais e livros-textos em uma versão simplória e, frequentemente, equivocada do campo da linguística forense. Considere-se, por exemplo, a explicação que o livro dá sobre sintaxe (p. 79). Embora questões sintáticas sejam cruciais em aplicações importantes em contextos forenses, como ambiguidades sintáticas na construção de sentido de textos normativos (Solan 2018; Kaplan e Green 1995), o exemplo que o livro dá para sintaxe é com duas versões de uma sentença aleatória em que os sintagmas aparecem em diferentes ordens possíveis, algo não só óbvio para o falante da língua, como pouco importante para linguista forense – exceto, possivelmente, se for parte da marcação de padrões idioletais, como no caso de Derek Bentley, cuja explicação consta do livro-texto de Coulthard e Johnson (2007: 173–80) e que o livro de Vichi chega a mencionar (p.36), mas não usa como exemplo.

Considere-se também a definição incorreta de semântica como "o campo que estuda o significado das palavras" (p. 79), definição que não só ignora os recentes avanços da interface semântica-pragmática (Oliveira e Basso 2007; Huang 2017), como faz supor que

o estudo do significado convencional, domínio tradicional da semântica, só se dá palavra por palavra.

Considere-se, ainda, como último exemplo, como o livro limita equivocadamente o escopo do trabalho do linguista forense a duas "principais perguntas", "o que aquele discurso significa?" e "quem é o seu autor?" (p. 66), ignorando a miríade de contextos e questões específicas a que um/a linguista forense pode dedicar seus estudos, seja em casos concretos, como perito/a ou consultor/a, seja em questões acadêmicas, como pesquisador/a.

Outros exemplos poderiam ser dados, mas não o farei por questão de espaço. No geral, o livro, ao simplificar excessivamente as questões, assunções ontológicas e epistemológicas e ferramentas metódicas da linguística forense, acaba construindo uma versão simplória, caricata e, no limite, equivocada do campo e de quem se dedica a ele. Sem dúvida parte do problema é a assunção errada de que no Brasil a linguística forense é ainda *tabula rasa*.

Outra parte do problema parece ser a ideia de que um público composto por pessoas sem formação básica em linguística aplicada possa querer aprender uma subárea dentro dela, ou começar a aprendê-la, lendo um livro, por mais didático que ele possa ser. É como imaginar que uma pessoa sem formação médica pudesse entender o que um neurologista faz lendo um manual "despretensioso" de neurologia.

Talvez o melhor resumo da razão pela qual o livro acaba não conseguindo entregar o que promete – isto é, ensinar como fazer linguística forense a um médico ou a um diretor de teatro – seja dado por uma correta advertência que é feita no próprio livro:

> [...] [A]o profissional é muito importante que tenha a humildade de reconhecer seus limites e também a seriedade e respeito pelo seu próprio trabalho, porque as chances de sermos contestados por outros profissionais se tornam muito grandes quando nos expomos em áreas que não são as nossas (p. 83).

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The Suspect's Statement: Talk and Text in the Criminal Process

Book review by Emma Richardson

Aston University, UK

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The Suspect's Statement: Talk and Text in the Criminal Process
Martha Komter (2019)
Cambridge: Cambridge University Press

Despite a long-standing, historical acknowledgement that spoken and written texts are not the same (Biber 1988; Halliday 1989) the complex issues involved in the process of converting one to the other is not recognized (or at least addressed) within legal contexts (see e.g. Haworth 2018). It has been fifteen years since Blackwell (1996) stated that "the need for forensic linguists to develop an understanding of the transcription process is as pressing as ever" (p.253). In this book, Martha Komter makes transparent the journey of the suspect's statement within the Dutch Criminal Justice System, drawing on her own work spanning more than ten years.

