LANGUAGE IN THE LEGAL PROCESS

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This review essay analyzes the relation between language and the two basic functions of law, the ordering of social relations and the restoration of social order when it breaks down. One main theme is the linguistic description of legal language and the sociolinguistic and sociolegal limitations on its reform. Drawing on a basic distinction between the nature of discourse in play, ritual, and the "serious" mode of everyday life, the essay goes on to contrast "play" genres of disputing with "fact"-oriented genres. An overview of the forms and functions of play genres of disputing is followed by a discussion of the management of three main aspects of "fact"-oriented disputes: the substance of arguments, linguistic form, and language and silence. Narrative and questioning modes of claim construction are contrasted. The notion of "thickening" in legal language is presented, and five possible explanations for this phenomenon are explored. The essay concludes with a discussion of topics for future debate and research.

TABLE OF CONTENTS

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I. INTRODUCTION

In the last five years, a new field of social science research has emerged whose topic is the interrelations between language and law. Social scientists, lawyers, and linguists are attempting to hurdle disciplinary barriers in order to study how language relates to the functions of law in society. This work is being carried out mainly in the United States and Britain, though a number of researchers in continental European countries such as Sweden, Germany, and Austria have also

become involved. Though law and language have generally been treated separately in the past, they share certain features: both are rule-governed symbolic systems that are uniquely human and essential to the fabric of society.

Students of law in society first began to take an interest in language in the 1970s. In a conference on "Developments in Law and Social Science Research" sponsored by the National Science Foundation, Walter Probert urged: "There needs to be greater concern in the law, of all places, with language behavior, not just language, but language behavior" (*North Carolina Law Review*, 1974: 1084). Probert was concerned not with the written language of statutes, but with "law talk" (Probert, 1972).

A. The Domain of This Essay

It is not what language and law have in common that is of interest in this essay but rather their *interrelations*. Words are obviously of paramount importance in the law; in a most basic sense, the law would not exist without language. Compare the roles of language in medicine and law: to practice medicine is primarily (though not exclusively) to work with physical substances, to relate to human bodies as physical objects. To practice law, on the other hand, is to relate to people as social beings, as "language animals" (Steiner, 1968; Winch, 1958). The substance of law is entirely symbolic and abstract (O'Barr, n.d.). Its dependence on language has interested a number of legal scholars, though their approach has been mainly philosophical and conceptual (Bishin and Stone, 1972; White, 1972; Probert, 1972). Though drawing on some of these insights, the newer work aspires to be more empirical.

The study of law and language starts from a pair of intuitions: the ability of law to regulate human affairs is related in an important way to the fact that *words count* and there are "serious" as well as "frivolous" uses of language; critical aspects of communication processes in the handling of "cases" may have important consequences for individuals and groups. We need to define the boundaries of the field of language and law broadly enough to incorporate relevant phenomena in both preliterate societies without legislatures, courts, or legal personnel, and modern societies with highly differentiated legal subsystems. This essay follows the lead of legal anthropology from Malinowski (1934) to Llewellyn and Hoebel (1941) to Roberts (1979) in focusing on the functions of law rather than its forms. As a first approximation, I suggest the following: we

are concerned with *the nature, functions, and consequences of language use in the negotiation of social order*. This essay will focus on the relation between language and the two basic functions of law: the ordering of human relations and the restoration of social order when it breaks down. Lest the reader conclude prematurely that this formulation overemphasizes the ways in which language maintains societal equilibrium, let me hasten to add that I will also be concerned with the ways in which language usage may be *dys*functional for groups or individuals, or for society as a whole.

As Hoebel and Llewellyn suggested, the ordering of human relations is the "bare bones" law job (Hoebel, 1954: 276). Law not only defines relationships and tells us which activities are permitted and which are not but also creates relationships where none existed before. Thus, for the purposes of this essay I will group together the regulative and facilitative functions of law. The second major function of law is the disposition of "trouble cases," the cleaning up of "all the little social messes (and the occasional big ones) that recurrently arise between the members of . . . society from day to day" (Ibid.: 280). My second purpose, then, is to analyze how language affects substantive and procedural justice in dispute processing.

In discussing preliterate societies, we must obviously focus exclusively on patterns of speech in settings where issues of order and dispute arise. In modern societies, on the other hand, we shall be concerned not only with the written language of statutes, legal documents, lawyers' briefs, and appellate opinions, but also with the myriad varieties of legal talk: lawyer-client interviews, the examination of witnesses in the courtroom, jury deliberations, labor-management negotiations, neighborhood quarrels, and the little "remedial interchanges" of daily life (Goffman, 1971).

In suggesting that the domain of our topic is no less than the relation between language and social order I have, of course, equated the *legal* with the *social*. Obviously, this casts the net very wide, perhaps too wide. One way to narrow the focus would be to restrict the discussion to language in relation to rules backed by force; that way we could compare functionally similar phenomena in modern and preliterate societies even though these societies may differ in the degree of differentiation of legal subsystems. The problem with this approach is that it eliminates processes of informal law, a topic of increasing contemporary interest. To avoid that pitfall, I have chosen a more global definition. The essay will deal

mainly with language uses in modern settings, where narrowly legal rules are applied, because these have attracted the greatest attention thus far.

This essay will pursue five goals: (1) to suggest an initial organizing framework for the study of language in the legal process; (2) to familiarize researchers in law and social science with some of the terminology and concerns of socially oriented linguistics; (3) to raise pertinent issues and review relevant empirical research; (4) to explore the emerging implications of this research for our understanding of law as institution and process; (5) to suggest topics for future debate and research on language and law.

B. The Critique of Language in Public Life

Contemporary interest in language and law is not purely academic but also, in part, a response to widespread public criticism in the 1970s of the uses and misuses of language in public life and of the power and status of the professions. Although some of the criticisms were voiced earlier, there have been several new developments. Many social scientists who study the professions have a different ideological stance from that of their predecessors who, they believe, inadvertently reinforced the power of the professions (Danet, 1980a). For the first time, linguists have become professionally involved in the debate about language in public life. Finally, both government and research foundations have become willing to invest large sums of money in serious exploration of the emerging issues.

1. The Language of Bureaucracy, the Professions, Advertising, and Politics

Criticism of language in public life is not new. Mencken's studies of the American language in the 1930s and 1940s dealt with such concerns as euphemisms and jargon in politics, bureaucracy, and the professions. He noted the tendency for occupational groups seeking professional status to dress up their activities linguistically: funeral parlor directors, for instance, call themselves "morticians" (1977: 343). Orwell (1946) published his classic essay, "Politics and the English Language," decrying the use of clichés, euphemisms, circumlocutions, and outright lies by politicians to hide their actions from the public and themselves. In the aftermath of World War II, various writers noted the euphemistic language and "language rules" of the Nazis (e.g., Arendt, 1964; Mueller, 1973).

Although criticism of public language in the United States continued into the 1950s and 1960s (see, e.g., Hayakawa, 1964; Mellinkoff, 1963; Postman et al., 1969), it came into its own only in the 1970s. In response to the traumas of the Vietnam War and the Watergate scandals, harsh criticism of the uses and misuses of public language began appearing in the press and in both popular and scholarly books and magazines (Bolinger, 1973; Bosmajian, 1974; Bush, 1972; Danet, 1976a; Gambino, 1973; Hummel, 1977; Kanfer, 1973; Newman, 1974; Pei, 1973; Rank, 1974; Schlesinger, 1974). The most accusatory of these writers asked to what extent the "misdeeds" of the Vietnam War and of Watergate were due to dubious uses of language by key actors. In a complementary development the British, who had earlier looked down on American English (Mencken, 1977: chap. 1), began to criticize their own public language as well (e.g., Cottle, 1975; Robinson, 1973).

2. The "Plain English" Movement

In 1971 the American National Council of Teachers of English formed a Committee on Public Doublespeak. One of its activities is the development of teaching kits to foster a critical attitude toward language among students. Shortly after his election, President Jimmy Carter issued an executive order requiring "clear and simple English" as a means of improving government regulations. What came to be known as the "Plain English" movement was launched. Banks and insurance companies in the private sector, as well as state and federal government agencies, began holding conferences on language reform, hiring consultants, and producing revised versions of legal and bureaucratic documents. Enterprising individuals set themselves up as experts on Plain English, though they had no formal training in linguistics. Corporate decision makers began to accept the idea that Plain English is good business. In one of the most serious commitments of resources to the goals of language reform, the Document Design Center was established in Washington, D.C., in the late 1970s, with large sums of money given to interdisciplinary research and training activities conducted jointly with Carnegie-Mellon University and the private New York consulting firm of Siegel & Gale (Redish, 1979). Parallel calls for the reform of legal language were heard in Europe. Swedes call legalese *krångelsvenska*, "muddled Swedish" (*Fine Print*, 1979a). Linguists there are studying popular comprehension of public language (Wood, 1978) and the language of judges (Nordlund, 1978).

Government agencies train officials to write comprehensible Swedish and employ language experts to evaluate texts (*Language Planning Newsletter*, 1979). Similar developments are occurring in Norway, where, for example, a linguist teaches courses on "Plain Norwegian for Bureaucrats."[1] A Plain English movement has also sprung up in Britain (Welch, 1979), where document design has been a preoccupation for many years (*Fine Print*, 1979b; Wright, 1978, 1979). Critiques of public language are also being voiced in Germany (Dagan, 1979) and France (Verin, 1976).

3. The Attack on the Professions

A critique of language has also been one element of the attack on the professions. In popular books and articles (e.g., *Time*, 1978; Barzun, 1978; Lieberman, 1970; Illich, 1977) and in more academic writings (e.g., Freidson, 1970; Daniels, 1971; Haug, 1975; Gerstl and Jacobs, 1976; Lopata, 1976), we hear charges that professions are not the experts they claim to be, that they do *not* put service to clients ahead of other considerations, that self-regulation by peer review does not work, and that the professions cannot prove conclusively that the "help" they offer really helps people.[2] Variations of these charges are often directed at the legal profession, as readers of these pages well know (e.g., Abel, 1979a, 1979b; Auerbach, 1974; Galanter, 1974; Caplan, 1977; Lieberman, 1978; Rosenthal, 1974; Nader and Green, 1976; Tisher et al., 1977).

Critics claim that the professions use language in ways that mystify the public or at least stultify critical thinking. Edelman (1977) sees this phenomenon as endemic in all of the helping professions. As part of his continuing critique of psychiatry, Szasz (1979) has developed the theme that psychotherapy is a dehumanizing form of rhetoric. Critics argue that the language of the professions is both a symbol and a tool of power, creating dependence and ignorance on the part of the public. In Gusfield's (1976, 1980) view, it creates *the illusion of authority*. Studies of doctor-patient communication have found that patients do not understand medical terminology and ask few questions and that physicians either exaggerate the ignorance of their patients or withhold information from them (McKinlay, 1975; Waitzkin and Stoeckle, 1972; Adler, 1976; Barber, 1980).

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[1] Personal communication from Ivar Berman and Mariken Vaa.

[2] See Danet (1980) for a review of the literature on relations of clients with professionals and bureaucrats.

II. LANGUAGE IN CONTEXT

We have seen that the interest of social scientists in law and language is in part a response to the public critique of the language of bureaucracy and the professions. Another contributing factor has been developments in twentieth-century linguistics, which have brought about a rapprochement between linguists and social scientists, two groups that formerly had little to do with one another. This section presents an overview of these developments in order to introduce some basic concepts and distinctions that will be needed later in this essay.

Linguistics is the formal study of language. Linguists study the communication of meaning through sound and the rules for the production and interpretation of meaningful utterances; they define units of language and search for the principles that determine how sounds are grouped into words and words into sentences. Traditionally, linguists ignored empirical variation in speech patterns, preferring to abstract from that variation the common features of language as a formal system (Lyons, 1970: Introduction). Many adopted an analytical distinction introduced early in the twentieth century by the Swiss linguist de Saussure (1916). De Saussure had suggested that we distinguish between *langue* and *parole*, language and speech, or language as code and the empirical uses of that code to convey messages. The major change in contemporary linguistics of relevance here is the shift of focus to *parole*, or language *use*.

Today, many linguists, psycholinguists, and sociolinguists have committed themselves to the study of language in context (e.g., Bates, 1976; Cole, 1978; Fillmore, 1973; Gazdar, 1979; Gumperz and Hymes, 1972; Giglioli, 1972; Labov, 1972a; Rogers and Murphy, 1977; Shuy and Shnukal, 1980). In contrast to linguists, who seek to generalize about language, psycholinguists and sociolinguists are interested in language *behavior*; they seek to generalize about *people*. Psycholinguistics came into its own in the 1950s and 1960s; it is the study of the mental processes involved in the acquisition and use of language (Slobin, 1971). Sociolinguistics emerged in the 1960s and 1970s and is the study of the interrelations between patterns of language use, social characteristics of speakers, and features of social situations (Fishman, 1971; Gumperz and Hymes, 1972; Giglioli, 1972; Bell, 1976; Labov, 1972a).

A. Competence and Performance

A pivotal development has been the interest in formulating a theory of competence and performance in language. The work of Noam Chomsky has been seminal here. Chomsky sees linguistic *competence* as the idealized speaker-hearer's ability to produce and understand his or her native language, even though he or she may not be able to articulate how this is accomplished. *Performance*, in contrast, is the actual use speakers make of their knowledge in concrete situations. Competence enables and is manifested in performance (Chomsky, 1965).

Students of legal socialization sometimes use the terms competence and performance in ways that seem, at first glance, quite parallel to their use by linguists (see, e.g., Tapp and Levine, 1977; Nonet, 1969; Carlin et al., 1967). On closer inspection, however, we may see that the concepts are not being used in the sociolegal literature with the same meanings or the same precision. Levine and Tapp, for instance, write that the term "legal competence" usually denotes "effective utilization of law" (1977: 163), a meaning that corresponds to the linguists' "performance."

Linguists and sociolinguists have broadened the concept of competence to include communicative competence (Hymes, 1971, 1972). Over the last decade, studies of the relation between sociocultural organization and language use have operated on the assumption that speakers internalize not only rules of grammar but also rules of appropriate speech usage. Thus, communicative competence includes mastery not only of grammatical rules but also of a set of cultural rules that include specification of the appropriate ways to apply the grammatical rules in speech situations (see, e.g., Ervin-Tripp, 1972).

B. Pragmatics

Focus on speech performance has led to the emergence of the field of pragmatics (e.g., Gazdar, 1979; Bates, 1976; Rogers and Murphy, 1977; Cole, 1978). This term is part of a threefold classification that goes back to the philosopher Peirce but that was first made known by Morris (1938: 6). *Semantics* studies the relation between signs and the objects to which they apply, *syntactics* analyzes the formal relations among signs, and *pragmatics* examines "the relation of signs to interpreters" (Morris, 1938: 6). For Katz (1977), pragmatics deals with those aspects of meaning that are derived from their context, in contrast to sentence meaning that could be derived from (an

idealized) "zero-context," as when an anonymous letter is sent. Gazdar (1979: 2) defines pragmatics as the study of those aspects of utterance meaning "which cannot be accounted for by straightforward reference to the truth conditions of the sentences uttered."

The study of language in context begins with the observation that many types of utterances convey meanings that cannot be understood or derived solely from a scanning of the string of words uttered. Suppose I say "It's hot in here," and you understand correctly that I mean you should open the window. Only the information we share about how language may be related to context can account for successful communication between us. This example illustrates one topic of interest to students of language in context, *indirect speech acts*.[3]

The study of pragmatics includes work in three areas, all of which are important for language and law, though their implications for this field have hardly begun to be explored. These are speech acts, presuppositions and conversational postulates, and discourse. Whereas the first two focus on individual utterances and their links to context, the third topic takes as its unit of analysis whole complexes of utterances, whether written compositions or spoken dialogues. Students of sociolinguistics and pragmatics share these interests as well as others, but whereas those working in pragmatics seek to generalize about language, sociolinguists want to generalize about people—how they use information about social characteristics of interlocutors and about situations to make communicative choices.[4]

C. Meaning as Object and Meaning as Act

The problems of what words mean or how they relate to their referents have been the subject of a vast philosophical literature that cannot be discussed here. One issue, however, is critical: the difference between *meaning as object* and *meaning as act* (see Bates, 1976: 8). In its most extreme form, the former view holds that meanings are either entities in the mind or sounds corresponding to entities in the external world.

[3] Ironic utterances also belong to the domain studied. If I say "This cake tastes terrific," and you and I both know that it is burnt, something other than literal meaning must contribute to an understanding of what I mean.

[4] Some blur the distinction between pragmatics and sociolinguistics (e.g., Bell, 1976); others try to maintain it, perhaps by what accounts for empirical variation in the choice of ways to realize a given speech act, such as a request (e.g., Ervin-Tripp, 1976).

One example of this view is Russell's (1905) theory of denoting. According to Russell, a sentence must refer to something to be meaningful; otherwise we could not tell whether it was true or false. For thinkers committed to such a perspective, scientific language is believed to be precise and unambiguous. They see a dichotomy between literal meaning and other kinds of meaning, relegating metaphor, irony, indirection and understatement, and the literary or expressive uses of language to a residual category. If one will only use language "correctly," one can arrive at a "correct" objective characterization of reality. This view, which dominates the thought of Russell (1956) and the early Wittgenstein (1961), underlies the logical positivism of twentieth-century natural and social science and has been the object of sharp attack in recent years (see, e.g., Winch, 1958; Pitkin, 1972; Filmer et al., 1973; Wootton, 1975). Not surprisingly, the same issues appear in jurisprudence and the sociology of law (cf. Hart, 1951; Bishin and Stone, 1972; Brigham, 1978; Grace and Wilkinson, 1978).

A very different view of language underlies all contemporary work on language in context. Wittgenstein came to reject the view of language just described. In his *Philosophical Investigations* (1968) and *Blue and Brown Books* (1964) he developed the concept of the *language game*. The meaning of a word is not just a referential correspondence between the sound made and the object referred to. The meaning of, say, the word "brick" is built up through "games" in which its uses are learned. Words are like tools in a tool box; though "fire" conventionally denotes the thing we associate with it, in the appropriate circumstances the same word alone—"Fire!"—will mean something entirely different—"Run for your life!" Describing the world, the core of the first view of language, thus becomes only one of many possible language games, which include giving orders, reporting events, asking questions, thanking, acting in plays, and so on.

The second view, then, is *constructivist* (Ortony, 1979). Cognition is the result of mental construction; knowledge of reality is a result of going *beyond* the information given and emerges through interaction between information and the context in which it is presented. The dichotomy between literal and nonliteral uses of language disappears. Metaphorical uses of language are not mere decorations but one more kind of *creative* use of language, important even in scientific theorizing (cf. Boyd, 1979). To speak, to interact with others verbally, is thus to construct the world, to constitute it, not merely to

mirror it in words. Constructivist views of language, knowledge, and experience are central in several brands of "subjectivist" sociology, such as phenomenological sociology (e.g., Schutz, 1962; Berger and Luckman, 1967), symbolic interactionism (Goffman, 1967, 1971), and ethnomethodology (Wootton, 1975; Turner, 1974).

D. The Study of Speech Acts

One of the most important developments is the emergence of a large body of work on speech acts. J.L. Austin (1970a, 1970b)[5] and Searle (1969, 1976)—both philosophers of language—are central, though many others have taken up the topic in the last five years (e.g., Cole, 1978; Rogers and Murphy, 1977). The analysis of speech acts is founded upon the distinction between sentences and utterances. An *utterance* is an empirical use of a sentence on a particular occasion. The *sentence* "It's raining" is seen as analytically separable from empirical instances of its use. Although most utterances may be grammatically well-formed sentences, we have seen that a one-word utterance like "Fire!" can successfully convey a meaning—in this case "There is a fire; hurry and get out"

In his initial work on speech acts, Austin (1970a) distinguished between two kinds of utterances, which he called performative and constative.[6] *Performative utterances* are those in which we *do* something rather than merely say that something is or is not the case. To say, "I promise" is to perform an act that can only be accomplished by saying the right words. Such utterances have no truth value. They do not describe an act; they *are* the act itself. The category of *performatives* includes christenings, marriage ceremonies, apologies, and promises. A performative is expressed in the first person present indicative—only "I promise" will do, not "I am promising" or "I promised." Constatives, on the other hand, are statements, assertions that such and such is so, and consequently they *can* be true or false. Ultimately, Austin rejected the distinction between performatives and constatives (1970b) and came to view all talk as a form of action. If I say

[5] J.L. Austin, the contemporary Oxford ordinary-language philosopher, should not be confused with John Austin of jurisprudential fame (1873).

[6] Austin invented the term *performative*. He comments that the closest existing term is *operative*, as used by lawyers.

> Lawyers when talking about legal instruments will distinguish between the preamble, which recites the circumstances in which a transaction is effected, and on the other hand the operative part—the part of it which actually performs the legal act which it is the purpose of the instrument to perform. [1970a: 236]

"The book is red," I am engaging in the speech act of asserting, though I have not said explicitly: "*I hereby assert that* the book is red."

Austin made a further distinction between three aspects of utterances: locutionary, illocutionary, and perlocutionary (1970b). *Locutionary* refers to the making of sounds, the physical utterance of what is literally said. The *illocutionary force* of an utterance is the work it accomplishes in being uttered in a specific context. The *perlocutionary effect* is the effect on the hearer; in *asserting* that the cake is good, I may persuade you that it *is* good.