Over six chapters, Komter highlights and makes transparent the 'career' of the suspect's statement grounded in the institutional and specifically legal context. The book provides a 'backstage pass' to the Dutch criminal law process as we move through the process from the interrogation where the statement is constructed through to the use of the statement in the courtroom trial. Komter highlights how the construction of the statement, as either a monologue, a question-and-answer-style transcript or a recontextualised monologue is later referred to and relied upon, and how sections of talk are presented as directly quoted speech. This is a problematic, overlooked and under-examined issue not just in the Dutch criminal justice system but in many other jurisdictions and non-legal institutional settings.

The book is firmly situated within ethnomethodology and Conversation Analysis (CA). As we move into chapters 2-4, the applicability of the method to the material is

demonstrated. Readers familiar with the methods and theoretical basing will be instantly familiar with the concepts and references that Komter draws on throughout the book. Yet, a reader from any discipline is able to access, understand and analyse the material due to the succinct and well-pitched explanations. As we move through the chapters, the analysis of the suspect's statement is supported by conversation analytic concepts such as 'alignment', 'footing' and most importantly for chapters 3 and 4, 'epistemics' (Heritage 2012). The excellently executed, fine-grained conversation analysis conducted by Komter is expertly presented in an accessible writing style, making the analysis readable for those with and without a technical CA vocabulary. In fact, in the Conclusion and Discussion section Komter states her analyses are interpretations which any reader would be able to make (page 187); a strength of ethnomethodology and Komter's application of it.

The book is well organised. The first of the analytic chapters, Chapter 2, 'The Police Interrogation: The Talk, the Typing and the Text' details the construction of the report during the spoken interaction. Chapter 3, 'The Police report: The Document, the Text and the Talk' situates the creation of the record within the bureaucratic and institutional context. We are guided through the features of the record which attend to the institutional business of evidence gathering. This chapter considers the authorship of the record and we are taken through many aspects of the report which are routine, and which are specific to the interview. It interweaves the institutional features of record keeping and makes explicit how this combines with the interviewee's words through the medium of the officer who is producing the texts comes to be in one record format.

In Chapter 4, we move into how the record is used with the aim being to show how the case file impacts the participants in the court. We see reference back to these records as facts of what the suspect has said, which we know from earlier chapters is not often the direct words of the suspect – yet they are 'quoted' nonetheless.

By the time we arrive at Chapter 5, 'The Career of A Suspect's Statement', we have been thoroughly prepared by the preceeding chapters, and are well-placed to see this through from interrogation to trial via one case. This chapter is a micro, turn-by-turn analysis of what was written up compared with what was said. It makes transparent the process, and we are walked through the analysis of the process and see a side-by-side comparison of the two transcriptions. What particularly stands out is the observation of the use of the formulation "you say x" (page 165) by court professionals 'quoting' the statement from the case file. We're shown how unlikely it is that the suspect did 'say' the words which they are later quoted as saying.

The Conclusion and Discussion section nicely brings us back through the chapters, tying each to the others. It is also here where we find a discussion of entextualisation (page 179). Entextualisation is an underpinning concept running through the book but Komter reserves explicit discussion for this section of the book and we do not see citations of references that we might expect such as Bauman and Briggs (1990), Maybin (2017) or Park and Bucholtz (2009), which might help the reader explore the concept further after reading this book. Komter finishes with an important and appropriate reflexive discussion on how we as academics also recontextualise material as we produce, reproduce and present transcribed extracts of data in our own work. It brings the discussion full circle. Many researchers examine this problem from a variety of angles,

in a number of contexts. A strength of the book is how tightly Komter sticks to her own work, and the Dutch legal setting. This ensures the book addresses the aims it sets out to, and the material presented and the discussion that follows fill the knowledge gap outlined. However, in reading so closely about Komter's own work, the reader is left to make the leaps to other jurisdictions and institutional contexts themselves, although there are comparisons to others' work in chapter 3. What is captured and what is omitted in the types of records Komter outlines in chapter 3 is central to the arguments here, yet we do not see a discussion of the existing literature.