Searle (1976) and Hancher (1979), among others, have attempted to develop typologies of speech acts, drawing on Austin's earlier efforts (1970b). It is useful to cross-classify Searle's (1976) categories with our two sets of functions of law.

1. Representatives

These are utterances that commit the speaker to something being the case or assert the truth of a proposition; they match words to the world. Searle distinguishes between speech acts whose illocutionary force or point (to use his preferred term) is strong, such as testifying or swearing, and those whose illocutionary point is weak, such as asserting, claiming, and stating.

2. Directives

These are future-oriented speech acts that seek not to match words to some current state of things but to change the world, to get someone to do something. Within the facilitative-regulative functions of law, they are most prominent in legislation that imposes obligations. The notion of directives clearly lies behind the Austinian view (1873) of the law as a set of commands. Strong directives are also prominent in dispute processing. Questions should be seen as a special form of request—to *tell* something rather than to do something. When a witness is under oath and on the witness stand, a question is not just a request but an *order* to tell something. Subpoenas, jury instructions, and appeals are all directives. Lawyers believe that the inclusion of an "enacting clause," as in "Be it enacted by the Parliament that all citizens aged 18 shall be eligible for army duty," is what provides the authority of such utterances. However, it is the matching of the form and content of the utterance with the context of its use—in a set of mainly nonlinguistic, i.e., legal, conditions—that invests it with

authority (cf. Hancher, 1979). Criminal law relies heavily on this use of language.

3. Commissives

These utterances commit the speaker to do something in the future. The major category in legal settings is, of course, contracts. Promises between friends are weaker commissives than contracts. Both the parties to a contract and the guarantors engage in commissive acts. Marriage ceremonies and wills are other examples. Societies and languages differ in the conventions, linguistic and nonlinguistic, that define these speech acts. They must be performed "just right" in order to count. These conventions, with all their ambiguities, often become explicit only when a dispute arises about what the parties understood by a commissive. Drawing on Grice's (1975) notion of the cooperative principle, Hancher (1979) proposes that contracts should be recognized as *cooperative commissives*, speech acts that cannot be said to have taken place unless the other party also commits himself or herself. In modern legal parlance, this is a *bilateral contract*.

4. Expressives

These express the speaker's psychological state about a proposition and include such speech acts as apologizing, excusing, condemning, deploring, forgiving, and blaming—what Goffman (1971) would call ritual demonstrations of one's position in relation to societal rules. In modern trials, the tradition of asking convicted persons just before sentencing whether they have anything to say is an opportunity for them to display publicly whether their relation to the rules has changed.

5. Declarations

These are utterances whose successful performance brings about a correspondence between their propositional content and reality. The change in reality occurs solely because of the utterance of the speaker, provided he or she has the authority to engage in such acts and regardless of any subsequent acts on the part of hearers. To say "You're fired" is not merely to depict reality, as in a representative, but to change it. How can the performance of a declaration bring about a fit between words and the world by the very fact of its successful performance? Declarations

> involve an extra-linguistic institution, a system of constitutive rules in addition to the constitutive rules of language, in order that the declaration may be successfully performed. The mastery of those rules which constitutes linguistic competence by the speaker and hearer is not in general sufficient for the performance of a declaration. In addition, there must exist an extra-linguistic institution and the speaker and hearer must occupy special places within this institution. It is only given such institutions as the Church, the law, private property, the state, and a special position of the speaker and hearer within these institutions that one can excommunicate, appoint, give and bequeath one's possessions or declare war. [Searle, 1976: 14]

Of special relevance for law and social science are Searle's observations about a subcategory that he calls *representative declarations*:

> Some members of the class of declarations overlap with members of the class of representatives. This is because in certain institutional situations we not only ascertain the facts but we need an authority to lay down a decision as to what the facts are after the fact-finding procedure has been gone through. The argument must eventually come to an end and issue in a decision, and it is for this reason that we have judges and umpires. Both, the judge and the umpire, make factual claims: "you are out," "you are guilty." Such claims are clearly assessable in the dimension of word-world fit. Was he really tagged off base? Did he really commit the crime? But at the same time, both have the force of declarations. If the umpire calls you out (and is upheld on appeal), then for baseball purposes you are out regardless of the facts in the case, and if the judge declares you guilty (on appeal), then for legal purposes you are guilty. There is nothing mysterious about these cases. Institutions characteristically require illocutionary acts to be issued by authorities of various kinds which have the force of declarations. Some institutions require representative claims to be issued with the force of declarations in order that the argument over the truth of the claim can come to an end somewhere and the next institutional steps which wait on the settling of the factual issue can proceed: the prisoner is released or sent to jail, the side is retired, a touchdown is scored. . . . Unlike the other declarations, [representative declarations] share with representatives a sincerity condition. The judge, jury and umpire can, logically speaking, lie, but the man who declares war or nominates you cannot lie in the performance of his illocutionary act. [Ibid.: 15].

Within the facilitative-regulative functions of law, regular declarations include marriage ceremonies (the speech act of the person conducting the ceremony, not that of those getting married), bills of sale or receipts, appointments and nominations, and the legislative stipulation of rights and of definitions of concepts. In dispute processing, regular declarations include lawyers' objections, sentences, and appellate opinions, all of which "count" because of the institutionalized authority of speakers to engage in these acts; examples of representative declarations are indictments, confessions, pleas of guilty/not guilty,[7] and verdicts. Given the

[7] The formulaic nature of representative declarations is strikingly illustrated by the transcript from a trial observed by Carlen (1976: 110-11).

Clerk: Do you plead guilty or not guilty?
Defendant: Yes, I did it. I said I did it.
Clerk: No. Do you plead guilty or not guilty?
Defendant: Yes, I did it. I just want to get it over.

right circumstances, such utterances are *fateful* regardless of their truth value. The ambiguous nature of representative declarations lies at the heart of much of the debate over whether dispute processes uncover the truth (see IV, infra).

E. Presuppositions and Conversational Postulates

A second topic in pragmatics that has received much attention of late is *presupposition* (Rogers and Murphy, 1977: Gazdar, 1979; see Bates, 1976: chap. 1; Lyons, 1977: 596-606). Briefly, presuppositions are assumptions about the context of a sentence that are necessary to make it verifiable or appropriate, or both (Bates, 1976: 6).

1. Types of Presupposition

There are at least two main kinds of presupposition, semantic or logical presupposition, and pragmatic presupposition.[8] *Semantic presupposition* pertains to the phenomenon whereby the speaker making an assertion or asking a question assumes or presupposes that something is so. The question "Why did you leave at ten o'clock?" presupposes that the addressee in fact left at ten o'clock.

Other types of information deducible from a sentence have to do with the relationship between that sentence and the context in which it is used rather than with assertion or logical entailment. The utterance "Mr. Smith, can I get your coat?" presupposes that the listener is an adult male and may also suggest that the listener is either a social superior or distant acquaintance of the speaker. *Pragmatic presuppositions* are conditions necessary for a sentence to be appropriate in the

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Magistrate (to probation officer): Can you be of help here?
The probation officer goes over to the defendant and eventually goes out of court with her. Later in the morning the case is "called on" again.
Magistrate: Do you plead guilty or not guilty?
Defendant: Yes, I did it.
Magistrate: No, I'm asking you whether you plead guilty or not guilty. You must use either the words "not guilty" or "guilty."
Defendant: (Looking toward probation officer) She said, "Say guilty."
Magistrate: No. You must say what you *want* to say.
Defendant: Yes, I'll say what you like. I did it.
Magistrate: No, You must use the language of the court. (To probation officer) Did she understand?
Probation Officer: Yes, she understood.
The probation officer once more approaches the dock, whispers to the woman and the word guilty emerges. Still the magistrate is not satisfied. The trial does not continue until the charge has once more been formally put and the plea formally taken.

[8] Bates identifies a third type, psychological presupposition (1976: chap. 1).

context in which it is used. They may be seen as the *felicity* conditions (Austin, 1970a, 1970b) that must be satisfied before an utterance can successfully perform its function as a statement, question, promise, etc. Among the pragmatic presuppositions that may underlie contracts are the conditions (1) that the parties are sincere and mean to carry out their commitments and (2) that they are able to do so, physically or otherwise.

2. Conversational Postulates

A particular class of pragmatic presuppositions is a set of assumptions about the nature of human discourse, called conversational postulates. Grice introduced the notion of *conversational implicature* in the William James lectures at Harvard in 1967-68. He stipulates a basic *cooperative principle* in normal conversation: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged" (Grice, 1975: 45). Conversation is a "quasi-contractual matter" (Ibid.: 48) governed by four maxims: (1) quantity (say what is necessary and no more); (2) quality (tell the truth); (3) relation (be relevant); (4) manner (be clear). Grice uses these seemingly obvious maxims and the notion of conversational implicature to account in a sophisticated manner for situations in which speakers imply something very different from what they actually say, as in the case of understatement, irony, or metaphorical utterances.

In an elaboration of Grice's ideas Gordon and Lakoff (1975) develop a set of conversational postulates to account for the phenomenon of *indirect speech acts*, utterances in which we use one sentence to convey the meaning of another. To get someone to close a window by saying "It's cold in here" is to mean both that it *is* cold in the room and something more. Gordon and Lakoff show that one can convey a request indirectly by referring to one of the felicity conditions of the speech act of requesting. They discuss two types of conditions, sincerity conditions (e.g., the speaker really wants the action done) and reasonableness conditions (e.g., it is reasonable to assume that the listener is capable of carrying out the act requested). Thus, one can convey a request indirectly by saying, "I want you to do X" or by asking, "Can you do X?" One of the main functions of indirection is to be polite (e.g., Ervin-Tripp, 1976).

F. Discourse Analysis

One of the major developments in the interdisciplinary study of language use is what is variously called *discourse analysis* (e.g., Coulthard, 1977; van Dijk, 1977; Labov and Fanshel, 1977), *textlinguistics* (Dressler, 1977), *conversational analysis* (e.g., Gumperz and Herasimchuk, 1972) or the *ethnography of speaking* (Gumperz and Hymes, 1972; Bauman and Sherzer, 1974). Interest focuses not on the single utterance but on how series of utterances are linked together to form larger units that we experience as wholes. The term "discourse" may be applied both to monologic communication, written or spoken, and to dialogue. In both cases, the theoretical focus is on how the parts are linked to the whole. These wholes may be studied apart from context (as texts), or in relation to context (as discourse). Widdowson (1973) suggested that the concepts *text* and *discourse* are related in the same way as *sentence* and *utterance*. Thus, one can study how cohesion is produced in texts, as opposed to how coherence is produced in discourse.[9] Halliday and Hassan (1976) explicate the devices used to produce cohesion in English. The ethnomethodological analysis of conversation includes attention to turn-taking, a basic element in the production of coherence in conversation (e.g., Sacks et al., 1974).

III. LEGAL LANGUAGE AND THE ORDERING OF SOCIAL RELATIONSHIPS

One of the major developments in the field of law and language over the last five years has been a focus on legal language (henceforth LL) as a social problem. The target of criticism is primarily written LL, especially that found in documents like contracts and consumer-loan forms. Two claims are made: LL is incomprehensible to the layperson, and it can and should be reformed.

We saw in the previous section that two basic types of speech acts are prominent in the ordering functions of law—directives and commissives—whereas representatives, declarations, and representative declarations are most

[9] Linguists are interested in explicating rules of use and interpretation as part of a general theory of language use. Sociolinguists committed to the study of the ethnography of speaking (e.g., Gumperz and Hymes, 1972) would put the emphasis, instead, on the sources of empirical variation in the uses that speakers make of rules. Labov sets as the goal of discourse analysis the explication of the relation between *what is said* and *what is done* interactively (Labov, 1972a; Labov and Fanshel, 1977).

significant in dispute processing. We noted also that Searle (1976) distinguished between speech acts whose illocutionary point is "strong" and those whose point is "weak." For law to regulate social relationships effectively, language uses in legal contexts must have this strong illocutionary point. The fundamental question to be raised in Part III, then, is, How can demands for comprehensibility and accessibility of law on the part of the public be reconciled with the need for LL to "count," to be taken "seriously"?

A. The Critique of Legal Language

One of the consequences of the complex division of labor in modern societies is the tendency for occupational specialties to develop their own communicative codes. We frequently speak of these codes as "argot," "cant," or "jargon" (Mencken, 1977: 709-61). In some contexts these terms are used neutrally to denote the specialized language of any trade, profession, or group; in others, however, they are used pejoratively. "Cant" may be the most negative term; it was first used to denote the secret language of gypsies and thieves in the fifteenth century (Ibid.: 709-31). Occupational jargons are functional insofar as they facilitate communication about difficult technical matters but dysfunctional if they create undesirable barriers between members of the group and outsiders.

How new a phenomenon is LL? How different is it from other kinds of language? In what ways is it functional and dysfunctional? LL is *not* a product of the Industrial Revolution and the extreme occupational specialization of modern society. Even before the birth of Christ, the Celts already had a group of identifiable lawyers who perpetuated customary law in a "learnedly archaic language," departures from whose formulas were considered a violation of tribal taboo (Powell, 1958, cited in Mellinkoff, 1963: 36). The lack of systematic scholarly attention to the second and third questions means that this essay cannot review the literature but must instead attempt to define more sharply the issues that need to be studied. To make the discussion more manageable, I will limit it to the legal variety of modern English (LE). Future work will no doubt compare legal Swedish, English, and German—languages deriving from the same language family—or the extent of differentiation in languages of differing families (e.g.,

Romance and Teutonic languages).[10] Comparative studies could also investigate the extent to which linguistic differentiation correlates with sociolegal differentiation, and what such correlations might mean.

1. Earlier Criticism of Legal English

Criticism of LE is by no means new. Modern LE—in both its British and American varieties—is mainly the product of the successive invasions of Britain by the Romans in the first century A.D., by the Angles and Saxons in the fifth century, and by the Normans in 1066. Consequently, modern LE is a mixture of Latin, Old English, and Norman French. "The first national outcry (in Britain) against LL was not that it was technical but that it was French" (Mellinkoff, 1963: 111). A fourteenth-century law ordered that the language of the law should be Anglo-Saxon since litigants did not understand courtroom proceedings, but the law itself was published in French, and the court records continued to be published in Latin.

In the sixteenth century, Thomas More wrote that in his Utopia "they have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters" (cited in Ibid.: 202). Sir Francis Bacon, Attorney General from 1613 to 1617, called for major reform, including the pruning of "prolixity . . . tautologies and impertinences" in the reporting of legal cases (cited in Ibid.: 192-93). The term "attorney" has had a negative connotation since the fourteenth century, but by the eighteenth century this was especially pronounced (Ibid.: 197-98). In the early 1700s the processes of linguistic differentiation and the growing power of the legal profession led Jonathan Swift to satirize the profession savagely in *Gulliver's Travels*:

> I said there was a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Purpose, that *White* is *Black*, and *Black* is *White*, according as they are paid. To all this Society all the rest of the People are Slaves. . . . It is a Maxim among these lawyers, that whatever hath been done before, may legally be done again: And therefore they take special care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of directing accordingly. . . . It is likewise to be observed, that this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they

[10] Uriel Procaccia, a law professor who has written on the problem of the comprehensibility of insurance policies (1979), reports in a personal communication that legal Italian is more difficult than legal French.

> have wholly confounded the very Essence of Truth and Falsehood, of Right and Wrong; so that it will take Thirty Years to decide whether the Field, left me by my Ancestors for six Generations, belong to me, or to a Stranger three Hundred Miles off. [1947: 295-97]

The eighteenth century saw the publication of what may have been the first of the do-it-yourself books, a volume called *Every Man His Own Lawyer* (Mellinkoff, 1963: 198). Among the most acid criticism heard in the late eighteenth and early nineteenth centuries was that of Jeremy Bentham, who wrote that the law was "spun out of cobwebs" (Bentham, 1843: 485), "wrought up to the highest possible pitch of voluminousness, indistinctness, and unintelligibility" (Ibid.: 332). As a result of Bentham's campaign for reform, and particularly for codification of the substantive rules and legal procedures, a multitude of form books appeared. To this day, books containing exact recipes for the preparation of documents—contracts, leases, or jury instructions—continue to play a prominent role (Mellinkoff, 1963: 275-82). In principle they should free the layperson to act autonomously, but in practice they have been so complicated and abstruse that lawyers have continued to serve as interpreters to the public.

2. The In-House Debate Among Lawyers

In our own century, scores of lawyers and judges have debated among themselves whether and why LE should be changed. Discussion tends to focus either on the need to improve the legal writing of below-average writers, or on the language of written laws and the profession as a whole (Kermish, 1975). A minority of writers focus on oral rather than written skills. Those concerned with individual style generally call for the improvement of legal writing and lawyer literacy in order to facilitate communication among members of the legal profession (e.g., Baugh, 1962; Bowman, 1970; Gerhart, 1954; Gottlieb, 1963; Greenbaum, 1956; Lavery, 1921, 1922; O'Hayre, 1967). This group often assumes that correct usage will lead to precise expression (Biskind, 1967; Rossman, 1962; Weihofen, 1964).

Beardsley (1941) and Morton (1941) exchanged salvos in two articles entitled "Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles" and "Challenge Made to Beardsley's Plan for Plain and Simple Legal Syntax"; another exchange took place between Hager ("Let's Simplify Legal Language," 1959) and Aiken ("Let's Not Oversimplify Legal Language," 1960). Hager called for the elimination of (1) archaic English words, and Latin or French words when the

principle could be expressed in English; (2) the corruption of common words by assigning them one or more purely legal meanings; and (3) overlong, unpunctuated sentences with many qualifications and exceptions. Aiken's reply is typical: he claims that technical subtleties cannot always be expressed in everyday language. Other lawyers concurring with Hager's position are Dick (1959), Rodell (1939), and Dickerson (1965).

Defenders of LE argue that vagueness can be functional (Christie, 1964) and that technical terms promote efficiency and reinforce the cohesiveness of the profession (Friedman, 1964). The parochialism of lawyers throughout this debate is evident in an article by Steuer (1969), who says that foreign words, anachronisms, and technically defined common words are useful in communications between lawyers and judges, in drafting documents, and in identifying and bringing together lawyers but who maintains that they should not be used in talk with clients.

3. Critics Outside the Legal Profession

Many lay critics have pointed to LE as a source of mystification and deception (e.g., Pei, 1973; Barzun, 1978; *Time*, 1978). John Erlichman's testimony at the Watergate hearings was replete with features of LE (Danet, 1976a); it may be no coincidence that a high proportion of the conspirators were lawyers.

Social scientists interested in the symbolic uses of language have paid special attention to LE. Thus, Edelman writes of the language of legislation:

> The obvious approach to defining the meaning of legal language is to apply the dictionary meanings of the words, and the layman naturally assumes that this is how the experts do define its meaning. That laymen make this comforting assumption is itself an important fact . . . . But dictionary meanings are operationally close to irrelevant so far as the function of the statute or treaty in the political process is concerned. For laymen either never see such language or find it incomprehensible; and its authoritative interpreters . . . know that it is in fact almost completely ambiguous in meaning.
>
> It is precisely its ambiguity that gives lawyers, judges, and administrators a political and social function; for unambiguous rules would, by definition, call neither for interpretation nor for argument as to their meaning. . . . Operationally, then, the dictionary level of meaning of legal language functions in two ways: it gives the mass of citizens a basis for assuming that there is a mechanical, precise, objective definition of law, and it provides a vocabulary in which organized groups justify their actions to accord with this lay assumption. [1972: 139]

Several social scientists have criticized the fact that criminal defendants are often unable to understand what goes on in their trials (e.g., Bankowski and Mungham, 1976: 89; Carlen,

1976: 83). Charrow and Charrow (1976) report that lawyers grossly overestimate the ability of the public to comprehend LL. Norwegian housewives and housemaids could not understand the language of a law designed to protect the latter (Aubert, 1969).

4. The Views of the Legal Realists

Edelman's argument about the language of legislation is reminiscent of the writings of the legal realists, notably Thurman Arnold and Jerome Frank. Both Arnold and Frank claim that lawyers and judges use language in ways that mask inevitable inconsistencies in order to create the illusion of consistency. In Frank's view, lawyers have to do this because all people have a childlike need for certainty and security (1930: 24-34). Whereas Frank highlights irrationality in judicial decision making, Arnold focuses on jurisprudence, the "holy of holies" of government (1935: 46). He holds that laypersons who become involved in the judicial process and therefore begin to see its contradictions must be persuaded that jurisprudence can provide the necessary consistency, as they would realize if only they had time to study it (Ibid.: 46-49). "Unintelligibility is the element that makes [jurisprudence] work. The mass of verbiage is so impossible to read that a mere reference to it is sufficient to confound the superficial person who questions the underlying unity of the law" (Ibid.: 65-66).

5. Contemporary Legal Reformers

Among contemporary lawyers concerned with reform, Zander has diagnosed LE as a serious barrier to lawyer-client communication (1978: 157-58). Lefcourt has called for the transformation of lawyer-client relations by "turning legal jargon into everyday language and encouraging mutual decisionmaking" (1971: 313). In an even more caustic critique, Caplan has allied himself with the iconoclast Illich:

> The easiest way to create a monopoly is to invent a language and procedure which will be unintelligible to the layman. This illusion of complexity—whose grand finale, like a rabbit out of a hat, is the divination of simplicity—has, in the past, been the art of countless quacks. In many ways, it is also the art of the ancient and noble profession of the law. [1977: 93]

Would Frank and Arnold have agreed with Caplan that we should get rid of the trappings of law that create mystification? I believe that their writings, like those of Edelman, can be read two ways, either as a call for reform or as an explanatioon of why the law *must* mystify. But what is it about legal language that mystifies? What, indeed, is mystification? How distinct a

variety of language is LL? What are its demonstrable consequences?

B. The Description of Legal English: A Lawyer's View

The most comprehensive effort by a lawyer to describe LE is that of Mellinkoff (1963), who identifies nine characteristics and four "mannerisms." He notes, first of all, that LE frequently adopts ordinary words but gives them a specific legal meaning that laypersons might never guess; thus an *action* is not just a doing but a lawsuit. Second, LE is full of Old and Middle English words now archaic in all but legal settings, e.g., *heretofore, thereof*, and *whosoever*. Third, LE uses Latin terms, not just words of Latin origin that have been Anglicized (as in *testament*), but phrases like *amicus curiae* (friend of the court) and *mens rea* (state of mind). Fourth, LE employs Old French words not in the general vocabulary (again contrasted with words of French origin that have passed into common usage, like *attorney*); examples are *oyez, oyez* (Old French for *hear, hear*) and *voir dire* (the selection of jurors through questioning by judge and counsel). Then there are technical terms like *garnishment, plaintiff*, and *lessor*. Mellinkoff also notes the formality of legal style, which uses special phrases for ordinary acts. Thus, *approach the bench* means come here (note that *bench* is also used metaphorically; one approaches the object on which the judge sits, not the judge himself/herself). Still another feature is the juxtaposition of extreme precision and extreme vagueness.

Mellinkoff claims that LE is wordy, unclear, pompous, and dull—highly subjective judgments that should not be part of an effort to describe LE objectively. But this attempt to characterize LE contains many fascinating insights and bits of historical fact. Mellinkoff pays special attention, for example, to the phenomenon of *doublets*, phrases like rules and regulations. Typically, these doublets combine a word of Anglo-Saxon origin with one of French (break and enter) or Latin (will and testament) origin. Originally intended to facilitate communication in a linguistically heterogeneous population, doublets have outlived their function, says Mellinkoff. But though he has paid attention to matters of vocabulary, his treatment is seriously lacking in its neglect of legal syntax and of the nature of legal discourse.

C. The Linguistic Approach: Problems of Conceptualization

1. Language, Dialect, or Register?

What, then, is LE? Is it a language in its own right? A dialect? One would think that linguists could distinguish sharply between languages and dialects, but they cannot. *Dialect* originally denoted language varieties in different geographical regions of a speech community, but it has been extended to varieties associated with sociocultural variables like social class. There are still other complications.

> What constitutes "one language"? Danish and Norwegian have a high degree of mutual intelligibility; this makes them almost by definition dialects of a single language. Do we count them as two? Cantonese and Mandarin, in spite of both being "Chinese," are about as dissimilar as Portuguese and Italian. Do we count Chinese as one language? To be scientific we have to ignore politics and forget that Denmark and Norway have separate flags and China one. But even then, since differences are quantitative, we would have to know how much to allow before graduating X from "a dialect of Y" to a "language, distinct from Y." [Bolinger, 1975: 13]

Since language and dialect imply judgments about the relative status of linguistic codes, linguists have adopted the term *variety* as a neutral way of referring to them. Generally, if two varieties are mutually intelligible, linguists call them dialects. Yet objective evidence of linguistic proximity may conflict with subjective judgments by speakers. Wolff (1964) has described two societies of the Eastern Niger Delta that spoke varieties of the Ijaw language family that were objectively very similar, but the society enjoying higher status claimed it was unable to understand the speech of the other. Dialects often come in chains; dialects A and B are mutually intelligible, as are B and C, but speakers of A may not understand C (Hockett, 1958: chap. 38). Thus, although lawyers and laypersons may not understand one another very well, lawyers can communicate with legal secretaries and courtroom bailiffs, who in turn can talk to laypersons.

O'Barr (n.d.), an anthropologist and sociolinguist, and Charrow and Crandall (1978), both linguists, all believe that the linguistic differentiation of legal English may be great enough to warrant calling it a separate language or dialect.

> Even well-educated speakers of American English often find it difficult to understand the language used in court. Their lawyers serve the role of interpreter. . . . This interpretation is necessary because the language of the courtroom is anything but ordinary English. Its lexicon and syntax are alien to twentieth century American English. *Court talk* . . . is as distinctive as the archaic forms of the King James English Bible. Its similarities to contemporary English deceive the ear; it sounds as though it should be understandable to speakers of English; but the assumption that it is comprehensible is indeed largely just that—an assumption rather than a demonstrated fact. [O'Barr, n.d.]

Another approach would be to call LE a *register* of English. Within this framework, dialects characterize speakers, whereas registers are a function of situation or use (Bolinger, 1975: 358-63). Bolinger suggests that register is mostly a matter of formality. We adjust our speech up and down the scale of formality depending on the occasion and what we want to communicate about it. Thus, although university lecturers may choose to deliver their lectures more or less formally, there is a general set of features that the speech community perceives as characteristic of a lecturing register. We can speak of the registers of politics or sports, and of more narrowly defined occupations like waitressing, car repairing, or computer programming.

Table 1 cross-classifies genres or types of language use in legal settings using two criteria: the mode of language use and the dominant style on a continuum from informal to formal. It distinguishes between written and spoken language, and then between composed or rehearsed and spontaneous speech. Note that the various cells in Table 1 can be divided into two larger groups, written (and composed spoken) versus spoken genres.

TABLE 1

A TYPOLOGY OF SITUATIONS IN WHICH LEGAL ENGLISH IS USED, BY STYLE AND MODE

Mode	*Style*			
	Frozen	Formal	Consultative	Casual
Written	Documents: insurance policies contracts landlord-tenant leases wills	Statutes Briefs Appellate opinions		
Spoken-composed	Marriage ceremonies Indictments Witnesses' oaths Pattern instructions Verdicts	Lawyers' examinations of witnesses in trials and depositions Lawyers' arguments, motions in trials Expert witnesses' testimony	Lay witnesses' testimony	
Spoken-spontaneous			Lawyer-client interaction Bench conferences	Lobby conferences Lawyer-lawyer conversations

Source: Joos (1961)

Joos (1961) has identified five basic styles in English, ranging along the continuum from formal to informal: frozen, formal, consultative, casual, and intimate. Frozen style is designed for print or declamation; the reader or hearer cannot cross-question the speaker, but it is possible to reread and

study a text. Formal style is designed to inform and is detached; the speaker removes himself or herself from the scene, and the hearer (or reader) cannot participate freely. Formal style is planned and grammatically complex. Consultative style is the way in which strangers communicate; the speaker explicitly supplies background information, and there is interaction between speaker and hearer. "The grammars of all other styles are formed by adding archaisms and other complications to the consultative grammar" (Joos, 1961: 34). Casual style "is for friends, acquaintances, insiders; addressed to a stranger it serves to make him an insider" (Ibid.: 23). It is characterized by ellipsis (omissions) and slang. Intimate style leaves implicit the greatest amount of information and is confined to small groups, usually pairs.

Only four of these styles occur in legal settings. The purest distillation of the legal register is no doubt found in written documents: the style is frozen, and matters are "all form and no content" or nearly so. To put it another way, form *is* content. The words are performative—a will written in the wrong formula is not a will. At least some kinds of spoken language in legal settings are also in a frozen style, for instance, a civil marriage ceremony, the formula for a criminal indictment, the witness's oath to tell "the truth, the whole truth, and nothing but the truth," and pattern instructions to the jury.

Formal style allows variation in content while focusing close attention on matters of form. Statutes, briefs, and appellate opinions would fall in this category. In the courtroom, examples of semicomposed speech are the opening and closing arguments of counsel and the examination of witnesses. Since direct examination in the adversary model is rehearsed, it is more nearly composed than is cross-examination.

Though we lack empirical information on the style that characterizes lawyer-client interviews, this cross-classification suggests that the ideology of the attorney will be a significant influence. Although all attorneys may use a variety of the consultative style, those adhering to the traditional model of professional-client relations may introduce more elements belonging to formal style, whereas those committed to a democratic, participatory model may incorporate elements of a casual style (see Rosenthal, 1974). Casual speech may characterize only conversations among insiders, as in lobby conferences or lawyer-to-lawyer conversations, though even

here some legal jargon, typically belonging to frozen and formal styles, would also appear. Although the scale of styles moves across the columns from most to least frozen, there is also some variation within each column. Thus, in some respects the written language of statutes and briefs, being fully planned, is more purely formal than the spoken examination of witnesses or arguments by counsel.

2. Legal English as a Form of Diglossia

The concept of *diglossia*, first developed by Ferguson (1964), provides a useful way of analyzing the linguistic status of legal English. Ferguson originally applied the concept to describe high and low varieties of Arabic, Greek, Swiss, German, and Haitian Creole. Diglossia refers to a linguistic situation in which one variety is "superposed" on another; the former, which typically enjoys higher prestige, is not the primary native variety for speakers but may be learned as an additional form.

Ferguson lists some ten features of diglossia. (1) "One of the most important features of diglossia is the specialization of function for H and L [the high and low varieties]; in one set of situations only H is appropriate" (1964: 431). (2) Speakers of H regard it as superior to L. (3) Since H is acquired through formal education, speakers are never quite as much at home in it as they are in L. (4) There is a strong tradition of grammatical study of H; there are grammars, dictionaries, treatises on style, and so on. (5) Diglossia is quite stable; it can persist for centuries. (6) "There are always extensive differences between the grammatical structures of H and L" (Ibid.: 433); "the grammatical structure of L is simpler than that of its corresponding H" (Ibid.: 434). (7) "Generally speaking, the bulk of the vocabulary of H and L is shared . . . but a striking feature of diglossia is the existence of many paired items, one H one L, referring to fairly common concepts frequently used in both H and L, where the range of meaning of the two items is roughly the same, and the use of one or the other immediately stamps the utterance or written sequence as H or L" (Ibid.). (8) The sound systems of H and L constitute a single phonological structure (cf. O'Barr, n.d.). (9) "No segment of the speech community in diglossia regularly uses H as a medium of ordinary conversation" (Ibid.: 435). (10) "Diglossia seems to be accepted and not regarded as a problem by the community in which it is in force, until certain trends appear. . . . These include trends toward more widespread

literacy [and] broader communication among different regional and social segments of the community" (Ibid.: 436). When H and L come into conflict,

> the proponents of H argue that H must be adopted because it connects the community with its glorious past or with the world community and because it is a natural unifying factor. . . . there are usually pleas based on the beliefs of the community in the superiority of H; that it is more beautiful, more expressive, more logical, that it has divine sanction, or whatever their specific beliefs may be. When these *latter arguments are examined objectively their validity is often quite limited, but their importance is still very great because they reflect widely held attitudes within the community.*
>
> The proponents of L argue that some variety of L must be adopted because it is *closer to the real thinking and feeling of the people; it eases the educational problem* since people have already acquired a basic knowledge of it in early childhood, and *it is a more effective instrument of communication* at all levels. . . .
>
> . . . H can succeed in establishing itself only if it is already serving as a standard language in some other community. . . . Otherwise H fades away and *becomes a learned or liturgical language* studied only by scholars or specialists and not used actively in the community. Some form of L or a mixed variety becomes standard. [Ibid.: 437; emphasis added]

This comparison of LE with the language situation in Switzerland or Greece is not tongue-in-cheek. Even if somewhat exaggerated, it is useful in shaking us out of both complacency and apathy with regard to LE. To sum up, then, a case can be made that either of the terms, dialect or register, is appropriate to identify and characterize LE. Which one is preferable cannot be decided on objective linguistic criteria alone. Rather, it is a political judgment about how LE is to be viewed in society.

D. Fragments of a Linguistic Description of Legal English

No adequate linguistic description of LE is presently available because linguists have not yet systematically sampled a sufficient variety of its uses and identified its distinguishing characteristics. I know of only five individuals or teams who have attempted even a partial description of a particular kind of LE. The first to do so were the British linguists Crystal and Davy, who included a chapter on "The Language of Legal Documents" in a book on English style (1969: chap. 8). They analyzed the linguistic features of two documents, an endowment-assurance policy and a hire purchase agreement. Gustafsson (1975), working in Finland, analyzed the syntactic properties of legislative LE, using the text of the British Courts Act of 1971 as her data base. Of the five efforts, hers comes closest to a formal description and includes comparison of the incidence of various features in LE and in scientific prose.

In contrast, three American teams have analyzed varieties of LE with an eye to possible reforms. Charrow and Charrow (1979), a lawyer-linguist couple, identified the linguistic features of pattern jury instructions and then proceeded to test the extent to which reform could improve comprehension. Although they present quite a systematic list of features of LE in jury instructions, description was not their goal, and they provide no base against which to compare the incidence of those features. Another team, headed by Sales, a lawyer-psycholinguist, also studied comprehensibility of jury instructions but avoided the issue of linguistic description altogether, preferring to draw on the psycholinguistic literature identifying the lexical, syntactic, and discourse-level features of language that commonly cause comprehension difficulties (see Sales et al., 1977; Elwork et al., 1977). Finally, Shuy and Larkin have written in general terms about the linguistic problems that arise in attempts to reform the language of insurance policies (Shuy, 1978; Shuy and Larkin, 1978). For brevity's sake I will call these five teams the LE linguists in the discussion that follows.

Although the available evidence is obviously fragmentary since the various LE linguists have analyzed different types of LE in two different countries, certain lexical, syntactic, and discourse-level features do seem to recur. Only Crystal and Davy paid full attention to the lexical features of their documents, and they found many examples of the features discussed by Mellinkoff (1963). Although the most systematic treatment of syntactic features is in Gustafsson's work, the Charrows identified the largest number of *different* syntactic features. In general, there is considerable agreement among Crystal and Davy, Gustafsson, the Charrows, and the Sales team concerning the key syntactic features. Discourse-level features—those aspects of LE that link different sentences—are treated much less fully, though all five pay them some attention.

To illustrate the lexical and syntactic features that a systematic description of LE would probably report, I will use a widely quoted bit of LE, a single sentence from a New York Citibank loan form that was the object of the first contemporary reform of LE in the United States (Gilman, 1978; Charrow and Crandall, 1978).[11] This sentence appears in

[11] The New York consulting firm of Siegel and Gale was originally commissioned in 1979 to revise only the graphic design of the loan form; the linguistic changes were their idea.

Figure 1, together with the revised version of this portion of the loan form.

FIGURE 1

TEXT OF ONE SENTENCE FROM A CITIBANK LOAN FORM: "BEFORE" AND "AFTER" VERSIONS

Before

In the event of default in the payment of this or any other obligation or the performance or observance of any term or covenant contained herein or in any note or any other contract or agreement evidencing or relating to any obligation or any collateral on the borrower's part to be performed or observed; or the undersigned borrower shall die; or any of the undersigned become insolvent or make assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have a right (at its option), without demand or notice of any kind, to declare all or any part of the obligations to be immediately due and payable, whereupon such obligations shall become and be immediately due and payable, and the Bank shall have the right to exercise all the rights and remedies available to a secured party upon default under the Uniform Commercial Code (the "Code") in effect in New York at the time and such other rights and remedies as may otherwise be provided by law.

After

I'll be in default:

(1) If I don't pay an installment on time; or

(2) If any other creditor tries by legal process to take any money of mine in your possession.

Source: Charrow and Crandall (1978)

1. Lexical Features

a. Technical terms. Distraint (line 11) is certainly unfamiliar; *default* (line 1) is somewhat less so.

b. Common terms with an uncommon meaning. Assignment (line 7) is used to mean "the transference of a right, interest or title" and not simply "something assigned, a task or duty." Other examples include: *note* (line 3), *attached* (line 11), *secured party* (lines 17-18), and *insecure* (line 12).

c. Words of Latin, French, and Old English origin. Collateral (line 4), *insolvent* (line 6), *creditors* (line 7), and *provision* (line 8) are Latin; *property* (line 10), *party* (line 18), *default* (line 1), *demand* (line 14), *contract* (line 3), and *obligation* (line 4) are French; and the archaic forms *herein* (line 3), *hereafter* (line 10), and *whereupon* (line 16) are remnants of

Old English.[12] Whether it is important to note that legal words have these origins is debatable. Does "normal" prose, whatever that is, differ from LE in the distribution of vocabulary items by origin? We do not know.

d. Polysyllabic words. The same may be said of another characteristic mentioned by Mellinkoff and others, the frequency of polysyllabic words like *obligation* and *collateral.* Are they more frequent in LE than in, say, newspaper language?

e. Unusual prepositional phrases: *in the event of default* (line 1) instead of *if* the borrower defaults. Charrow and Charrow (1979) have also noted this phenomenon, though the particular phrase they identified in jury instructions was *as to.*

f. Doublets. There are eight different doublets in the Citibank sentence, two of which appear twice; among them are *demand or notice* (line 14) and *rights and remedies* (line 17, lines 19-20). Note, however, that not all doublets are truly synonyms: one can have legal rights for which there are no legal remedies.[13]

g. Formality is illustrated by the use of *shall*, as in *the undersigned borrower shall die* (lines 4-5).

h. Vagueness characterizes the description of the rights of the bank, which is entitled to *all the rights and remedies* available (line 17). These are specified nowhere in the document.

i. Over-precision characterizes the specification of the consumer's obligations: *default in the payment of this or any other obligation or the performance or observance of any term of covenant contained herein* (lines 1-3) instead of *default in the payment of this loan.*

2. Syntactic Features

Syntax is the study of the principles by which words are put together. The evidence suggests that LE is characterized by many highly distinctive syntactic features.

a. Nominalizations are nouns constructed from verbs, often by adding "ing" or "tion." Crystal and Davy, Gustafsson, the

[12] Information on the origin of these words is drawn from Mellinkoff (1963).

[13] This was pointed out by Uriel Procaccia.

Charrows, and Shuy and Larkin all report the prominence of nominalizations in materials studied. The very first line of the Citibank sentence is full of nominalizations: *In the event of default in the payment of this . . . obligation* could have been rendered *If you fall behind and do not pay what you owe*. A typical nominalization in LE is *make assignment*, instead of *assign* (line 6). I count 11 different nominalizations in the Citibank sentence.

b. Passives. A second feature of LE appears to be the high frequency of passive constructions, for instance, *as may . . . be provided by law* (line 20) instead of *as the law may provide* (see also lines 4-5, 7, 10-11). Sales et al. (1977), Charrow and Charrow (1979), and Shuy and Larkin (1978) all include passives among the features discussed, the first of them noting that in a passive sentence the grammatical subject is really the psychological object.

c. Conditionals (see Holland and Rose, 1980). Of the five LE linguists, only Crystal and Davy note this feature. The sentence in Figure 1 consists of six conditions on the main clause, all following the phrase *in the event of* and marked by semicolons (lines 1-13).

d. Unusual anaphora. A fourth distinguishing feature of LE may be the absence of pronouns to refer to persons and entities already mentioned. Both Crystal and Davy and Shuy and Larkin find an unusual style of *anaphora*, or backward-oriented reference to previously mentioned nouns, in the types of LE they examined. Where we would expect a pronoun, LE tends instead to use the same nouns over and over. The Citibank sentence repeats nouns in this manner in at least two cases: *borrower* and *undersigned* (lines 1-9). Take the phrase *borrower's part . . . or the . . . borrower shall die* (lines 1-6). *Borrower* is mentioned twice instead of *in the event of default on the borrower's part, or if he (or she) shall die*. The absence of pronouns may be intended to make LE more precise, to leave no doubt as to the referent; yet, ironically, it may end by confusing the reader.[14]

[14] The absence of pronouns is noticeable both within sentences and in adjacent sentences; see the discussion of discourse features below. Charrow and Crandall (1978) suggest, on the other hand, that LE may be characterized by unclear anaphora. In contrast to Crystal and Davy, and Shuy and Larkin, Gustafsson (1975: 24) found pronouns within sentences but not between them.

e. Whiz deletion is probably another common feature of LE, though so far it has been studied only by Charrow and Charrow. *Whiz* is an abbreviation for a *wh*-word combined with some form of the verb *to be*, usually *is*. There are two instances of whiz deletion in the Citibank sentence: *covenant [that is] contained* (lines 2-3) and *remedies [which are] available* (line 17).

f. Prepositional phrases are discussed by all the LE linguists except the Sales team. Both Gustafsson and Shuy and Larkin mention their high frequency, but this is probably less distinctive than their placement. Crystal and Davy, Gustafsson, and the Charrows all note that they tend to appear in unusual locations. Prepositional phrases and most other types of adverbial clause do not usually appear between the subject and predicate of a sentence (Quirk and Greenbaum, 1973: 207-42, 322-30), as is apparently common in LE. In 42 book-sized pages of print containing only 289 sentences, Gustafsson found 199 unusually placed adverbials exceeding five words in length.[15] The Citibank sentence contains a total of 32 prepositional phrases, mainly chained together in long sequences, in one of which the order is unusual: *right . . . without demand or notice . . . to declare* where we would probably expect *right to declare . . . without demand or notice* (lines 13-14).

g. Sentence length and complexity is one of the most distinguishing features of LE. I noted above that Gustafsson found only 289 sentences in 42 book-sized pages of text—an average of fewer than 7 sentences per page. The average sentence contained about 55 words, almost twice as many as the average sentence in scientific English (28 words) and nearly eight times the number of words per sentence in dramatic texts (Barber, 1962). In a study of sentence length in different types of English written prose, the longest sentences occurred in a genre consisting of government documents and business house publications; the mean sentence length in this genre was only about 25 words, and the longest single sentence

[15] Gustafsson does not supply separate data on the frequency of prepositional phrases but rather includes them with other types. Of the 199 unusually placed adverbials, 159 occurred between the subject and the verb and another 40 between the auxiliary and the main verb, e.g., between *shall* and *pay* in *shall pay* (1975: 19-22). Charrow and Charrow (1979) found "a few" misplaced phrases whose placement caused comprehension difficulties. They report a high frequency of one particular prepositional phrase, "as to," e.g., *as to the importance of.*

was 240 words long (Marckworth and Bell, 1967, cited in Gustafsson, 1975: 11).[16] The Citibank sentence contains a remarkable 242 words, which may be unusually long even for LE.