The publishing of this book exposes the overlooked and largely unquestioned impact of influencing factors on the construction of suspect statements, such as whether the interrogation was conducted by a single officer or multiple interviewing officers, and the impact this has on how the statement is constructed, and how it is produced during the interaction. It also raises questions about the agency of the suspect and the extent to which they are able to convey their version of events in their own words. We see how the interrogation of the suspect is so closely curated by the question-and-answer sequence, led by the officers, that the possibilities for what can be reported by the suspect are constrained. This ultimately determines which details are available to be recorded, recontextualised and later quoted by professional participants in court.

This book is well-situated to be a go-to on the practices of interrogation and record-keeping in the Dutch legal context and an excellent reference for those of us who are examining other jurisdictions and institutional contexts. It provides exceptional detail for others to pick up issues raised here, and examine and make comparisons of their own jurisdiction or institutional setting. It will be an ideal text for teaching, certainly a text for those who want to get quickly and easily up to speed with 'the way things are done' in this context. For a practitioner audience, this book does not make recommendations. However, in highlighting the issues, in such an accessible way, and by inviting other scholars to examine these practices there will no doubt be implications for practice.

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Obituary

Remembering Ronald R. Butters
February 11, 1940 – April 6, 2021

Edward Finegan

Emeritus Professor, University of Southern California, USA

After fighting the disease for several years, Ron Butters lost his battle to cancer at age 81. Ron is best known to many readers for his work in forensic linguistics as writer, editor, and consultant, and from 2009 to 2011 as president of the International Association of Forensic Linguists. While he was equally well known in the field of American English and served as president of the American Dialect Society, in this remembrance I focus on his forensic linguistics work and offer some personal thoughts and reminiscences in that arena.

Ron spent his entire career on the faculty of Duke University, where he started as an assistant professor in 1967 after completing his Ph.D. in English (with a concentration in linguistics) at the University of Iowa. He became Professor Emeritus of Linguistics and Cultural Anthropology in 2007. In those four decades his natural gifts for leadership saw him chairing Duke's distinguished English Department on several occasions and the Linguistics Program for more than a dozen years over several terms. As well, for eight years he co-chaired the North Carolina State University-Duke University Doctoral Program in English Sociolinguistics. Those were but three of many significant roles he played as a Duke faculty member and administrator. He also taught as a visitor at the University of Bamberg, Cadi Ayyad University, Universitat Pompeu Fabra, and the International Summer School in Forensic Linguistics. In editorial capacities he served in a dozen ways, including as editor of *American Speech* (the American Dialect Society's venerable journal) from 1996 to 2007 and then as co-editor of *The International Journal of Speech, Language and the Law* (IJSLL) from 2007 to 2010.

After publishing dozens of articles principally on American English, Ron developed an interest in forensic linguistics around 1990 and was retained as an expert in various kinds of litigation. Soon, though, his principal focus turned to trademark, where his insights and discipline shone. In *AutoNation v. Acme Commercial Corporation d/b/a CarMax the Auto Superstore* – his first trademark case, I believe – he was retained on behalf of AutoNation, while CarMax retained Roger Shuy. Both experts filed reports and were deposed but did not get to testify at trial. The jury found for AutoNation, and Shuy later devoted a chapter to the case in his 2002 book *Linguistic Battles in Trademark*

Disputes. "AutoNation USA clearly had the better evidence," he wrote, "and Butters brilliantly developed and brought it out" (143). "Brilliant" is also how I'd characterize Ron's case reports, ones I've read when he and I were retained on opposing sides, others when we were asked to address different aspects of a case by a single litigant, and still others publicly available. Ron's focus on trademark is highlighted by the fact that he secured for himself the domain name TrademarkLinguistics.com and mounted a website that brought him many engagements as an expert.