Sentence length and grammatical complexity tend to go together, though even long sentences can be simple in structure (Quirk et al., 1972: 795). In the corpus studied by Gustafsson, there were 827 different clauses in the 289 sentences, of which 396 were independent and 431 dependent, an average of 2.86 clauses per sentence.[17] Only a fifth of the sentences consisted of a single independent clause, and 54 contained three or more dependent clauses. Gustafsson compares her results with those of Barber (1962) for scientific prose. In the latter the most common type of sentence (41 percent) had one independent clause; thus, such sentences are twice as frequent as in Gustafsson's material. Barber found only three out of 350 sentences with six or more clauses, whereas Gustafsson found 20 out of 289 sentences. She concludes that the main difference between scientific and legal prose is in the degree of subordination.

No less important is the nature of the internal organization of clauses within sentences. Linguists study *embedding*, the ways in which subordinate clauses are nested within independent ones. Complex sentences containing one or more dependent clauses are of interest here, not compound sentences that consist of two or more independent clauses. Gustafsson reports no data on the distribution of different types of embedding, though her impression is that left-branching and right-branching sentences are the most common (1975: 14). The most complex sentence in the 14 jury

[16] Marckworth and Bell suggested that three factors might account for the extreme length of certain genres: an awareness of the significance of style, the need to be precise, and the availability of a specialized set of concepts (1967: 370-76). The set of 14 jury instructions studied by Charrow and Charrow contained 44 sentences, ranging in length from 7 to 72 words (1979: 1320, 1364).

[17] This includes only finite clauses, i.e., those containing verbs with full specification of tense and person. In left-branching sentences the subordinate clause appears first, uninterrupted: "While the driver was repairing the truck he sang loudly." In right-branching sentences the main clause appears first, uninterrupted. Center-embedded sentences are those in which the main clause is interrupted by a subordinate clause: "The truck that Bill was driving crashed into the post" (see Sales et al., 1977: 45-48; Holmes, 1973). As the number of embeddings increases, the sentence becomes more difficult: "The boy [whom the girl (whom the man in the red car hit) kissed] lives next door to me." The Charrows found the following left-branching sentence in one California jury instruction: "Whether or not it is negligence for one to proceed into a dangerous situation of which he had previous knowledge is a question of fact" (1979: 1328 n. 59).

instructions studied by the Charrows contained nine subordinate clauses (1979: 1327).

h. Unique determiners are phrases like *such* and *said*, appearing in conjunction with nouns where other terms would ordinarily be used. Crystal and Davy, the Charrows, and Shuy and Larkin also noted this phenomenon in their materials. In the Citibank sentence there are three instances, e.g., *in any such event* (line 13) instead of *in this event* (see also line 19).

i. Impersonality. LE prefers the third person over first or second person references. Of course, one would not expect to find personal references in the language of legislation studied by Gustafsson, but they might be thought appropriate in the contracts and insurance policies studied by Crystal and Davy and by Shuy and Larkin. The jury instructions studied by the Charrows do use the second person in addressing members of the jury. But like most contracts, the Citibank loan form is entirely impersonal. Note the difference between the two versions of the Citibank form: instead of *in the event of default . . . on the borrower's part*, the second says simply, *I'll be in default*.

j. Negatives, especially multiple negatives, are an important syntactic feature of LE. Both the Charrows and the Sales team pay special attention to negatives in jury instructions. Linguistic analysis and psycholinguistic research show that negatives are not limited to words like *not* and *never* or prefixes like *un*, but include conjunctions like *unless* and *except*. In the Citibank sentence the phrase *in the event of default* (line 1) carries the negative meaning *if you don't pay*. The Charrows found 19 negatives in the 14 jury instructions, 6 of which were multiple (1979: 1366).

k. Parallel structures is a term commonly used by students of poetics, oral tradition, and literature (see Jakobson, 1960; Hawkes, 1977; Gossen, 1974). Charrow and Crandall (1978) noticed this phenomenon in LE. By my count, the sentence contains no less than 19 parallel structures, mostly of the form *A or B* (e.g., *now or hereafter*, line 9), though there is also *A or B or C* and *A and B*. Note that this syntactic category incorporates the lexical category of doublets.

3. Discourse-level Features

Impressionistic analyses of LE as discourse suggest that it violates some of the rules of ordinary language. Most of the LE linguists note that legal writing violates rules about anaphora, not only within sentences, but *between* them. Entire documents avoid pronouns, with the result that this type of prose strikingly resembles that found in school primers.

> Jill said, "Help Ben, Bill. Stop the ducks. Help Ben stop the ducks."

Legal documents lack cohesion because they string together sentences in lists. Readers have difficulty determining which ideas are most important. Shuy and Larkin see this in insurance-policy language, and Sales and his colleagues find it present in jury instructions as well. Legal discourse is overcompact; each sentence is made to count for too much. In other kinds of prose, the writer often expresses an idea one way and then restates it in somewhat different form, giving the reader more time to digest it.

4. Prosodic Features

While analyzing the Citibank sentence, I unexpectedly discovered many examples of devices we normally expect to find in poetry. Those who are skeptical of such a reading might consider that students of stylistics see no clear boundary between literature and other writing, or between poetry and prose, but arrange genres of language use along a continuum (Fowler, 1966; Jakobson, 1960). Like poems, written LE may make use of the sounds of the English language.[18] The Citibank sentence is full of alliteration, assonance, and rhythm, and even rhyme, meter, and phonemic contrast. These are all prosodic, or word-music, features of the English language.

The words *covenant, contained, note*, and *contract*, which appear in close proximity (line 3), play on the consonants *c, n*, and *t*, a classic type of alliteration that occurs mainly at the beginnings of words and in their stressed syllables. *Deposit* and *possession* (line 10) also contain alliteration in the

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[18] What Fowler has written about poetry can be applied to LE:

> Poems have the characteristic that while they are most usually originally realized in written form, their reading is often a spoken one. We need not consider the question of whether the poem is designed as a spoken utterance and committed to writing only as a guarantee of permanence. . . . Professor Firth considered that all written texts have "implication of utterance". . . . We need note only that poetic texts rather than any others may exist in both types of substantial realization—phonic and graphic. The problem is to determine what aspects of phonic substance are part of the poem, and what are to be relegated to the reading only. [1966: 7]

repetition of a *z* sound, as do *rights* and *remedies* (lines 17, 19-20) with their initial *r*.

Assonance is "the repetition of identical or related vowel sounds, especially in stressed syllables" (Abrams, 1961: 3). The triplet *covenant, contained, contract* (line 3) is marked not only by alliteration, but also by repetition of the *o* sound in the first, stressed syllable. *Performance* and *observance* (line 2) (and *performed* and *observed* in line 5) are also pairs containing assonance, but with the *er* and *o* sounds reversed in the two terms.

Rhythm is the pattern of stressed and unstressed syllables in speech. The pair *deposit/possession* (lines 9-10) not only contains alliteration, but each word also has the same pattern of unstressed, stressed, and unstressed syllables. And *performance* and *observance* actually rhyme (line 2). There may even be signs of meter, regular stretches of rhythmic beats, in this sentence. Consider

x x x / x x / x x / x x / x x
In the event/of default/in the pay/ment of this/or any
/ x x / x
o/ther obliga/tion (line 1)

Is it mere coincidence that the first six "feet" have the same rhythmic pattern of three syllables each, with the stress falling on the last syllable within each foot?[19]

The last prosodic feature I will discuss is phonemic contrast.[20] I find a remarkable relationship between the terms *observance* and *performance*. Note that *observance* contains the consonants /b/ and /v/, while *performance* contains /p/ and /f/. The phonemes /b/ and /p/ are identical sounds, except that /b/ is voiced while /p/ is unvoiced. Similarly, /v/ and /f/ are the same, except that /v/ is voiced and /f/ is unvoiced. *Observance* contains the voiced versions of each consonant, and *performance* the unvoiced versions; moreover, the order of the members of each pair is the same in both words.

In presenting this analysis of the prosodic features of the Citibank sentence I do not mean to suggest that the person

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19 This type of meter is called *anapestic* (Abrams, 1961).

20 Phonemes are the units in the sound system of any language. The term *phonemic contrast* has a technical meaning: "A difference between sounds which is sufficient on its own to permit words to be differentiated. Thus the phonemes /p/ and /b/ in English show a contrast, since it is primarily the difference between them which enables speakers to distinguish the words *pin* and *bin*" (Hartmann and Stork, 1972: 171). Other languages, like Arabic, do not have this particular contrast. "Voiced" means the vocal chords are made to vibrate.

who wrote this or any other similar document is an expert on poetic devices or the phonemic system of English. Rather, this may be evidence of intuitive exploitation of the sound or musical resources of the language to emphasize what is, I suggest, the critical element of the document, the commitment of the borrower to pay back the money. The play of five overlapping devices—alliteration, assonance, rhythm, rhyme, and consonantal contrast—in *observance* and *performance* constitutes a kind of *stretta*, to borrow another analogy from music. *The Random House College Dictionary* defines *stretta* as either "the close overlapping of statements of the subject in a fugue, each voice entering immediately after the preceding one" or, more loosely, "a concluding passage played at a faster tempo."

E. Comprehensibility of Legal English

The contemporary focus on the comprehensibility of legal language has its roots in the development of readability formulas, which began in the 1920s. Textbook writers wanted to know if the average pupil in a specific grade could read their books.

> A readability formula is a mathematical equation that is used to predict the relative difficulty a reader will have with a specific written text. . . . As mathematical equations, readability formulas yield a numerical score that can be used to compare two versions of a text. . . . In a typical readability formula, the reviewer takes sample passages from the text, usually 100 words in length, and counts the occurrence of certain features. Typical features counted . . . are number of words per sentence, number of multisyllable words, number of words *not* on a certain list. [Redish, 1979: 2]

Over the years, hundreds of such formulas have been developed and applied to a wide variety of reading material (see, e.g., Flesch, 1974, 1979; Dale and Chall, 1948; Gunning, 1964). Their great weakness is that they deal with issues of textual comprehensibility at only a superficial level (Redish, 1979; Charrow and Crandall, 1978; Klare, 1963, 1974-75; Kintsch and Vipond, n.d.). They overemphasize the importance of word length and sentence length when these are better viewed as *symptoms*, rather than the causes, of incomprehensibility (Charrow and Crandall, 1978; Charrow and Charrow, 1979).

1. Lexical Features Affecting Comprehensibility

Psycholinguists find that uncommon words are more poorly perceived, remembered, and understood (see generally Charrow and Charrow, 1979; Sales et al., 1977; Elwork et al., 1977). High-frequency words are heard, read, and repeated faster and with fewer errors (Paivio and O'Neill, 1970;

Champagnol, 1971). Most researchers discover a positive correlation between word frequency and memory (e.g., Baddeley and Scott, 1971; Duncan, 1973). Denotative meanings of high-frequency words are easier to decode (Lowenthal, 1969). Varying the known frequencies of words in elementary school books can improve comprehension quite dramatically (Marks et al., 1974). Concrete words increase retention (Gorman, 1961; Duker and Bastian, 1966), and there is also some evidence that they are better understood than abstractions (O'Neill, 1972; Begg and Paivio, 1969).

The only direct evidence available on how lexical features affect the comprehensibility of LE is in the study by Charrow and Charrow (1979). They had 35 subjects paraphrase a set of 14 jury instructions pertaining to an automobile negligence case. The mean number of correct responses for 36 difficult technical terms was only 34 percent. When 17 difficult lexical items were replaced by easier ones, the mean score on correct paraphases increased to 50 percent (Ibid.: 1372).

2. Syntactic Features Affecting Comprehensibility

It seems reasonable to expect that lexical and syntactic sources of difficulty might go together. Labov (1976) testified as an expert witness in a class action suit that portions of legal documents that received low readability scores using a vocabulary measure were also the most complex syntactically.

Linguistic theory indicates that nominalizations are more difficult to process than their equivalent verb forms (McCawley, 1970). In the Charrows' study of jury instructions, nominalizations were not well understood. The mean percentage of correct replies for instructions containing nominalizations was 29 percent, as compared to nearly 40 percent for all instructions *not* containing them. Moreover, removing nominalizations significantly improved comprehension of instructions.

Another syntactic feature of LE discussed earlier is the use of the passive. Psycholinguistic evidence concerning the effects of the passive voice on memory and comprehension is equivocal. Though some studies find passives more difficult to recall or comprehend, others fail to find a difference (Slobin, 1968; Huttenlocker and Strauss, 1968; Wearing, 1973). Apparently, if subject and object of a sentence are not logically interchangeable, and especially if it is functionally meaningful to highlight something by use of the passive, this use has no deleterious effects. The Charrows found that passives in LE

generally did not affect comprehension adversely, though those appearing in subordinate clauses were less well understood than active verbs in such clauses (1979: 1326). Removing passives improved comprehension significantly only in subordinate clauses.

The twelve instances of whiz deletion in the unreformed jury instructions studied by the Charrows received only 25 percent correct responses (1979: 1366). Portions of instructions containing misplaced phrases received the lowest single average of correct responses (24 percent) of any of the grammatical or lexical variables studied; moving them to more natural places in sentences improved comprehension scores by nearly 40 percent. A similar improvement was found when the phrase "as to" was replaced by another construction.

Sentence length by itself has little influence on recall and comprehension (Wearing, 1973). Sentences containing embedded clauses are more difficult to remember and understand (Fodor and Garrett, 1967: Hamilton and Deese, 1971; Wang, 1970), though right-branching sentences are more easily processed than left-branching ones (Holmes, 1973; Hamilton and Deese, 1971; Goldman-Eisler and Cohen, 1971). In the Charrows' study, sentence length accounted for only 1.7 percent of the variation in subjects' scores, and there was virtually no relation between sentence length and comprehension (1979: 1320). Embeddings, on the other hand, were inversely related to comprehension; modifying instructions to reduce embeddings sharply increased comprehension in sentences containing three or more embedded clauses (Ibid: 1372).

Sales and his colleagues and the Charrows both cite psycholinguistic evidence that negative sentences are more difficult to understand than positive ones, and that difficulty increases with the number of negatives (Just and Carpenter, 1971; Just and Clark, 1973; Cornish and Wason, 1970). The Charrows report that while a single negative in jury instructions does not reduce comprehension, multiple negatives do, though the difference was not statistically significant (1979: 1324-25).[21]

[21] I have not included a separate section on how discourse features of LE influence comprehension because the study of discourse comprehension is in its formative stages (see, e.g., Van Dijk, 1977; Dressler, 1978). Among the LE linguists whose work has been highlighted in Part II, Shuy and Larkin (1978) and Charrow and Crandall (1978) both state or imply that violations of the rules of ordinary discourse impede comprehension. Some attention is also paid to impact on comprehension of matters of discourse, such as logical

F. Prospects for Reform

1. Scope of the Movement for Reform

The Plain English movement has swept the United States in the last five years. And though parallel movements in other modern societies have been slower to emerge, there is every reason to believe that they will gain momentum. At last count, 22 American states had laws specifying standards and procedures for the readability of insurance policies and other types of consumer contracts, 8 had bills pending, and 10 had regulations or directives relating to this issue (Pressman, 1979; Semegen, 1980). At the national level, Lown (1979) reports that the Employee Retirement Income Security Act of 1975 mandates clear explanations of employee benefit programs; the Magnuson-Moss Warranty Act requires that warranties accompanying consumer goods be in simple, readable language; and an amendment to the Truth-in-Lending Act obliges the Federal Reserve Board to issue model loan forms in readily comprehensible language. The Document Design Center in Washington, D.C., offers workshops to various federal agencies, such as the Federal Trade Commission (*Fine Print*, 1979b: 2).

In 1978 New York State passed the New York Plain English law, requiring that all consumer credit contracts for amounts below $50,000 be written in nontechnical language, in a coherent manner, and using words with common, everyday meanings (although it failed to offer criteria for those concepts). In 1979 the California Real Estate Commissioner funded a study of the readability of a typical real estate document. A variety of banks, including Citibank of New York (author of the infamous sentence analyzed in Part II), Crocker National Bank of California, National Bank of Washington, and Bank of America are all reportedly simplifying their documents (Lown, 1979). Business groups are conceding that the tide cannot be turned back (Semegen, 1979).

Plain English is also beginning to reach the courts. Whereas the comprehensibility of LE was only a subsidiary issue in the class action suit in which Labov (1976) testified, it is central in a more recent case. A group of women law students at Rutgers University has brought a class action suit against the New Jersey Department of Human Services over a Medicaid form that must be filled out by women welfare

organization, in Sales et al. (1977) and Elwork et al. (1977), as well as in Charrow and Charrow (1979).

recipients seeking abortions. They claim that the document is far too difficult for these women to understand and therefore deprives them of their rights (*Fine Print*, 1979b).

2. How Much Can Comprehension Be Improved?

Is the reform of LE worth the trouble? This is a question with important sociolegal as well as sociolinguistic implications. In a rare exploratory attempt to assess the consequences of linguistic (as well as substantive) reform of a consumer contract, Davis (1977) found that only low-income consumers benefited from the changes. Levels of comprehension remained about the same for the others, regardless of the language and the amount of detail in the contract.

Both the Charrows and Sales and his colleagues have demonstrated that it is possible to improve comprehension of jury instructions. By pruning the syntactic and lexical sources of difficulty, the Charrows improved overall comprehension from about 45 to 60 percent (1979). Note, however, that this is still quite poor. Would we be satisfied if jurors understood little more than half of what judges tell them? Sales and his associates showed that rewriting jury instructions not only improves comprehension but also increases the likelihood of "correct" verdicts (Elwork et al., 1977). Bruce Sales has told me that his team is now conducting further research to see whether they can guarantee that 90 percent of jurors will understand 90 percent of the information presented.

One argument against investing heavily in linguistic reform might be that legal concepts are inherently difficult and cannot be simplified. Charrow and Charrow (1979) investigated this issue. A group of experienced attorneys rated the *conceptual* complexity, without regard for *linguistic* complexities, of 52 unreformed instructions and achieved a high level of agreement in their ratings of each instruction. These ratings account for only a small amount of the variability in subjects' scores. More important, the greater the conceptual difficulty of an instruction, the *more* comprehension was improved by the reformed instruction (Ibid.: 1334-35).

3. Linguistic Reform and Legal Deformalization

The problem of linguistic reform must be related to larger issues of delegalization and deformalization now being debated both by students of law and society and by the public. The current trend toward reform of LE is just one expression of the

strong pressure for delegalization, deformalization, and deprofessionalization prevalent in contemporary Western legal systems (Abel, 1979a). Paradoxically, the trend toward legalization, including the use of law to define and guarantee rights for minority groups, has led to the creation of legal institutions with which these groups cannot cope. Reform of LE is not a rejection of legality but an attempt to make it more accessible to the layperson. The linguistic reformers are not claiming that we should do away with legal forms, but only that we should make them better.[22]

4. Limitations on Reform

There are a number of serious limitations on what linguistic reform can accomplish that have yet to be scrutinized thoroughly. First, as Procaccia (1979) has pointed out, no amount of simplification of the language of an insurance policy or contract can guarantee that its conditions are fair. Fairness is a substantive issue, not just a formal one. Still, if meanings were more transparent than they are today, perhaps important sectors of the public would be better able to demand substantive reform too.

A related, and extremely telling, point is that most contracts are not negotiated. Typically, customers acquiesce in the boilerplate conditions of standard forms; such contracts express the transfer of legislative authority from the state to the corporate and managerial elite (Procaccia, 1979: 88). We know that many contracts are never read; they are "things" we file away in a drawer. Will more people read contracts if they are written in Plain English? If the conditions remain the same, will customers benefit because the language is comprehensible? Perhaps the better educated, who are presently more capable of coping, will benefit somewhat, but it is unlikely that the disadvantaged will be significantly better off as a result of linguistic reform.[23]

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[22] Perhaps if forms are very easy to use, people will need lawyers less, and do-it-yourself legality will become more common. Thus, linguistic reform is related to the push for deprofessionalization, if not delegalization.

[23] This claim seems to contradict Davis's (1977) finding that lower-income subjects benefited more from revision of a customer contract than did middle-income subjects. The two claims can easily be reconciled. Davis's study created artificial conditions in which subjects read the documents as part of their participation in research. Under more normal conditions, low- (and high-) income persons would be far less likely to read such documents as carefully as they did for Davis. Thus, though changing the language may help low-income persons to understand a document, they will benefit from this only if they take the trouble to read it.

Indeed, Procaccia advises against radical linguistic reform on the ground that linguistic obscurity has, in the past, benefited disadvantaged litigants. He claims that in both the United States and Israel judges tend to rule in favor of individuals and against corporations when the obscurity of contractual language is at issue. He warns that linguistic reform will probably lead judges to hold individuals more strictly to the contractual language. Although he may be right about past bias, his view smacks of "benevolent paternalism," and not all would accept it. He also argues that there is an irreducible level of uncertainty in law that linguistic reform will not eliminate.

> Much of the confusion in insurance litigation has resulted from obscurity in the law, not in contractual terms. As long as judges are unsure what constitutes a warranty . . . there is a very dim hope that [insurance] policy language will make them any surer. Indeed, the legal uncertainty has produced results not anticipated by underwriters in the rate making process; industry draftsmen retaliated with more complex language, in response to newly found legal intricacies. Thus, a perplexing legal norm is more often the cause, not the effect of obscure draftsmanship. [1979: 82]

On closer examination, Procaccia's point is not specifically legal but concerns the nature of language and the way we use it to talk about reality. If judges are not sure what a warranty is, this is at least in part because of difficulties in mapping *warranty* onto those things that might be considered warranties. Thus, the indeterminacy in law is in part the indeterminacy of language itself.

In short, much of the thinking behind the Plain English movement is naive, both about the complexities of language and about the extent to which linguistic reform can change sociolegal realities. Linguists will argue that clarity and simplicity are not necessarily the same, that language has important functions beyond the referential, that Anglo-Saxon words are not necessarily preferable to Latin, and that legal jargon *can* sometimes be beneficial. Analysts of the sociolegal scene will predict that Plain English will make only a minor contribution to deformalization and deprofessionalization. Finally, sociologists and anthropologists may advocate preservation of some of the obscurity in LE because of the important symbolic functions this language serves (see Part V).

IV. LANGUAGE AND DISPUTE PROCESSING

I turn now to the second main theme of this essay, the role of language in the conceptualization, processing, and resolution

of disputes. I shall define a dispute as the assertion of inconsistent claims with respect to either a resource or the breach of a social norm. This definition incorporates conflicts of interest as well as those arising out of broken rules. As Roberts (1979: 52) points out, the two are closely related. Conflicts of interest easily become tinged with normative arguments. Similarly, parties to conflicts initially based on a perceived violation of a norm may simultaneously be pursuing self-interest.

Conflicts of interest and disputes over normative violations differ analytically in another respect. The latter are typically retrospective in orientation; the conflicting claims emerge out of inconsistent evaluations of past behavior. Conflicts of interest, on the other hand, are present-oriented. Thus, in the here and now, two children claim the same ball: "It's mine!" "No—it's mine!" Some societies institutionalize verbal fighting in modes that do not involve examination of "facts." A good example is Eskimo song duels (Hoebel, 1954). These are genres of "disputing for fun" or for "sport," though at another level they perform important social functions, channeling and resolving conflict in an expressive rather than an instrumental manner.

Disputes can be divided into three broad stages:

CLAIM———→COUNTERACTION———→OUTCOME

This model resembles Bohannan's breach of norm, counteraction, and correction (1957: 211) but is generalized so as to include disputes involving conflicts of interest. Claims typically take the form of an "accusation" or a "challenge." Accusations, of course, refer to perceived normative violations. Challenges can be accusatory or pertain to conflicts of interest: one party challenges the other with claims like "I'm stronger," "I'm better," "I deserve higher status than you," etc. With respect to accusations, there is no dispute if the accused admits the charge; in competing claims of interest, claim is typically followed by counterclaim. The intermediate stage of counteraction involves, minimally, a response on the part of the person (or group) who is accused or challenged and some procedure to determine the outcome or get rid of the "trouble." We will distinguish between processes that "examine evidence" and seek to determine "facts," on the one hand, and those that pursue some symbolic, expressive, or nonrational mode of determining the outcome.

I use outcome (Abel, 1973) to include situations in which the conflict may not be resolved, as well as those in which a

decision or determination is made and a course of action, such as punishment or reparation, chosen. Not all disputes move through the whole sequence, and societies may divide it into different communication events. Thus a "trial" as we know it in the adversary system is a highly bounded communication event that includes the three elements of the basic model. But reading the indictment aloud at the beginning of the trial is a repetition of an accusation that has already been made and processed.

A. A Communication Model of Dispute Processing

To organize the discussion of language and communication in dispute processing, I shall make use of a general sociolinguistic model proposed by Hymes (1972; see also Bell, 1976: chap. 3), who suggests that we attend to eight sets of features in speech situations, which he designates by the acronym SPEAKING.

1. Setting and Scene

Setting refers to the physical circumstances of a communication event, mainly the time and place, indoors or outdoors, type of furniture and other props, and so on. *Scene* refers to the cultural aspects, such as whether the event is "formal," "casual," etc.

2. Participants

This category includes not only who they are and their roles, but also who addresses whom at any given time, whether an audience is present, what its role is, and so on.

3. Ends

Hymes distinguishes between two kinds of *ends*: the *goals* of the participants, and the actual *results* of interaction. The latter is equivalent to *outcome*.

4. Act Sequences

A communicative event consists of a series of speech acts having both *form* and *content*. How something is said is of no less interest than what is said, for form constitutes content.

5. Key

The notion of *key* is borrowed from music to denote "the tone, manner or spirit in which the act is done" (Hymes, 1972:

62). The tone of a communicative event may be mock or serious, painstaking or perfunctory. Later I will distinguish between three basic keys of social interaction: *play, ritual*, and the *"ordinary"* or *"serious."*

6. Instrumentalities

These include both the channels employed and the style—the forms of language, registers, or language varieties. In Table 1 I used these two features to classify communicative situations in which LE may appear, distinguishing between written and spoken language and adding the intermediate category of spoken-but-composed language. Literally, then, *channel* means aural sound versus marks on paper. We will also distinguish between the general code or language variety used and the form of actual messages, the stylistic choices made in act sequences.

7. Norms

Hymes distinguishes between norms of interaction and norms of interpretation. All societies elaborate norms to govern the flow of interaction: who may speak, to whom, in what order, about what, when to remain silent, and so on. The ethnography of speaking (see Gumperz and Hymes, 1972; Bauman and Sherzer, 1974) stresses not only explication of rules of speaking but, more important, the uses that speakers make of them. Interpretative norms are those we use to "read" the messages of others. Silence, for example, is interpreted differently in different situations and societies.

8. Genres

These are communicative forms recognized by a society, typically identified most easily by the labels that society gives them. Categories like poem, novel, proverb, or riddle are all genres of language use. There is some ambiguity about levels of analysis because genres often, though not always, overlap with speech events. Thus there may be several genres in a trial: opening statements, testimony, closing statements, the judge's charge to the jury.

B. Verbal and Nonverbal Modes of Dispute Processing

An overview of the literature on disputing suggests that there are seven types of dispute processing, which may be distinguished according to whether the means used are more or less verbal (see generally Roberts, 1979: chap. 4). There are

three relatively nonverbal types: physical violence, appeals to supernatural agencies and the use of nonrational, magical procedures (oaths, ordeals, and sorcery), and ostracism or avoidance. The four relatively verbal modes of dispute processing are shaming (which may, of course, also be expressed nonverbally, reconciliation rituals, verbal contests and duels, and settlement-directed, "fact"-oriented talk. Only the last two categories will be discussed in this essay.[24]

Societies vary in the extent to which they express an explicit preference for talk as a way of settling disputes.

> In some societies it is recognized that quarrels *should* be resolved through talk rather than by fighting, ostracism or sorcery. In others no particular value is attached explicitly to talking but it may be used alongside other methods of handling disputes. Elsewhere different values prevail, demanding as a matter of honor some direct physical response to many types of wrong and resulting in the identification of conciliatory gestures with weakness. [Roberts, 1979: 116]

Prior to Dutch and Australian administration, many societies in New Guinea preferred retaliatory violence to talking (Koch, 1974). The Jalé language, for instance, contains no word for settlement-directed talk apart from one Koch translates as "shouting match" (Koch, 1974, cited in Roberts, 1979: 117).

Some societies, on the other hand, love talk for its own sake and are highly argumentative. Litigation "looms . . . large in the lives of most sub-Saharan African peoples" (Fallers, 1969: 326). "The Tiv are a litigious people and enjoy listening to and participating in *jir* [courts or moots]" (Bohannan, 1957: 13). The Arusha value eloquence and articulate argument (Gulliver, 1963: 224-25). Gluckman found the Barotse to be "very litigious," making frequent use of family, village, and political courts (1955: 21). The Basoga "very readily resort to the public litigation and adjudication of disputes" (Fallers, 1969: 326). Elders are connoisseurs of the litigious art. This society has a rich vocabulary, with special terms for the notions of "accused," "case" or "cause," "testimony" or "evidence," "adjudicate," and so on. Reisman reports that in Antigua, a different part of the world (though one with an African heritage), people love to "make noise," to engage in boasting, cursing, and argument. Fox (1974) found that the Rotinese, inhabitants of an Indonesian island, have a great love of talk, enjoy taking sides in endless dispute, and compete in the use of eloquent phrases; *Dedëak*, the Rotinese word for "language

[24] Strictly speaking, these categories are not mutually exclusive. Shaming may occur, for example, in an Eskimo song duel; see the discussion of Eskimo song duels below. Note also that divination, though nonrational, is highly verbal.

or speech," may refer to any organized, coherent speech: a "court case," "a dispute," or "a piece of news" (1974: 67).

C. *Play, Ritual, and the "Serious": Genre and Key in Disputing*

The literature on dispute processing has paid attention, for the most part, to modes that emphasize "fact-finding," "evidence," and "truth." In these genres an attempt is made to relate outcomes to substantive issues of responsibility for action, whether the methods used are rational or irrational. Much less attention has been paid to other types of response to disputes—what Roberts (1979: 59) calls "channeling conflict into ritual"—in which process is to some degree dissociated from the issues out of which "real" disputes arise and conflict is represented or expressed by some other form of activity.

The disputing Roberts (1979) calls "settlement-directed talk" is typically in the "serious" key of everyday social life. Words are a means to an end; talk is instrumental. In "play" modes of disputing, on the other hand, people play with words for their own sake. As Handelman (1977) and Miller (1973) have pointed out, play is a way of organizing activity, not a particular set of activities. Huizinga defines play as

> a free activity standing quite consciously outside "ordinary life" as being "not serious," but at the same time absorbing the player intensely and utterly. It is an activity connected with no material interest, and no profit can be gained by it. It proceeds within its own proper boundaries of time and space, according to fixed rules and in an orderly manner. [1955: 13]

Play involves communication of the metamessage "this is play," so that what might otherwise have a different, "serious" meaning instead signifies "pretend" or "make-believe" (Bateson, 1972; Goffman, 1974). The distinction between "play" and "serious" modes is problematic, however, and can break down: a joke can be taken as a serious insult. An important feature of play is that it is amoral:

> play pleases players by permitting them a masked individuality (playing at symbolic types, identical definition of the situation, loss of self) which enables mass participation *without collective responsibility.* [Handelman, 1977: 186; emphasis added]

The contrasting features of expressive and serious modes of discourse can be highlighted by adaptating an analysis of speech play developed by Kirshenblatt-Gimblett (1976: 9). At one end of the continuum are instances of talk in which performance is valued for its own sake and process is more important than outcome. Here expressive and poetic functions of language are dominant (see Jakobson, 1960). There is maximal stylization of language; form dominates content, and

meanings are opaque. In task- or "fact"-oriented disputing, on the other hand, the emphasis is on outcome rather than process. The referential function of language prevails, and, ideally, content totally dominates form. There should be minimal linguistic stylization; the ideal would be a "style-without-style" (Roeh, 1977) in which only substance matters and participants do not self-consciously monitor the form of their utterances. Meanings should be totally transparent, and there should be strict accountability for action, verbal and nonverbal, past and present (in the context of disputing as well as before entering the dispute).[25]

In practice, various types of discourse are found at points along the continuum rather than at the extremes. No talk is *only* process-oriented; it accomplishes *something* for interlocutors. And even the most instrumental varieties of talk display functions of language besides the referential. Few instances of language use are as "pared down" as the example Kirshenblatt-Gimblett (1976) gives of instructions from a control tower on how to land an airplane.

Conceptualizing uses of speech in terms of a dichotomy between expressive and referential or instrumental functions obscures an important theoretical distinction between play and ritual. Handelman (1977) suggests that play and ritual are logically similar domains of experience in that expressive functions of language dominate both, yet they are mutually exclusive in the ways in which they relate to social order. Rappaport (1971) noted that in human as in animal behavior, ritual pertains to a type of communication that features conventionalized display. To be effective, ritual signals must be noticeably different from ordinary, instrumental activity (Ibid.: 63). The essence of ritual is sanctity.

> *Sanctity . . . is the quality of unquestionable truthfulness imputed by the faithful to unverifiable propositions.* Sanctity thus is not ultimately a property of physical or metaphysical objects, but of discourse about such objects. [Rappaport, 1971: 69, emphasis in original]

As Handelman puts it, play is predicated on a premise of "make believe," whereas the premise of ritual is "let us believe." The metamessage of ritual is, "All messages included within this frame are sanctified and therefore unquestionable and true" (Handelman, 1977: 188) whereas that of play is, "All messages within this frame are false in some sense, and are false without [i.e., outside it]." "Play doubts the social order, while ritual integrates it" (Ibid.: 189).

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[25] That many societies recognize perjury as a criminal offense is evidence of the high level of accountability in "fact"-oriented disputing.

Although this formulation is extremely helpful in illuminating the nature of play and ritual as cultural forms, it is not precise enough to permit analysis of specific instances of language use in play and ritual. Recall Searle's (1976) typology of speech acts (Part II, supra). In claiming that play messages are "false," Handelman apparently has in mind assertions about the nature of the physical or social world—representatives and representative declarations, in Searle's terms. As we shall see, Handelman's formulation does account nicely for a central feature of play disputing: it is perfectly permissible in, say, verbal dueling to insult one's partner by asserting a proposition both know to be false.

However, there are many other utterances in the play mode that cannot be called "false." For instance, when we tell someone, "Go to hell," we do not mean literally that the person should go anywhere. The distinctive feature of a joking or play directive of this kind is that the sincerity condition on the speech act is relaxed. Second, messages communicated in a play mode can be true *or* false. If, in a verbal duel among Turkish boys (Dundes et al., 1972) or black Americans (Labov, 1972b), one boy accuses the other's mother of being a whore and this is true, the play frame will be maintained as long as normal conditions of accountability are relaxed. Finally, take the example of two children playing doctor. One says to the other: "Open your mouth." Here we have a directive with its sincerity condition fully operating, yet in an important way the reality is different from that in which real doctors ask real patients to open their mouths.

No adequate theory or method exists today for the frame analysis of talk, though Goffman (1974) has made an attempt to construct one. For the purposes of this essay I propose, tentatively, that the basic metamessage of play is, "Messages within this frame are permitted to be false," whereas that of the "serious" is, "Messages within this frame are challengeable, questionable, arguable" (see section IV.E, infra; see also Perelman, 1963).

We can now locate various types of disputing conceptually. In play genres disputants play with words, and attention to "facts" is minimal or nonexistent. Huizinga devoted a whole chapter in his famous study of play to genres of play disputing and the relation between play and law (1955: chap. 4). The second genre is reconciliation rituals, which belong to the domain of "pure" ritual; their function is to reconcile the parties directly, without processing the "facts" or working off

the emotions that accompany "real" disputes, as sometimes happens in play disputing (cf. Koch et al., 1977; Gulliver, 1963: chap. 11). I believe that "fact"-oriented disputing is located not in the realm of the purely serious, but in an intermediary realm where the serious and the ritual overlap. "Fact"-oriented genres of disputing involve discourse in a hybrid mixture of keys: there are ritual and serious (and perhaps play) elements in them. The highest-order metamessage is that "through talking about 'evidence' in a dispute we 'find facts,' and 'do truth and justice.'" At a somewhat lower level is the metamessage that the claims made while determining "facts" are themselves subject to challenge, negotiation, and argument. What parties and witnesses do and say is questionable, but what those who control the dispute process do and say is *not*.[26] To the extent that the element of *agon*—contest or competition (Huizinga, 1955)—is also present, some might want to locate "fact"-oriented disputing where the three domains of play, ritual, and the serious overlap. But though the "sporting" element in the adversary system has been noted by many (e.g., Huizinga, 1955; Pound, 1906; Frank, 1966; Frankel, 1975), I prefer to leave the element of play in "fact"-oriented disputing a matter for further empirical investigation.

Having applied these basic distinctions between play, ritual, and the serious to dispute processing, we can now see more clearly that there are actually two kinds of expressive process-oriented talk. Both play and ritual emphasize talk for its own sake and highlight the expressive and poetic functions of language. They share a lack of concern for "facts." There is a trend toward stylization: form can come to dominate content,

[26] Two types of trial offer a sharp contrast to the ordinary garden variety. In one, participants contest not only the specific allegations against them but also the entire system on which the administration of "justice" rests. The trial of the Chicago Seven, with its extreme violation of the rules of courtroom decorum (even by the judge) illustrates the attempt by defendants to place in question the words and deeds of those conducting the trial. In terms of an analysis, these defendants tried to move all discourse in the trial into the realm of the serious and questionable (cf. Clavir and Spitzer, 1970).

The trial of Adolf Eichmann exemplifies the opposite case, in which all discourse is moved into the realm of ritual. Here even the substance of the charges was effectively unquestionable, though the possibility of cross-examination was maintained. Who could challenge what was not only beyond argument but also unspeakable? The Israeli government, on behalf of the Jewish people, exploited the genre of the trial to allow some speech about the unspeakable.

Political trials in totalitarian regimes may express the conflict between these tendencies. The authorities engage in ritual presentation of arguments, although their power allows them to treat "evidence" as beyond argument; defendants, in contrast, treat the entire system as subject to question. Some might claim that the trial of the Chicago Seven was no different from trials in totalitarian regimes.

and meanings tend to become opaque. In play, accountability is low, and one can say many things that could not otherwise be said. But though accountability is high in ritual, it is different from accountability in serious communication. In the latter, one is accountable for the propositional content of one's utterance; in ritual, one is accountable for following the right formula.

D. Forms and Functions of Play Genres of Disputing

1. Seven Examples of Play Disputing

a. Eskimo song duels. In the 1920s and 1930s several researchers reported an expressive disputing genre known as Eskimo song duels (Rasmussen, 1927; Weyer, 1932; Mirsky, 1937). Both Eastern and Western Eskimos have *nith*-songs, duels in which words are the weapons used: "little sharp words, like the wooden splinters which I hack off with my ax" (Hoebel, 1954: 93). Apparently, there are three varieties: "pure" play, a genre in which the community uses these songs to shame and censure breaches of norms, and a third variety in which the two parties to a specific dispute "fight it out" in an expressive manner. Hoebel reports that the singing style is "highly conventionalized," uses "traditional patterns of composition," and is delivered in a manner to "delight the audience to enthusiastic applause" (Hoebel, 1954: 93). Songs may also be accompanied by "butting," in which the singer butts his opponent with his head while singing his excoriation. In some cases, contests are announced in advance and held on festive occasions, a type of "sporting performance" (Hoebel, 1954: 92).