Among the better-known trademark disputes for which Ron provided expert testimony was one involving the name of the Washington Redskins football team. Attorneys for Native American opposers to the trademark had retained a linguistics expert to document the character of the term, and Pro-Football retained Ron and a respected lexicographer for their expertise in the matter. Ron's specialized knowledge of American English led him to opine that, during the second half of the twentieth century, the word "redskins" had taken on "'an important, powerfully positive new meaning' identifying the …football team; that 'redskin(s)' primarily refers to the football team in contemporary American English; and that the connection between the contemporary meaning of 'redskin(s)' as a football team with the original meaning as a Native American is greatly attenuated." So reported the U.S. Patent and Trademark Office's Trademark Trial and Appeal Board in its 1999 denial to renew the trademark as disparaging and thus in violation of trademark law. Pro-Football appealed, and a federal court reversed the TTAB's decision, in part owing to Ron's initial testimony.

Another well-known case involved Microsoft's opposition to Apple's USPTO application to register the term "app store" as a trademark. Microsoft contended that "app store" was a generic term and thus unprotectable, and Ron's declaration in rebuttal to Apple's expert report was filed with the TTAB in 2011 (as he was completing his term as IAFL president). An occasional attorney who'd previously retained Ron has pointed me to that report as a model of what they'd like for a case.[1]

Perhaps the most controversial matters Ron tackled involve authorship analysis. Given his negative view of the scientific status especially of stylistic analysis as a tool in authorship analysis, he was retained generally in rebuttal to other experts. In *People v. Coleman*, Christopher Coleman was accused of murdering his wife and children in 2009, and part of the case against him relied on the authorship of text messages and writing on the wall at the murder scene. Coleman objected when the State of Illinois sought to proffer testimony about the authorship of documents he denied writing, but the court admitted the expert's testimony with some limitations. As Coleman's authorship expert at trial, Ron rebutted the State's expert's methods, calling his four categories of linguistic similarities "useless" and opining that the similarities noted in the known and unknown documents were "linguistically meaningless." Besides the conflicting testimony about authorship, jurors heard abundant evidence of other kinds in the course of the trial and ultimately found Coleman guilty. Ron, of course, made no assumptions about the guilt or innocence of the accused, which he respected as the responsibility of the jury, with its much broader picture of the facts than a linguistics expert would possess.

Two months after the Coleman trial, Ron addressed a packed auditorium at Aston University on "ethics, best practices, and standards" – a central concern throughout his career. That concern was expressed, among other ways, by his organizing a symposium on "Ethical Issues in Forensic Linguistics Consulting" at the 2009 annual meeting of the

Linguistic Society of America, whose papers were published that same year in IJSLL. In addition, not long before the 2011 IAFL meeting at Aston, Ron had chaired an LSA subcommittee charged with formulating a code of practice for the Society's members. When in 2011 Maite Turrell succeeded Ron as IAFL president, she appointed him to chair a committee to draw up a code of practice for the Association. It is not surprising, then, given his commitment, that in his IAFL presidential address at Aston Ron focused on two points spelled out on the Association's website: research into the practice, improvement, and ethics of expert testimony and drawing up a code of practice on matters such as giving evidence in court and writing official reports.

To make his larger points tangible in the address to IAFL delegates, Ron focused on "comparative analysis of disputed texts" and exemplified with specific analyses by linguists he named. He homed in on what he regarded as inadequately tested authorship attribution claims, particularly those generally described as "forensic stylistics." With no punches pulled, he conveyed a powerful impression.

Certain details in Ron's oral address evade me now and aren't apparent in the published version. It is noteworthy, though, that in the Proceedings Ron's address is followed by a paper that was not presented at the conference. In the preface to the Proceedings, the editors graciously report that, "[t]o commemorate Butters' term as the President of the IAFL, Larry Solan kindly accepted an invitation to write a response to the plenary address, which we include in these pages as a way to stimulate discussion in an area close to Ron's heart." That's a characterization one wishes to conjure oneself on those occasions when subtlety, kindness, and generosity are needed to help keep an organization running peaceably and to nurture harmony among its members. It is no surprise that Solan's essay shines with his characteristic good sense and even-handedness. "With insight and candor," he writes in his opening sentence, "Ronald Butters . . . reminds us that forensic linguists, like practitioners in most areas of forensic science, have done more to advance their field substantively, than they have to advance it ethically," and he goes on to "applaud Butters for raising these important issues in such a public and salient context." The essay is a masterly bookend to the Proceedings.

Especially since he retired from Duke, Ron consulted and testified in scores of cases. Never did a meeting or email exchange with him fail to reveal that he was working on a report – or a couple of them. Over the past decade or so, Ron and I were both retained in perhaps half a dozen of the same cases, sometimes by opposing counsel, sometimes by counsel on the same side of a dispute but for distinct aspects of the litigation. While we met often at professional meetings and consistently enjoyed a lunch or dinner together on those occasions, we never brought up substantive matters about our common cases. The only thing either of us knew about the other's views was what appeared in our reports or depositions. Each of us has occasionally been put on the spot by an attorney asking in deposition just what we thought of the other professionally; needless to say, it was an honor always to express my view that I held Ron in the highest esteem. Over the course of decades, he and I became ever closer friends, and any difference of views about a forensic linguistics analysis we were both engaged in remained compartmentalized. It was natural to acknowledge our mutual involvement in cases, of course, and one or the other of us occasionally remarked that it would be interesting once a case had finished to revisit it, but we seldom, if ever, did. When, a couple of years ago, Ron grew frail from illness and treatment, he referred cases he was asked to take on to Phillip Carter

or me and perhaps to others. Throughout his illness, he remained active and engaged until his final weeks. His chapter on "Trademark linguistics," published in *The Routledge Handbook of Forensic Linguistics* (2nd ed.) in 2021, is among the richest in the book.

Besides his colleagues at Duke and in the American Dialect Society and the International Association of Forensic Linguists, Ron leaves behind his two daughters, Rachel Willis and Catherine Blum, and his grandchildren and great-grandchildren. He also leaves behind his beloved husband Stewart Campbell Aycock, his partner for many years before they were able legally to marry.

Notes

[1]The report can be read at https://ttabvue.uspto.gov/ttabvue/v?pno=91195582&pty=OPP&eno=27.

Obituary

Remembering Bethany K. Dumas

Philip Gaines

Montana State University, USA

The language and law community mourns the passing of Bethany Dumas, a long-time scholar and activist in forensic linguistics and a good friend and supportive colleague to many. Bethany died on June 22, 2021 at the age of 83. Originally a Texan, Bethany traversed a number of southern states to earn her academic credentials and teach—in Arkansas, Missouri, Louisiana, Texas, and ultimately Tennessee, where she researched and taught at the flagship UT campus in Knoxville for over 40 years. As Bethany recounts, it was at the University of Arkansas that she decided on linguistics as her area of specialization and where in 1971 she earned her PhD in the field. Fifteen years later, Bethany earned her JD at the UT law school– a qualification that enhanced her scholarly and professional impact at the interface of language and law.

A glance at Bethany's CV reveals the productive work of a scholar in a wide range of academic and pedagogical domains: college writing, bilingual education, women's studies, dialectology, language variation, and—of course—linguistics. Along the way, Bethany even published a memoir about E.E. Cummings, whom she had serendipitously befriended.

It was in forensic linguistics, however, that Bethany distinguished herself – both academically and professionally. Bethany was an early contributor in the formative years of the field as a distinct discipline – beginning with a 1985 conference paper on the linguist as expert witness. In her prolific publication history, Bethany brought analytical expertise and insight to a remarkable array of topics: consumer product warnings, voice identification, authorship attribution, semantics in the judicial process, plain legal language, statutory interpretation, dialect variation in legal settings, courtroom discourse, and jury instructions—about which Bethany was a tireless advocate for reform, especially in capital cases. Notably, her mastery of issues in comprehensibility was solicited by the Tennessee judiciary in their rewriting of pattern jury instructions. In addition, Bethany's forensic expertise was employed in over 60 legal cases.