Hoebel claims that song duels are "juridical instruments insofar as they . . . serve to settle disputes," although there is "no attempt to mete [out] justice according to rights and privileges defined by substantive law" (1954: 98). Gluckman takes issue with this both because he feels the term "juridical" should not be used for modes of disputing that fail to examine "evidence" and because he argues (on the basis of more recent sources) that the function of song duels, like that of gossip in other societies, is social control rather than the resolution of specific grievances (1965a: 303-13).[27]

[27] There are many geographical variations in these song duels. Among East Greenlanders, they may continue for years; elsewhere they usually finish in a single season. Greenland song duels are mainly for fun (Mirsky, 1937; cited in Gluckman, 1965a: 305). Greenlanders teach the songs to their families, who then serve as choruses in the contests (Hoebel, 1954: 96). Iglulik Eskimos north of Hudson's Bay and Keewatin Eskimos of the Canadian Northwest

b. Song challenges in a Fijian Indian community. A genre of disputing similar to that of the Eskimo song duel has been reported by Brenneis and Padarath (1975) for an Indian village on one of the islands of Fiji. Competitive "song challenges"

> take place at social gatherings where members of several religious communities are present . . . and involve teams of performers from two different religious groups. The content of the individual . . . "challenge songs" varies greatly, but singers usually attack, insult and slander the religion, relatives and persons of their opponents. As the competition continues, the songs are increasingly concerned with accusations of social impotence and immorality that would, in almost any other context, provoke physical assault or other overt conflict. . . . A group is defeated when its members became flustered, are unable to respond, are goaded into inappropriately vehement response, or call an end to the competition. [Ibid.: 283]

Song challenges, catalyzed by personal enmities or secular political concerns, take place either at weddings or other social events or at gatherings convened for that specific purpose. From three to six men of each group participate, sitting apart from their opponents and from the audience and taking turns. Songs are accompanied by several musical instruments. There are two types: *bhajan*, religious songs sung in "Sweet Hindi," a High language with written texts, and *gayan*, locally produced songs in the local dialect, *jangli bat*, or "jungle talk." *Gayan* consist of series of unrhymed couplets, often ending in a tag phrase repeated throughout the song. After the lead singer performs a couplet, the others repeat either the entire second line or the final tag phrase. The authors view the song challenges as a mode of dealing with conflicts over issues of sexual morality and male prestige. The artificiality of the performance situation relieves the tension accompanying the presentation of such issues and makes their expression possible (see Abrahams, 1968).

c. Verbal dueling: Turkey. Turkish boys between eight and fourteen in both urban and rural areas engage in a traditional form of ritualized[28] exchange of insults with highly sexual

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Territories have both play and semiserious song duels (Hoebel, 1954: 97; Van den Steenhoven, 1962; cited in Gluckman, 1965: 304). Iglulik Eskimos have "song cousins," partners with whom they compete over the beauty, composition, and vividness of "metrical abuse" in their songs, which are delivered in "a light-hearted, humorous manner" (Hoebel, 1954: 97). The semiserious genre is the "grudge song duel," in which a "real" grievance or accusation is "worked off" expressively (Ibid.). Though these songs are also humorous, they contain more derision and ridicule. Song duels are also found among the Caribou Eskimos all down the west coast of Alaska and even into the Aleutian Islands. Spencer (1959, cited in Gluckman, 1965a: 308-12) reported differences in duels among North Alaskan Eskimos depending on whether or not contestants were members of the same community.

[28] I use the term "ritualized" with caution here since I am trying to distinguish play and ritual. Play can also be ritualized to the extent that messages are repetitive and predictable.

content. These duels have an ABAB structure, whereby the challenge by the first boy must be answered by the second, following two principles: the retort must imply that the other plays a passive female role in a sexual relationship (content specification) and end rhyme with the initial insult (form specification). These dueling rhymes also make extensive use of metaphor and allusion. The first boy is the aggressor; the second must respond by providing an appropriately rhymed retort. So long as the second boy succeeds, the first must continue proposing other retorts, each time posing a different word which the second boy must counter with a proper rhyming word (Dundes et al., 1972). The authors see this tradition as providng an important public arena in which boys may play out the painful process of becoming a man, a psychological explanation that other students of verbal dueling do not accept (see below).

d. "Truly frivolous talk": verbal dueling in Chamula. In a comprehensive study of Mayan oral tradition, Gossen identified three genres of disputing speech among the Tzotzil-speaking Indians of Chamula, Chiapas, Mexico (Gossen, 1974, 1976). The general term *k'op* means "word," "language," "argument," "war," "dispute," and "court case," among other things. There is a genre of serious talk (*k'op sventa kavilto*, court language) for trials and hearings that contrasts with two genres of "frivolous talk" (*ʔištol k'op*): verbal dueling (*ba ɬ'i ʔištol loʔil*) and "buried language" (*mukul k'op*), a genre for making indirect insults and accusations.

Verbal dueling occurs between males aged 12 to 35 and, like the Turkish variety, is highly obscene. Metaphoric couplets are governed by strict rules: the basic principle is that there must be a minimum sound shift from insult to response (formal specification), combined with a maximum of derogatory or obscene attack on the opponent (content specification). The subtler the sound and semantic shift employed in the response, the better the performance. Exchanges range from 2 to 250 consecutive turns. Each "move" must contain at least one consonant-vowel or consonant-vowel-consonant segment taken from the previous move. The table on the following page is the opening of a 65-part duel.

The skill involved in this form of dueling is so great that Gossen never got beyond the level of a six-year-old, though he reports being fluent in conversational Tzotzil. In his view, dueling is both competitive and solidary. It is

> a drama in which . . . status is established in a pair of players who were not ranked before the duel. Ultimately, the victor wins by virtue of his mastery of language and social rules, as in adult life. But in *truly frivolous talk*, ranking is established by criteria which are the inverse of those in effect in adult settings. The duel does not state "how good I am" but rather "We are both bad, but you are worse." Verbal dueling is thus an effort to establish temporary ranked categories in a social group in which adult rank category boundaries are actually not yet clear. [Ibid.: 140-41]

Tzotzil (Phonological continuity indicated by □ and ↓)	English	Explanatory Notes
1. k'el un	Look at me.	Standard initial phrase for *truly* frivolous talk.
2. k'el ?avahnil	Look at your wife.	That is, "I might do as your wife," or "My sister might do as your wife."
3. hel avanik	Let's go ahead.	
4. heč ?avalik	That's true, what you say.	
5. š?eč ?avak'ik	It happens that you give it to her.	
6. š?eč' ?avok'ik	It happens that you break it.	That is, break her hymen.
etc.		

[Gossen, 1976: 131]

e. "Sounding": Black Americans. One of the best known forms of verbal dueling is a genre of ritualized insult among black Americans known most commonly as "playing the dozens," "sounding," or "signifying." Sounding is part of a rich set of verbal skills developed by lower-class black men on the streets (Abrahams, 1974). Street talk is associated with verbal performance, play, and the expression of masculine individuality, whereas talk at home is associated with the domain of women and the serious world of work. Sounding has been described by Dollard (1939), Abrahams (1962), Dundes (1973) and Kochman (1972), among others, but the most extensive sociolinguistic treatment is that of Labov (1972b) on sounding in the ghetto of South Central Harlem in New York City.

Sounds may be rhymed couplets, but they take other forms as well. Using the tools of discourse analysis, Labov identified a number of basic syntactic structures. Sounds have a form more complex than a simple ABAB exchange between partners

because they are performed in front of an audience that reacts to each sound before the partner retorts. Labov's analysis leads him to formulate a rule for sounding:

(1) If A makes an utterance S in the presence of B and an audience C, which includes reference to a target related to B, T(B), in a proposition P, and

a) B believes that A believes that P is not true and

b) B believes that A believes that B knows that P is not true . . . then S is a *sound*, heard as *T(B) is so X that P* where X is a pejorative attribute, and A is said to have sounded on B. [Ibid.: 302]

The key element in this formulation is that speakers A and B share the knowledge that the content of the insult is patently untrue. "A mother (grandmother, etc.) may be cited for her age, weight, ugliness, blackness, smell, the food she eats, the clothes she wears, her poverty, and of course her sexual activity" (Ibid.: 288). The following sequence shows that sounds have departed very far from the original model of sexual insult.

—Your mother eat rat heads.
—Your mother eat Bosco.
—Your mother look that taxi driver.
—Your mother stinks.
—Hey Willie got on a talkin' hat.
—Your mother a apple-jack-eater.
—Willie got on a talkin' hat.
—So, Bell, your mother stink like a bear.
—Willie mother . . . she walk like a penguin. [Ibid.: 290]

The underlying structure of these insults requires the expansion, "Your mother is so poor that she eats rat heads, your mother is so dirty that she stinks like a bear," etc. The difference between ritualized insults and personal insults—between playing and being serious—is that in the latter case the addressee answers by denying, excusing, or mitigating the insult, rather than by insulting the first speaker. The rule for replying to a ritual insult with another ritual insult is:

(2) If A has sounded on B, B sounds on A by asserting a new proposition P′ which includes reference to a target related to A, T(A), and such that it is an AB-event that P′ is untrue. [Ibid.: 305]

As with the other types of verbal dueling discussed above, someone emerges a winner from these contests.

f. Contrapuntal talk in Antigua. Reisman (1974), writing about the Caribbean island of Antigua, reports three genres of disputatious, argumentative, or contentious language: boasting, cursing (*kas-kas*), and argument. These three genres belong to the more general category of "making noise," whose forms and uses are distinctive and whose basic function is the vigorous assertion of the self through the sound of one's voice, usually with many people talking at once.

Varieties of boasting are found in many cultures. In Antigua, speakers taking part in speech competitions called Singing Meetings engage in boasts to introduce themselves:

> I am the champion of champions
> From my head to my toes
> I must remain a champion
> Wherever I goes. [Ibid.: 117]

Boasting is an approved source of humor, "an essential form of defense against all forms of attack or criticism" (Ibid.: 118).

Kas-Kas is a women's genre. It

> is a highly stylized conversational genre, marked off by stylization from other patterns of speaking, although it shares expressive features and meaning with more private patterns of "getting vex". . . . *kas-kas* . . . includes a "row" which is public enough to become a "scandal" (or) . . . the verbal noise people make when a dispute breaks into the open. [Ibid.: 119]

One of the participants usually stands on the road, directing abuse at someone in or by a house. The content consists of an exchange of boasts and teasing challenges, the aim of which is to shame the person by making some offense known to all. Cursing is highly theatrical:

> The performance is featured by a characteristic intonation, an extension of pitch range, emphatic high pitches and rising glides, with a tendency to rhythmic even stress on each syllable. There are often pauses between sentences, accompanied by a spinning motion, turning away, arms akimbo, leaning from the waist, head stuck forward—reconstituting one's forces and then spinning back to the attack. [Ibid.: 120]

Argument is the genre of disputing used by men. As in cursing, there is no direct answer to the accusation. "The essential feature of argument is the *non-complementarity of repetition*. Each person takes a point or position and repeats it endlessly, either one after the other, or both at once, or several at once" (Ibid.: 121; emphasis in original). A typical argument occurs after a cricket game when men keep shouting, saying the same thing over and over till they give up in exhaustion.[29] It is acceptable in Antigua, as it is not in most cultures, for many people to speak at once. But this does not mean that people pay no attention to each other; there is so much repetition that hearers manage to pick up at least some of what the others are saying.

g. Rituals of encounter among the Maori. The Maori of New Zealand stage rituals of encounter between host and visiting groups on public occasions in the setting of a special meeting-house and courtyard for orators. Ceremonial gatherings called *hui* last from one to three days.

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[29] Repetition is common in many types of verbal disputing and surfaces clearly in children's disputes; see Brenneis and Lein (1977).

> In traditional times, intertribal and subtribal warfare was endemic, and encounters between groups of this scale were potentially dangerous, as an exchange of insults or some unwitting offense could spark off hostilities on the spot. There was a fierce preoccupation with *mana* or prestige, and even the most peaceful meetings were marked by intergroup rivalry. The rituals of encounter were used on all occasions when different groups met, as a finely balanced mechanism for keeping the peace and allowing competition to proceed without bloodshed. Today there is no fear of warfare, but suspicion and hot pride are still powerful underlying factors in group encounters on the *marae*, and the rituals are played out in a keenly competitive spirit. [Salmond, 1974: 194]

After initial greetings, the oratory begins. A local speaker rises and shouts, "I greet the living" and then launches into a traditional chant, establishing his credentials. Finally he delivers his oration, at the end of which he begins an ancient song and is joined by members of his group. In some tribes all local orators speak first and then the visitors; in others, locals and visitors alternate.

> For the most part these rituals are not really aimed at communicating semantic information . . . but rather at fulfilling a required set of ritual paces. . . . The messages being passed are subtle claims to esoteric knowledge and prestige, and the fact that most of the incantations are no longer understood supports this claim. [Ibid.: 210]

The most interesting aspect of these rituals is not the rules that govern them but the games people play with them (Ibid.). Salmond finds that there are three basic strategies: to manipulate options already present in the rules, to force the other side to break a rule, and to break a rule and get away with it. These rituals of encounter are intriguing in their resemblance to modern adversary trials. Like Maori orators, trial lawyers differ in their ability to take advantage of both legal and sociolinguistic rules (see IV.E, infra).

2. Mixing Keys

Although most identifiable disputing genres probably maintain either a play or serious key throughout, there are instances in which the two are mixed. Bohannan (1957) reports a case (among the Tiv of Northern Nigeria) in which a quarrel between two men led one to compose a song about what a "skunk" the other was. He sang and drummed the song every night, with others joining in, until his opponent was provoked to hire a songmaker. Eventually the first man hired a songmaker too. Competitive nightly singing continued for over three weeks before the leaders intervened. One of them summoned the two parties to his compound. The ensuing confrontation combined a hearing of a song contest by the two sides and a "fact"-oriented examination of the "evidence" in the quarrel. The leaders successfully resolved the dispute; one

side won the song contest, and the other won the substantive case (Ibid.: 142-44)!

Mixing of keys also occurs when people in roles like court jester, joker, or buffoon convey serious messages in a light and humorous way. Roberts (1979: 63, citing Turnbull, 1965) notes that

> among the Mbuti, acknowledged clowns and buffoons take the edge off disputes by ridiculing and making fun of the disputants, diminish tension by their diversionary antics and pour scorn on any individual whose actions threaten the security and harmony of the group. Because of the "jesting" way in which these "warnings" are conveyed, and because of their veiled character such strategies avoid the possibility of retaliation which more abrupt and undisguised intervention might attract.

This phenomenon is to be distinguished from the category of "joking relationship" often studied by anthropologists since the latter refers to a relationship between two persons in which one is permitted or obliged by custom to tease or make fun of the other, whereas the Mbuti clowns can apparently behave this way toward a wide range of persons.

3. Play Disputing in Perspective

The examples of play disputing have been drawn from a literature known mainly to students of folklore and ethnographers of communication.[30] In retrospect, we can distinguish between two types. One is the "pure play" dispute, in which mock accusations or challenges are made and the processing immediately follows the challenge. In a single bounded sequence A challenges B with a proposition on the order of "I'm better than you" or "You (or yours) are no good," and B responds with a counterclaim. The sequence may repeated endlessly, with either the identical content or much elaboration and expansion.

In contrast, tranformed disputes have a time lag between the making of a "serious" claim or accusation and its processing in a play mode. A, perceiving that B has violated some norm (whether or not this injures A), formulates the "charge" internally. This grudge or grievance is later brought to a forum where expressive disputing dissipates it. As Hoebel (1954) points out, there is no attention to substantive justice in such cases; rather, the grievance is worked off—it evaporates.

[30] See Kirshenblatt-Gimblett (1976: 206-07) for an extensive bibliography. The one exception is the Eskimo song duel, which anthropologists without a special interest in language have written about. Consequently, the information about the linguistic features of these duels is scanty.

Pure play includes the Eskimo song duels; the Fijian song challenges; the varieties of verbal dueling in Chamula, Turkey, and black America; and the Maori rituals of encounter. The Eskimo grudge (or shaming) song duel, Antiguan *kas-kas*, and the Tiv scandal are all transformed disputes in which a real grievance is worked off in the play mode.

Turner's (1977) concept of *liminality*, which he, in turn, has taken from Van Gennep (1960), helps us to understand the functions of play disputes. Van Gennep distinguishes between three phases in *rites de passage*: separation, margin (or *limen*—"threshold"), and reaggregation. Liminal processes break down structure or hierarchy (everyday roles, differentiation) and create a temporary *communitas*. Play disputes similarly attack hierarchy and categorization, creating temporary solidarity among equals. Yet paradoxically, the outcome is either the creation of an artificial or temporary hierarchy, as in play disputes, or the restoration of real hierarchy, as in transformed disputes. In *communitas* there is also release from accountability—reciprocal insults can be just as vile as the parties can make them as long as the play frame persists. Abrahams's observations about the conventions of joking are perhaps true of all of the genres of play disputing we have examined: "they provide a sense of *artificial ordering (of words)* in the face of *disorder (of concepts or themes)* (1972: 238; emphasis added). Both types of play disputes also provide catharsis, and if they are truly play, participants have some fun to boot.

The highly obscene content of Chamula, black American, and Turkish verbal dueling has led a number of researchers to develop psychological interpretations of their significance, arguing that they provide a way for adolescent boys to work out insecurities about their masculine identities. But this approach has been downplayed in recent years as researchers have paid more attention to the social context in which dueling takes place and the ways in which it relates to other speech genres within the same community (Compare Dundes et al., 1972; Abrahams, 1962, with Gossen, 1974, 1976; Kochman, 1972). What Gossen has written of Chamula dueling holds for all three examples: through mock inversion of social norms, boys and young men learn the boundaries of expected behavior. At the same time, dueling also socializes by teaching verbal skills. Gossen suggests that in Chamula society, "the ability to wage a good verbal duel serves as one of the earliest signs of social maturity, intelligence and linguistic eloquence . . . a sign . . . of

an excellent traditional education" (1976: 141).[31]

E. "Fact"-Oriented Disputing

1. Management of the Substance of Arguments

a. Argument, rhetoric, and the construction of "facts." In all genres of "fact"-oriented disputing, advocacy and argument are paramount. The importance of persuasive skills is widely recognized by trial lawyers in the Anglo-American adversary system. Law review articles and trial manuals attempt to offer systematic instruction in the exploitation of persuasive skills to win cases (e.g., Probert, 1959; Massery, 1978, and the manuals and ideas reviewed in Danet and Kermish, 1978, and O'Barr, 1978). The salience of these skills in the adversary model of justice is, in fact, a controversial subject. Critics like Frank (1966) claim that this model encourages attorneys to suppress the truth in order to win, while defenders insist that it is the best way to bring out the truth (e.g., Freedman, 1975). Lawyers and social scientists debate whether the adversary system is preferable to the continental inquisitorial model, in which the judge asks the questions, lawyers are relatively passive, and witnesses appear for the court, not for a party (Damaska, 1975; Thibaut and Walker, 1975).

Persuasion is important in all fact-oriented disputing in the serious key of everyday life. The constructivist view of language found in the later Wittgenstein is entirely consistent with a theory of argument developed by Perelman (1963), though the latter never mentions that source. Perelman proposes that the nature of proof differs radically in science and in human affairs: in science one speaks of demonstration, and proofs may be "correct" or "incorrect"; in human affairs we prove our case by argumentation, and arguments are "stronger" or "weaker." The theory of argument studies "the discursive techniques which make it possible to evoke or further people's assent to the theses presented for their acceptance" (Ibid.: 155). All arguments are in part a function of

[31] The same is true in black America. In his autobiography, Rap Brown writes:

> I learned how to talk in the street, not from reading about Dick and Jane going to the zoo. . . . The teacher would test our vocabulary each week, but we knew the vocabulary we needed. They'd give us arithmetic to exercise our minds. Hell, we exercised our minds by playing the dozens. . . . We played the dozens for recreation, like white folks play Scrabble. . . . Though, the dozens is a mean game because what you try to do is to totally destroy somebody else with words. [1969: 25-27, cited in Abrahams, 1972: 217]

the audience to which they are addressed and which the speaker is obliged to accomodate.

Speakers can develop arguments only by linking them to the taken-for-granted premises of listeners. All argumentation depends on what is accepted and acknowledged as true, normal, or probable; many of these premises are drawn from the realm of common sense. In human affairs there is no direct and immediate means of attaining truth, the employment of which would be preliminary to any rhetoric. Truth is rather the outcome of dialogue, discussion, and the confrontation of opinions. In Perelman's view, the study of rhetoric has undergone a gradual debasement since Aristotle. By the sixteenth or seventeenth century, rhetoric was thought to deal only with stylistic methods, which were viewed as separable from content. "Positivism, as it developed during the second half of the nineteenth century, marked the lowest point of rhetoric" (1963: 159). Applying Perelman's ideas to dispute processing, Santos writes:

> argumentative discourse (rhetoric) is the structural mode of actualization of law in the dispute settlement context. Rhetoric is argumentative discourse aimed at seeking adherence on the basis of persuasion. The backbone of such discourse is language, used both as a means of argumentation and as a magical form of action. . . . No matter how precisely a norm is written, nor [*sic*] how carefully a legal concept is defined, there is always a background of uncertainty and probability which cannot be removed by any deductive or apodictic method. The only solution is to employ the inventive art . . . of finding points of view or "common places" (*loci communes, topoi*) which, being widely accepted, will help to fill the gaps, thus rendering the reasoning convincing and the conclusion acceptable . . . . These *topoi* . . . are endowed with conviction power, not with truth power. [1977: 14-15]

In short, the "facts" of a case do not preexist but are constructed through interaction (Scheff, 1968). The quotation marks around the word "facts" remind us that dispute processing in the serious mode involves determinations of what will count as facts.

b. Language and legal reasoning. Disputes constitute two different versions of reality, each advocated with all the resources—linguistic and nonlinguistic, substantive and formal[32]—the parties can muster. Of central interest here is legal reasoning: the meanings of action and the grounds for action or, to use the term introduced by Perelman (1963) and

[32] In fact there are likely to be more than two versions of reality since even witnesses on the same side may vary considerably in their versions of events.

Santos (1977), *topoi*, principles of what is "reasonable," based partly on common sense and partly on formalized policy.

There are only a few monographic studies of the process of fitting words to deeds, or negotiating the fit between categories and history. Two of the best and most comprehensive are Gluckman (1955) on the Lozi and Fallers (1969) on the Basoga. One of Gluckman's central conclusions is that Lozi parties and judges, like those in the Anglo-American legal system, work with a concept of the reasonable man, best translated as "a man of sense" (1955: 125). In applying norms to behavior during cross-examination, they ask: Is this what a reasonable and customary man of sense would have done? Gluckman also finds a hierarchy among Lozi legal concepts in which higher-order concepts are most general and have multiple meanings. Lozi legal concepts are also absorbent—they draw into themselves a variety of raw facts—and permeable—suffused with unquestionable premises and presuppositions (Ibid.: 293-94).