Bethany was a faithful representative for forensic linguistics at the Law and Society Association and a valued presence at gatherings of the International Association of Forensic Linguists. Her broad experience, wide-ranging knowledge, and analytical acumen made her a leader and mentor to both emerging colleagues and students of linguistics. Impromptu conversations at academic conferences revealed a seasoned profes-

sional who was genuinely interested in the work of others and always inclined toward encouraging and supporting her fellow scholars – many of whom came to know here as a warm and caring friend.

Obituary

In remembrance of Dr John Gabriel Christopher Luke Olsson, who passed away on the 9th of June 2021, aged 69

June Luchjenbroers

Past colleague and research associate

It is with deep regret that I announce the passing of Dr John Olsson, BSc (Psych); MA, MPhil, PhD (Linguistics); LLB (Hons) and BPTC (The Bar). The long string of academic and professional achievements is well known in the field of forensic linguistics as well as the law for which he'd been called to the bar by the Inner Temple in October 2016.

John's status as one of the world's most experienced authorship specialists began with his choice to freelance as a forensic linguist in 1994. This was at a time when practically all forensic work was carried out by the police and possibly university faculty. So, in the last 26 years his reputation grew, as he worked in forensic authorship cases in over 450 criminal and civil cases, and was instructed by both defence and prosecution counsels, in courts around the world, including in the USA, Australia, Canada and Singapore, in addition to courts in the UK.

His testimonies dealt with hoax letters, threats, kidnap and other ransom demands, but despite this diversity of cases from all over the globe, he chose to further branch out into the law. First with a Bachelor of Law degree (H1), then as law faculty teaching forensic linguistics at Bangor University, and then to study for the bar at the University of Law where he gained the Bar Professional Training Certificate (BPTC). Amazingly he'd also recently completed solicitor training. I asked him once why he chose to go into the law and he told me, it's because he wanted to know how they (lawyers) think. He'd found it challenging to work with lawyers as a linguist because their thought processes seemed so very different. He later also told me, "never the twain shall meet".

I first met John when he was working on his first book, *Forensic Linguistics: An Introduction to Language, Crime and the Law*, in 2003. Given my forensic linguistics past, he'd asked me for my views on what he'd written. I'd recommended some radical changes, but was still amazed by the breadth of the changes he subsequently made. He had started again from scratch and that was the manuscript he'd submitted. It was released in 2004. On top of his freelance work as a forensic linguist, John taught at Bangor University in both the Law school as well as Linguistics. He designed and taught courses for a couple of North American universities, as well as the University of Trinidad.

And he'd studied psychology, linguistics, forensic linguistics and then the law. All of this at the same time as his freelance work as well as his publications. He wrote a total of six books, but it was only for the third edition of his first book that we actually collaborated. He showed remarkable energy and drive to keep all his projects going in set time, but he also found the time to talk to students and colleagues to help unravel problems or to find or develop new projects, and online courses such as the MSc in Forensic Linguistics that we co-wrote. When I was working at Bangor I could always rely on him to fit a lecture into my courses. John would always find the time to come and talk to the students, and during our MSc degree in Forensic Linguistics he organised an opportunity for our students to make a presentation to his lawyer contacts regarding a specific, current case.

I could go on about John's academic and professional achievements, but John was also a very creative person, enjoying art (several of his paintings are on display in his home); and music (his brother played the piano during the funeral service as well as piece after piece at John's wake). Apparently, John played the piano as well as his very gifted brother. John also had a pilot's licence and a helicopter license, and he'd also produced and published an aviation magazine called 'Pilots International' for several years in the eighties and nineties. If that's not enough, he'd also written other non-academic pieces for which he'd started up a small-scale publishing firm. It's hard to imagine any one person having so much energy and drive without something suffering, and yet John did.

John leaves behind a loving partner in Angie (short for Angela) and her children, as well as two brothers and other members of his family. His health had declined over the past year; he lost a lot of weight, but not his drive. His typical day would involve working through the night and going to bed when most of us get up (ca. 6am), to then start the day just after noon. And that's where he was found. . . in his bed, seemingly asleep. Apparently, his heart had given up.

You are sorely missed by so many John.

Rest in peace.