Fallers (1969) writes that arguments and decisions in Soga law tend toward "fact-mindedness" rather than "rule-mindedness." Basoga seldom talk explicitly about the law. Legal concepts rarely come up except in discussions of marginal cases in which the fit between the case and a concept is not obvious. Comparing Soga law with that of the Lozi (Gluckman, 1955), the Tiv (Bohannan, 1957), and the Arusha (Gulliver, 1963), Fallers concludes that the Basoga have the most legalistic subculture, with the Lozi close behind them. The Basoga apply one concept of wrong per case, choosing a technically legal norm rather than a moral one; they are interested not in reconciliation but only in the application of a legal rule (though the rule is left implicit). An interesting illustration of how the Basoga fit categories to cases is their treatment of the offense of "harboring," "the action of a father or guardian in allowing his married daughter or ward to remain away from her husband's home without the husband's consent and without sufficient reason" (Fallers, 1969: 144). In one such case, Mukama defends himself against Jabwire's charge of harboring. The girl's presence in his home is not in dispute, only its meaning.

Q. Although you weren't the one who negotiated bridewealth with Jabwire; do you agree that you harbored that wife?
A. No. I didn't harbor her. She just came to visit.
Q. Is the girl of your clan?
A. Yes, she's of my clan. I call her "sister."

In fact, the woman in question is his "daughter" by several Soga criteria: her biological father is dead; Mukama is a

generation older than she; and he is married to her mother. In calling her "sister"—a term available to him only because it is applicable, in the most extended sense, to all women of the lineage—Mukama is "manipulating the ambiguities in the kinship terminology to his own advantage" in order to escape legal responsibility for her (Ibid.: 148).

This reasoning is very similar to that in a manslaughter case I analyzed. A Boston physician was accused of manslaughter in connection with a late abortion. In his defense his attorney claimed that the fetus in question was not a "person" or a "baby." If there was no "person," he argued, there could not have been a killing (Danet, 1980b).

Santos (1977) describes the way residents of Pasargada, a Rio de Janeiro squatter settlement, used the *topos* of "the reasonable resident." A man who had extended a wall of his house so that the narrow street was almost completely obstructed claimed in his defense that the street had always been narrow and he had not exceeded the original dimensions of the house, and that he had invested money in the construction of the wall and had neither money nor time to demolish it. In attempting to persuade the man to remove the wall, the *presidente* elaborated on the unreasonableness of his behavior:

> By disregarding the interests of his neighbors he was behaving unreasonably because if all the residents behaved like him Pasargada would very soon be impossible to live in. His cooperation was requested . . . a reasonable resident not only does not violate collective interests but cooperates to restore them when they have been violated. . . . [Mr. KS's] conflict is not only with those who live on his street but also with those who die in Pasargada and whose coffins have to pass through the street on their way to the cemetery. Mr. KS is violating the interests of the living *and* the dead. . . . His transgression . . . [also] damages the community interest in cleanliness because it prevents the street cleaner . . . from carrying the rubbish in a wheelbarrow to the entrance of Pasargada. [Ibid.: 82]

In a recent pilot study of buyer-client communication in England, Cain (1979) found that the essence of lawyers' work is the translation of lay discourse into legal discourse.

c. Justifications and excuses. Closer to home, a variety of studies, mainly in the United States and Britain, have looked at accounts of ostensibly untoward action and the justifications and excuses alleged offenders present in order to defend themselves (Mills, 1940; Austin, 1970a; Scott and Lyman, 1970). The simplest strategy is to deny all culpability. Barring that, alleged offenders try to minimize the negative connotations of the act in question or transform it into a positive, or at least neutral, act. The two main types of neutralizing strategies are

justifications and *excuses*. Justifications accept responsibility for the act but deny its pejorative quality, whereas excuses admit the pejorative quality of the act and minimize responsibility (Austin, 1970a; Scott and Lyman, 1970).

One justification, frequently used by juvenile delinquents, is *denial of injury*, the claim that the so-called victim was not hurt or could afford the loss (Sykes and Matza, 1957; Emerson, 1969). A second is *denial of the victim*, in which the offender admits the act but says the victim "had it coming to him." A third is the *appeal to loyalty*, variations of which occurred in the Watergate scandals. Lower-ranking persons claimed they engaged in illegal acts out of loyalty to Richard Nixon; Bernard Barker also claimed (like Eichmann), "I was not there to think; I was there to obey orders" (Danet, 1976). A fourth type is *principled justification*, the claim that the act was done in conformity with some higher-order norm; John Erlichman, for instance, maintained that spying activities during Watergate were required "in the name of national security" (Danet, 1976a). Principled justifications are rare in juvenile court (Emerson, 1969). A distinctive strategy, common among both juvenile delinquents and rape defendants, is *counterdenunciation*, also called condemning the condemners or blaming the victim (Sykes and Matza, 1957; Emerson, 1969; Holmstrom and Burgess, 1978: Futerman and Libes, 1979; McBarnet, 1977). Other strategies are the claim of *self-interest* ("I stole the car because I wanted to drive a shiny Cadillac") (Scott and Lyman, 1970; Emerson, 1969) and the claim that *"everyone does it,"* used by fences dealing in stolen goods (Henry, 1976).

Excuses are more common than justifications among juvenile delinquents (Emerson, 1969). A frequent excuse is *accident*, of which one variant is *mistake*. This is how John Erlichman characterized the roles of Howard Hunt and Gordon Liddy in breaking into the office of Daniel Ellsberg's psychiatrist (Danet, 1976a). Excuses of *defeasibility* claim duress or ignorance (Scott and Lyman, 1970). Duress may also be invoked to explain *failure* to act, as in the excuse of a policeman testifying before the Scarman Tribunal, which investigated disturbances in Belfast in 1969 (Atkinson and Drew, 1979). Another type of excuse is the *sad tale*, in which the offender blames a broken home or other unfortunate circumstances for his actions (Emerson, 1969; Scott and Lyman, 1970). Emerson also reports the claim "It wasn't my idea."

Each culture recognizes certain justifications and excuses as more persuasive than others in particular contexts.

d. Verbal offenses. A fascinating legal-linguistic issue is the processing of offenses that involve words rather than (or in addition to) other behavior. It may be that all societies regulate talk as action and therefore develop procedures to determine whether certain utterances violate norms. Among non-Western societies the following, at least, recognize slander or insult as a verbal offense: the Basoga (Fallers, 1969: 87), the Tiv (Bohannan, 1957: 114), the Ifuago (Hoebel, 1954: 120), the Lozi (Gluckman, 1965a: 231), and the Zapotec (Nader, 1967: 1271). And the Lozi, the Ashanti, and the Cheyenne define perjury as an offense (Gluckman, 1955: 111; Hoebel, 1954: 237, 169). Contempt of court is a legal offense in Busoga (Fallers, 1969: 87). Antiguan *kas-kas* is legally actionable (Reisman, 1974).

What is more intriguing is how societies process verbal offenses. In some, the mere utterance of critical words is regarded as offensive; in others, intention is relevant. Sometimes the affront must directly address the injured person but may be either true or false (insult); other legal systems make words actionable regardless of where they are uttered but require that they be false (defamation) (Abel, 1969: 620-26). Verbal offenses often involve indirect speech acts. When, on March 21, 1973, Richard Nixon told John Dean, "It seems to me we have to keep the cap on the bottle, or we don't have any options," did he mean to convey an order to continue the cover-up of the Watergate break-in? A good deal of the case against Nixon turned on interpretations of such ambiguous utterances (Danet, 1976a, 1976c).[33] There is much confusion and inconsistency in the way courts decide such cases. Williams (1976) suggests that careful linguistic analysis of the criteria used in conspiracy cases can improve the conceptual unity of American conspiracy law. In cases involving threats against the life of the President of the United States, courts use two main approaches: (1) a hearer-based approach: would a reasonable person, hearing the utterance in context, reasonably interpret it as a threat? (2) a speaker-based approach: would a

[33] A famous instance of indirection, about which historians have been arguing for 800 years, is an utterance of King Henry II, which led to the death of Thomas à Becket. There are several variations of the utterance, such as "Will no one rid me of this turbulent priest?" (Warren, 1973), or "What a parcel of fools and dastards have I nourished in my house that not one of them will avenge me of this one upstart clerk" (Norgate, 1891). See Danet (1977).

reasonable person, hearing the utterance in context, reasonably conclude that the speaker intended it to be interpreted as a threat? (Danet et al., 1980a). Bishin and Stone (1972: 57-63) summarized a case in which a soldier was court-martialed for killing a Korean in response to an illegal but indirectly conveyed order. Davison (1976) pointed out that the court evaded the question of whether an indirectly conveyed order is as compulsory as one that is directly conveyed.

2. Narrative and Questioning Modes of Claim-Construction

Parties to a dispute present and press their claims in two principal ways. In the *narrative mode*, they simply tell their stories, performing speech acts of telling, asserting, and claiming. The second mode features *questioning* and is obviously prominent in modern dispute processing, apparently because of the role of the third party. Whereas the modern inquisitorial model combines questioning by the judge with relative freedom for witnesses to tell their stories in open-ended narrative style, the adversary model requires tight control of questioning so that claims are generally expressed only as answers to very specific questions. Lawyers may attempt to persuade the jury or judge directly only in opening and closing statements. The dominant mode of persuasion in the adversary system is therefore highly indirect.

a. Questioning as a basic mode of communication. Questioning is a prominent mode of communication in many settings in modern society, both formal and informal. One has only to think of the classroom, the journalist's interview, doctor-patient communication, and psychotherapy, as well as the courtroom. Through questioning, moreover, we get to know others and maintain and renew personal relationships. Questioning is probably so prominent in modern society because of its extreme role differentiation and fragmentation of social relationships. Lacking a common, ongoing set of experiences, people continually have to create relationships from scratch. In societies where people are involved in multiplex relationships and spend their days together, there may be less need to use questions to create and maintain relationships. Yet, as we shall see, questioning appears to be common even in simpler societies.

We still know very little about questioning as a basic mode of communication, though there is a large linguistic literature on questions (see Kearsley, 1976). Where this literature

emphasizes interrogative *forms*, a sociolinguistic perspective calls attention to the *functions* of questioning in a variety of social contexts. It focuses, for example, on the fact that one can formulate a question not only in the grammatical interrogative ("What happened?") but also in the imperative ("Tell me what happened") or declarative (I'd like to know what happened") (see Danet and Kermish, 1978; Philips, 1979). Questions can convey a variety of intentions. A real question is one whose purpose is to elicit information. But we also use questions to make polite requests ("Can you pass the salt?") and suggestions ("Why don't you read that book?"), as well as ironical assertions (prosecutor to jury in closing statement: "Is this man innocent?"). Although psycholinguists and sociolinguists have begun to study questioning processes, most of this work still concentrates on the referential, information-processing function of questioning (cf. Kearsley, 1976; Churchill, 1978; Goody, 1978).

Schegloff and Sacks (1973) identified a basic unit of social interaction, the *adjacency pair*, which consists of two utterances spoken by different people in sequence. Question-answer exchanges are one of the most common forms of adjacency pair and are governed by a *chain maxim*: "When you are asked a question, respond with a direct answer, and then give the turn back to the questioner." A question is a summons to reply, a means to compel, require, or demand a response, though the extent to which a question is perceived as requiring an answer is culturally variable (see IV.E.4, infra).

Goody (1978) classifies questions according to two dimensions: whether they seek information or supply it themselves (rhetorical questions), and whether they offer deference or seek to exercise control. Questions that not only seek information but also exercise control include interrogation, riddles, direct examination in the courtroom, and school exams. The last two share the characteristic that the examiner knows the answer; but in the courtroom the lawyer wishes to display that answer to the decision maker, whereas in the schoolroom the teacher wants to learn what the student knows. The speaker may use stroking questions to elicit information deferentially, or indirect suggestions to display deference while appearing to be concerned with information. Questioners may supply information with decreasing amounts of deference by making indirect requests, issuing orders under the guise of questions, or posing a challenge as a joke. Finally, the questioner may offer information in forms that exercise

increasingly explicit control: greeting questions, norm-establishing questions, and ordeal questions.

b. Questioning in disputes. Many of the above types of questions appear in dispute processing, but most probably combine an interest in information with an attempt to control. Questioning apparently emerges whenever there is a third party concerned with "evidence" and "facts." Pospisil (1971: 236) claims that "the secular establishment of evidence almost universally employs the questioning of witnesses." Both tribal and modern societies distinguish between direct evidence and hearsay, and between credible and noncredible witnesses (Ibid.: 236-37). The presence of questioning is easier to document for adjudicatory genres of disputing than for mediation or arbitration, where third-party control may be less focused. Roberts suggests that in stateless societies lacking a clearly defined authority to resolve disputes, the role of third parties is inherently problematic (1979: 134).[34] We know little about the exact conditions under which claim construction is transformed from direct argument to some combination of direct argument and indirect claims made in response to questions. Most of the anthropological literature is insufficiently detailed to permit precise statements about the nature of the procedures. However, the available evidence suggests that questioning is surprisingly prominent, though not as formalized as in the modern adversary system.

c. Questioning in tribal disputing. The most common pattern of communication in quasi-adjudicatory and adjudicatory tribal disputing is one in which plaintiff tells story and is questioned and then defendant tells story and is questioned. Fallers's (1969) transcripts of Soga court cases are detailed enough to display this structure quite clearly. The extended narrative presentation of claims by both parties alternates with very structured question-response sequences, classic adjacency pairs. The same pattern is reported by Bohannan (1957) for the Tiv, though with less detail. The *mbatarev*, or officials, may ask any question they think necessary and may continue questioning till they are finished or interrupted; any person present may ask a question or give an opinion, but only the

[34] Atkinson (1979) examines the strategies used by the decision maker in a British small claims court to display neutrality when there is no formal confrontation between advocates to give each side an "equal" chance to make its case. A brief summary of this paper is available in Danet (1980b).

most prestigious may do so without receiving permission from the *mbatarev* (Ibid.: 20-22).

Alternated narrative and questioning also characterize two genres of "fact"-oriented disputing among the Kpelle of Liberia. In Kpelle trials there are no advocates; the parties directly assert their claims, and each is questioned after his presentation (Gibbs, 1962, 1967). Gibbs provides no information on the exact structure of questioning or the rules that govern turn-taking. He contrasts the coercive nature of courtroom procedures (limited airing of grievances, little effort at reaching consensual agreement, imposed settlement, presence of authoritative personnel, unilateral ascription of blame, etc.) with the more informal moot that stresses therapy for the parties. Although the basic structure of communication is the same in both, other aspects of the moot create an informal, solidary mood: it is situated at home rather than in court, everyone sits together in contrast to separation of litigants and adjudicators in court, there are ritual blessings before the moot and consumption of rum or beer at its end.

Gluckman uses the term "cross-examination" frequently, both in his reports on Lozi judicial process and in general discussions of tribal disputing (1955, 1965b, 1973). Despite a wealth of materials on Lozi court cases, however, he does not describe the exact sequence of events in court, perhaps because the sequence is less formalized than in other tribal societies.[35] He rejects the idea that judges act as if witnesses are lying; they are merely challenging or testing witnesses. One judge relieved the apprehensions of a worried defendant with the remark, "Do not think I am reprimanding—no, I am seeking to understand properly" (1955: 96). Cross-examination among the Lozi is multifunctional:

> The wise and skillful judge inquires into all the grievances that are brought up; he tries to bring into the open the whole record of quarrels and breaches of obligation on both sides. Yet a striking feature of this procedure is that judges during this cross-examination already begin to pass both legal and moral opinions on the actions of the parties and on the sentiments and motives that may be reasonably deduced to explain those actions. For though the judges are trying to reconcile the parties . . . they have to defend the law. Hence they state the law and attack any departure from its standard. Above all, in cross-examination the judges try to get the litigants themselves to admit where they have

[35] He tells us only that

> among the Barotse we are dealing with a powerful kingship exercising its authority through a hierarchy of councils which acted as parliaments, executives, and courts of justice; yet their proceedings in court, while highly marked by a distinctive etiquette, had no special procedures to restrict the search for redress by the allegedly aggrieved. Anyone could plead any suit in whatever words he himself pleased. [1965b: 4]

> erred, by showing them how the evidence . . . convicts them of breach. [1965b: 10]

Most other studies are far less explicit about the procedures governing the communication process in "fact"-finding. In Burundi, judges trying to sort out conflicting evidence subject principals and witnesses, one at a time, to repeated questioning in closed interrogation sessions (Albert, 1972). Ndendeuli moots in Tanzania have few rules of procedure, though direct assertion of claims is apparently followed by questioning (Gulliver, 1969). Yakan litigation also combines narrative presentation of claims with questioning, though Frake (1969) gives no details on the latter. Gulliver mentions "cross-questioning" of witnesses explicitly only in connection with the relatively formalized courts among the three Arusha dispute processes he investigated (1963: 268).[36]

In dispute-processing sessions among the Bena of Tanzania, resolution is by mutually agreed settlement, yet there is much questioning, apparently more than in other genres of mediated settlement (Swartz, 1976). At the same time, there is considerable freedom about who may question and in what sequence. Disputants stand to speak in the midst of a circle of seated fellow villagers, who serve as "questioners and judges." The close questioning can be done by anyone, but usually a few senior men ask more than anyone else. There is "minute dissection of each disputant's story," followed by suggested settlements. Although no decision is enforced, in practice some proposed settlement is almost always accepted. Swartz's description suggests that some of the latent coercion to comply comes not from the control exercised through questioning itself but from management of the nonverbal features of the interaction. Since disputants must stand in the middle with their hands behind their backs and face the senior men, we might infer that direct eye contact and reduced physical distance add to pressure to accept a settlement.

These examples of relatively ordered, direct counterassertion of claims, either as spontaneous self-initiated utterances or in response to questions, contrast sharply with what occurs in other settings. Strathern (1975), for example, reports that among Melpa speakers in the Western Highlands of Papua New Guinea, facts are processed via a type of veiled

[36] Cross-examination has also been reported among the Kapauka of New Guinea (Pospisil, 1958), the Cheyenne (Llewellyn and Hoebel, 1941), and Ashanti (Hoebel, 1954). Frake (1969) compares Yakan litigation to that of the Subanum (also of the Philippines), which is conducted on festive occasions amidst drinking. Perhaps this is an instance of transformed play disputing (see IV.D.3, supra).

speech rather than through direct interrogation or confrontation. In a case of pig theft, the inquiring councillor sat under a tree by the roadside and told parallel cases, discussing what ought to be done. Each subsequent story made its point in more aggressive fashion, communicating the identity of the suspect. Crucial evidence about who had eaten the stolen pig was never explicitly presented. In another case, when abrupt, explicit questions *were* asked, the dispute ended in violence.

Norms prevent direct accusations in other societies as well. Among the Marina of Madagascar (Keenan, 1975) each disputant tells sympathetic third parties of his feelings; intermediaries called *mpanao fihavanana* (restorers of relationships) resolve the dispute. Even if persons are caught in the act, they are rarely accused by any one. The need to be indirect applies only to men. Women can make direct accusations, so men often use them to communicate sentiments that cannot be otherwise expressed.[37]

O'Barr (1976) studied the Pare village of Mlimani, in southern Tanzania. Villagers make frequent use of *kingua*, a kind of doubletalk, one function of which is to make indirect accusations about the wrongdoing of someone absent. Disputes among the Kapauku, studied by Pospisil (1958), do not fit the pattern of more or less peaceful "settlement-directed talk" most anthropologists report. Yet even in the resolution of disputes by "shouting," questions play a role. The complainant and defendant begin shouting, and others gather around, express opinions, and sometimes even shout as well. If the arguing goes unchecked, it may result in physical violence. Usually, important men intervene and question the defendant and witnesses, look for evidence, and eventually make a decision, which they induce the parties to follow.

3. The Management of Linguistic Form

Thus far I have stressed the ways in which disputants manipulate the content of their cases to their advantage. How do they package their arguments linguistically? We shift focus now from *what* the parties say to *how* they say it.[38] Whereas in

[37] Abel (1970: 24-25) found that women were far more likely to be plaintiffs than defendants in the primary courts of Kenya, suggesting that in a number of quite disparate societies it is culturally appropriate for them to accuse, whereas a man is expected to remain silent or defend his honor physically.

[38] Some aspects of form are quite easily separated from content, but the line between sometimes blurs. Presuppositions of utterances are good examples. Suppose a certain presupposition is implied by an utterance rather than stated explicitly. Is this a matter of form or content, or both?

the preceding section the main emphasis was on premodern societies, most of the material to be reviewed here pertains to modern disputes, mainly those conducted according to the adversary model.

a. Question form. Sociolinguistic work on question form draws on lawyers' notion of the *leading question*, roughly defined as one that supplies its own answer.[39] One of the rules of adversary procedure is that lawyers are generally not allowed to ask leading questions on direct examination (when questioning their own witnesses) but are allowed, and even encouraged, to do so when cross-examining the other side's witnesses. Questions may be leading in either form or substance. Those cast in declarative form are always leading unless their substance is uncontested or the witness is in some way incapacitated.

The advantage of leading questions is that they allow lawyers to assert their own versions of reality; the legal justification is that they help to control the witness (Wellman, 1903; Jeans, 1975). At a critical point in the trial of Kenneth Edelin, a Boston physician accused of manslaughter, the prosecutor asked: "And if that oxygen [to the fetus] is cut off, the fetus is in difficulty, health-wise, is that a fact?" (*Commonwealth of Mass.* v. *Kenneth Edelin*, 1975) He wanted to imply that cutting off the oxygen to the fetus "killed it," which in some sense is true, though Edelin could not explicitly admit that. Regardless of Edelin's reply, the prosecutor might well have scored a point with the jury. Holmstrom and Burgess (1978: 204-06) report that defense attorneys in rape trials use three types of aggressive leading questions when trying to discredit victims:

(a) declarative questions
Defense: (to victim) So you changed your testimony.
Judge: (obviously displeased) That is for the jury to decide.

(b) accusatory yes/no forms
Defense: (in accusing tone) Now isn't it true he felt you up?
Victim: He *tried* to.

[39] See Johnson (1976); Danet and Kermish (1978). Here are two definitions of a leading question:

> Questions which so suggest to a witness the specific tenor of the reply as desired by counsel that such a reply is likely to be given irrespective of an actual memory of questions which instruct the witness how to answer on material points or put words into his mouth to be echoed back are leading. [Conrad, 1956: 340]

> A question is leading when, by its substance or form, it suggests a desired answer. If a question is made up of an unqualified statement of an assumed fact, either unproved or contested, followed by an interrogation as to that fact, it is almost necessarily leading and objectionable. [Busch, 1960: 25-26]

(c) interrogative, forced-choice questions
"Did you attempt to run, yes or no?"

My colleagues and I have developed a typology of question forms in terms of the degree to which they coerce or constrain the answer (Danet and Kermish, 1978; Danet et al., 1980b). Declaratives are the most coercive because they tell more than they ask ("You did it . . ."); [40] next are interrogative yes/no or choice questions ("Did you do it?" "Did you leave at nine or at ten o'clock?"); third are open-ended who-what-where-when-why questions—*wh*-questions, for short ("What did you do that night?"); least coercive, and most indirect and polite, are "requestions," questions that superficially inquire about the witness's willingness or ability to answer but indirectly request information ("Can you tell us what happened?").

Lawyers in fact use low proportions of leading declaratives and coercive yes/no questions during direct examination but make ample use of them on cross-examination. In the questioning of defendants and prosecution witnesses in six criminal trials heard in Boston's Superior Court, an average of 87 percent of the questions asked on cross were coercive (declarative, yes/no), as compared to 47 percent on direct (Danet and Bogoch, 1980a).[41] In six Israeli trials dealing with the same offenses (murder, rape, assault), 51 percent of the questions asked on direct were coercive-controlling, as opposed to 70 percent of those on cross, suggesting that questioning is less polarized in Israeli trials (Ibid.). *Wh*-questions are prominent in direct examination but rare on cross; requestions are relatively rare in both, though slightly more common on direct. Bresnahan (1979) also found a high 89 percent of the questions coercive in the cross-examination of one defendant in the trial of two Filipino-American nurses.

The more serious the offense in the Boston trials, the higher the proportion of coercive questions asked by prosecutors on cross (Danet and Bogoch, 1980a). This suggests that questions may also be a form of symbolic punishment. In the Israeli data the question forms of the defense attorneys were influenced by the seriousness of the offense (Danet and

[40] The addition of a negative, a tag (as in "You didn't return home that night, *did you*?"), or falling intonation all make such questions even more coercive, and their effect is cumulative. For a linguistic approach to why question forms vary in the extent to which they constrain the questionee, see Philips (1979).

[41] Only 7 percent of the questions asked on direct examination were declaratives, which suggests that lawyers used them only for noncontroversial matters, such as the routine presentation of witnesses' credentials ("You are a physician, are you not?").

Bogoch, 1980b). The general pattern of question forms used by Israeli judges (there are no juries) resembles that of Israeli attorneys; about two-thirds are either yes/no (or choice) questions or, rarely, declaratives. Judges asked the lowest proportion of coercive questions during direct examination of the victim in rape trials (Ibid.).

The distribution of question forms used by several senators during the Watergate hearings resembled that in adversary trials. Although the formal structure of hearings is different from that of trials, and there are no controls over question form, Senator Sam Ervin, the Democratic, anti-Nixon chairman of the committee investigating the Watergate scandals, used polite, indirect forms when questioning John Dean, the "star witness for the prosecution," and more coercive forms when questioning John Erlichman. For Senator Gurney, the most pro-Nixon member of the committee, these usages were reversed (Danet, 1976b). Thus the political biases of the senators were a functional equivalent of adversary representation in a trial, suggesting the parallels between trials and political conflicts.

The form of a question alone does not necessarily determine how coercive it is. A noncontroversial assertion cast in the declarative is less coercive in context than a supposedly open-ended *wh*-question.[42] Bresnahan compares two questions addressed to one of the Filipino defendants:

(1) You don't recall not asking Lula, do you?
(2) Where was his I.V. line?

The second question is the more coercive because it presupposes a controversial claim, that there *was* an I.V. line (1979: 2). Philips (1979) suggests that the degree of coerciveness of a question is a function of social as well as linguistic processes and that its coerciveness in the courtroom may derive more from the superior status of the questioner, lawyer, or judge than from the form of the question itself. She found that in 39 changes of plea heard by nine judges, question form varied least in the most legally significant portions of the proceeding. Moreover, *wh*-questions were rarely used and, when they were, led to a more genuine dialogue in the determination of facts than did yes/no questions (Philips, 1979, summarized in Danet, 1980c).

[42] Danet and Rafn (1977) reported a weak tendency for lawyers to coordinate question form and topic; they were more likely to choose a coercive form for a question about a witness than for one dealing with the behavior of someone else.

There is some empirical evidence that lawyers overestimate the ability of witnesses to resist control even by friendly interrogators. Taking length of response as an index of lawyers' ability to control witnesses, Danet et al. (1980b) found that during cross-examination, coercive questions did result in a higher proportion of short answers than did noncoercive ones. However, the extent to which coercive questions controlled length of response was a good deal lower than on direct examination.[43] Bresnahan (1979) also reports that coercive questions produce shorter answers.

The limited information available on cross-examination in tribal questioning suggests that it may fall, for the most part, lower down the scale of coerciveness. Gluckman comments that "there are no improper or objectionable questions [among the Lozi] and no one who can protest against any question on behalf of the litigants or their witnesses" (1955: 112). The portions of transcript in his book show few instances of what we would call leading questions.[44] Fallers presents fuller sequences of questioning, which reveal consistent use of yes-no and *wh*-questions with virtually no exception. Use of control questioning to assign responsibility for wrongdoing is highly institutionalized in Gonja, though Goody (1978) provides no illustrations of it. Rhetorical questions play an unusual function in Gonja trials: they select and define the norms used in reaching decisions. Thus, an elder may ask, "Is it one parent who creates a child?" If the others say, "No, it is not one parent who creates a child," this indicates their agreement that the

[43] Coercive questions also resulted in fewer answers containing mitigating forms—hedges like "well" or "I guess." But again the degree of control over mitigation was less on cross- than on direct examination (see Lakoff, 1970). Quantitative analysis alone obviously cannot tap all that is interesting or important in questioning. A lawyer may do more damage to a witness by eliciting one discrediting admission, whether through a coercive or noncoercive question, than through the frequent use of leading or yes/no questions.

[44] The following are two examples of Lozi challenge questions, both from The Case of the Eloping Wife:

> Q. Do you not know it is our marriage-custom that the bridegroom's people, even if only his friends from the compound where he works, come to the girl's home, and they both bring her to his hut?
> A. No reply from woman questioned.
> . . .
> Q. Did you not think of waiting until after the case of the husband had been heard?
> A. Wife's father: No, I did not think of it. [Gluckman, 1955: 116]

The same transcript contains an example of an accusatory rhetorical question:

> Q. How can you take a woman to *sinawenga* (the marriage feast), and the next day go to her father to ask for her, when the *sinawenga* is over?
> A. No reply from defendant. [Ibid.]

It may be worth noting that two of these questions elicit no answer and the third virtually no information, which suggests they may be ineffective.

norm holding both parents responsible for the child is to be applied to the case. If no one responds, it means that the norm is not considered helpful (Ibid.: 30).

To sum up, we have seen that in questioning sequences, superficial speech acts of asking are in a sense secondary to what is being accomplished interactionally. Questions serve as *weapons* to test or challenge claims and vehicles to make *accusations* (cf. Downes, 1978; Atkinson and Drew, 1979: chap. 4; Churchill, 1978: chap. 8; Danet, n.d.),[45] *cues* for witnesses to speak their lines during direct examination (Danet and Bogoch, 1980a), and, at least in Gonja trials, as indirect *suggestions* (Goody, 1978). We see also that in some circumstances questions may be a form of *symbolic punishment* (see Gibbs, 1975: chap. 4; Feeley, 1979).

b. Mitigation. In addition to mitigating responsibility for wrongdoing through substantive justifications and excuses, defendants can mitigate the *form* of their utterances by using a rhetorical device to soften the impact of some unpleasant aspect of an utterance on the speaker or the hearer (Fraser, 1979).[46] In the trial of Kenneth Edelin, the term "fetus" mitigates the connotation of "aliveness" for the "baby/fetus" in question, thereby distancing the defendant from wrongdoing. Whereas lexical choice can be viewed as a matter of either form or content, strategic manipulation of syntactic choice is more clearly a matter of form alone. In their respective presentations of abortion in the opening statements of the Edelin trial, the prosecutor preferred active, monosyllabic, vivid verbs that necessitated explicit identification of actors (e.g., "*they tried* twice . . . *they* were unsuccessful"), whereas the defense attorney preferred nominalizations and passives, both of which left the identity of the actors implicit, as well as polysyllabic, Latinate, obfuscatory verbs (e.g., "after two unsuccessful *attempts*") (Danet, 1980b, n.d.).

In the Watergate hearings, John Erlichman called the Ellsberg break-in "the thing" (Danet, 1976a). In rape cases, defense attorneys highlight the victim's responsibility for what happened by using words that suggest sexuality and romance,

[45] Downes (1978) gives a beautiful example of a Q-A sequence in which elaborate analysis of pragmatic presupposition is necessary to account for the implicit accusation in an ostensibly factual question addressed to Paul Robeson during the House Un-American Activities Committee hearings:

Q. Are you now a member of the Communist party?

A. Oh please, please, please.

[46] For a discussion of mitigation/aggravation in psychotherapy, see Labov and Fanshel (1977).

whereas prosecutors choose terms emphasizing force and aggression (Holmstrom and Burgess, 1978). When cross-examining the victim in one case, a defense attorney asked, "Didn't the defendant 'sweet-talk' you?" In another, the defense attorney referred to a forced walk with the defendant as "sauntering along." In an Israeli rape trial the prosecution characterized the sexual act in question as *siyut mini* ("sexual torture"), whereas the defense called it *romantika* ("romance") (Futerman and Libes, 1979).

It is obviously in the interest of defendants to mitigate the illocutionary force or point of damaging assertions ("I guess I killed her") but to avoid mitigating neutral or positive assertions ("I didn't do it" rather than "I guess I didn't do it"). "I guess" is a kind of hedge (Lakoff, 1970). John Erlichman's testimony during the Watergate hearings was full of hedges on potentially damaging admissions (Danet, 1976a). Mitigation is one of the features of a more general constellation that O'Barr and his colleagues call "powerless" speech. They find that "powerless" speech is generally evaluated as being less credible than "power" speech (O'Barr and Conley, 1976; Erickson et al., 1978; Conley et al., 1978; Lind and O'Barr, 1979).[47]

e. The manipulation of eyewitness testimony. A large body of psychological research, beginning in the early 1900s (e.g., Muncio, 1915), has demonstrated the extreme vulnerability of eyewitness testimony to "linguistic engineering" (Loftus, 1977). This work generally concludes that a series of questions produces a less accurate but more complete report of events than does a report in narrative form (see Loftus, 1975: 162 n.3). Loftus has shown how the manipulation of semantic presupposition in questions can significantly alter the truth value of answers to those questions or to later ones and can even affect verdicts (see generally 1977, 1979). She found that (1) the severity of verbs (e.g. "smashed" versus "hit") affects answers (Loftus and Palmer, 1974; but see Read et al., 1978); (2) the choice of the definite article "the" or the indefinite article "a" ("Did you see the/a broken glass?") can alter responses (Loftus and Zanni, 1975); (3) implanting false information in a

[47] The general question studied by the O'Barr group is how jurors respond to the speech style of witnesses. Their research did not separate the responses to mitigation of damaging admissions and positive assertions. If both types of mitigation are perceived negatively, then defendants are in a double bind: their instincts lead them to hedge on damaging admissions, yet doing so may lead decision makers to respond to them even more negatively than if they had not hedged at all.

question can lead a witness to report it as fact (Loftus, 1975); (4) when exposed to delayed, misleading information, subjects are less confident of their correct responses than of their incorrect ones (Loftus, 1977); (5) people asked questions worded in an aggravating, aggressive, active manner report the incident they witnessed as noisier and more violent than those asked more neutral questions (Loftus et al., 1975); (6) substantively leading questions encourage simulated jurors to give more guilty verdicts than do more neutral questions (Kaspryzk et al., 1975); (7) when a witness sees a number of people committing different acts, leading questions can increase the likelihood of identifying the wrong person as responsible for a given act (Miller and Loftus, 1976).

Questions with marked modifiers, which presuppose something, yield answers with larger variances than questions with unmarked modifiers, which do not; thus, "How tall was the man?" will yield a more accurate answer than "How short was the man?" (Harris, 1973). Subjects remember not only what is directly stated in courtroom testimony but what is pragmatically implied (Harris et al., 1975). Although judges typically instruct jurors to ignore inadmissible evidence, simulated jurors exposed to such evidence and then told to ignore it cannot do so (Sue et al., 1973; Harris, 1978). A lapse of time between exposure to an event and later questioning reduces the ability to distinguish between actually reported and merely inferred events (Spiro, 1975, cited in Loftus, 1977).

d. Registers. Conley and O'Barr (1977) created an index of formal and informal style based on 34 contrasting sets of lexical and syntactic features, such as "proceed" rather than "go," and whether "that" was used, as in "he said [that] he was going." They found that direct examination is carried on in a more formal style than cross and that changes in witnesses' styles during direct examination corresponded closely to changes in lawyer style. Cross-examination, on the other hand, was a "verbal duel": there were rapid style shifts that constantly upset the stylistic equilibrium of lawyers and witnesses. At regular intervals during direct examination, the style of lawyer and witness became more formal as lawyers asked questions that served to summarize the preceding testimony (establish "facts") in more legalistic language. This was reversed on cross, when summation of testimony was given in a less formal style.

In the rape trial studied by Futerman and Libes (1979), the defense attorney alternated between a Hebrew literary register and slang during cross-examination of the victim. In one sequence he used slang, ostensibly to create rapport; but his choice of code and particularly his repetition of slang terms introduced by her also communicated something more: "See what a primitive, low-level person this is." The attorney was at a linguistic advantage since he could switch registers, whereas the victim could not.[48]

Leodolter (1975, 1976) studied variation in standard German and Viennese dialect among people being tried for driving offenses in Vienna. Both middle-class defendants and those with previous convictions switched registers less than either upper-middle-class or working-class defendants. Middle-class accused consistently spoke a casual register of standard German, whereas working-class defendants spoke in dialect. When working-class and upper-middle-class defendants switched, it was to a very formal style.

Complaints about the general incomprehensibility of the legal register to laypersons and, in particular, the inability of defendants to understand what goes on in court were reviewed in earlier sections of this essay. Despite the frequency of such criticism, there are no detailed, systematic empirical studies characterizing the situated use of this register in court. We saw earlier that the patterned jury instructions routinely used in the United States are seriously incomprehensible (Charrow and Charrow, 1979).[49] According to three measures used by the Charrows, comprehension of unmodified jury instructions ranged from 32 to 45 percent. An extreme case of strategic use of the legal register is reported in Kidder's (1976) study of litigation in Bangalore, India, where clients experience "linguistic blackout." They are intimidated not only because they do not understand the official language of the court—English—but also because lawyers use doubletalk to impress and mystify them, engaging in long speeches of apparently profound content which are actually loaded with non sequiturs, unfinished sentences, and illogical transitions (Ibid.: 245).

[48] There is some overlap here with the notion of mitigation. A formal style is often thought of as more "distant," a casual one as more "intimate," (see Joos, 1961). The similarity of findings in the Duke (Conley and O'Barr, 1977) and Jerusalem (Futerman and Libes, 1979) studies suggests that strategic use of slang to highlight key issues and enhance responsibility for action may be a much more general phenomenon than we recognize.

[49] See Sales et al. (1977) for a comprehensive state-by-state bibliography of published jury instructions.

e. Norms of address. Patterns of address are generally accounted for by two variables, power and solidarity. Other things being equal, superiors address inferiors in a form analogous to the French *tu*, while inferiors must return *vous* to their superiors; equals may use reciprocal forms. The norm of solidarity says that strangers must use *vous*, while familiars may use the intimate *tu* (Brown and Gilman, 1972; Ervin-Tripp, 1972). In English, there is similar patterning in the use of first and last names (Brown and Ford, 1964). As modern society has become democratized, the norm of solidarity has generally taken precedence over that of power, so that unequal strangers exchange *vous*.

The rules of speaking in modern courtrooms generally require everyone to use the equivalent of *vous* in cognizance of the fact that they are strangers interacting in a formal situation.[50] Attorneys doubtless make strategic use of address forms in order to bolster or denigrate the moral character of witnesses. The following are two interesting cases in which address is actually anything but polite.

Consider, first, the opening gambit of the prosecutor in his cross-examination of Kenneth Edelin:

Prosecutor: *Doctor*, are you board-certified?
Edelin: I have the first part of my boards which I took in June of this last year, '74.
Prosecutor: Have you had orals yet?
Edelin: No, that comes two years after the completion of residency.
Prosecutor: So the answer to my question, are you board-certified, *Doctor*?
Edelin: I am not eligible, no, I am not board-certified.
Prosecutor: Your answer is no?
Edelin: That's correct.
[*Commonwealth of Mass.* v. *Kenneth Edelin* 1975: 120]

In this passage the prosecutor ostensibly acknowledges Edelin's right to the title "Doctor" but at the same time forces him to admit that he is *not* yet a full-fledged doctor because he has not passed all the examinations to qualify as a board-certified obstetrician/gynecologist. The hidden message is "This man is not a doctor, after all" (Danet, n.d.).

A striking example of the situated exploitation of norms of address can be found in the Israeli rape trial analyzed by Libes and Futerman (1979). The following exchange occurred between the defense attorney and victim on cross-examination:

Attorney: G'veret Buzo . . .
(Miss Buzo . . .)

[50] In the Fijian song challenges (Brenneis and Padarath, 1975), contestants use the otherwise inappropriate *tu* form as part of their insulting strategy.

Victim: Tikra li Dorit, im lo ihpat l'ha.
(Call me Dorit, if you don't mind).
Attorney: G'veret Buzo . . .
(Miss Buzo . . .)

The attorney is communicating, "See, I am being polite to you even though you are not worthy of it." In asking him to call her Dorit, the victim appears to be merely following convention, initiating a transition from the address form used with strangers to the familiar one of first name. But since this is a situation of hostility, she cannot really be seeking to put the relationship on a more friendly footing; in effect she communicates, "I reject your false politeness; I know you are trying to degrade me and control me. Call me by my first name. In getting you to do so, I am not only trying to control you, but I will convey to the judges that I am not a person who puts on airs—I'm an ordinary, down-to-earth young woman. In saying, 'if you don't mind,' I acknowledge that I know you *do* mind; thus I make explicit the hostility between us."[51] The attorney's persistence in using "Miss Buzo" is explicit confirmation that he has no desire to reduce the distance or hostility between them. He therefore conveys indirectly, "I reject your strategy; you can't one-up me. I am the boss here, not you. Moreover, I dramatize the status difference between us by *refusing* to accept your 'invitation' or even respond to your request with a reason as to why I refuse; I therefore imply ironically that you don't deserve to be called 'Miss Buzo' at all."

There are also special norms governing how one is to address a judge. Many of us are familiar with the fact that in English it is customary to say "Your Honor." When asking permission to do something, attorneys begin "May it please the court." Like the phrase "approach the bench" for "come here," these forms depersonalize the decision maker and create distance between him/her and others, thus realizing and reinforcing the authority of "the law." In Hebrew, one addresses the judge as "*K'vod Hashofet*," which means something like "Your (or His) Honor, the Judge," or "Honored Judge," and "*K'vodo*," for short—literally "His Honor." In other words, the judge is addressed *in the third person*.[52]

[51] This is a good illustration of the fact that sociolinguistic skills are not the monopoly of highly educated people. Dorit Buzo is poorly educated, yet her response to her cross-examiner is apt enough.

[52] When seeking permission to receive tape recordings of trials in Jerusalem's District Court I went to see its then Chief Justice, Judge Miriam Ben-Porat. I was totally taken aback when she addressed me, in Hebrew, in the third person. If anyone was supposed to use the third person it was I, but I had never done so before and found myself utterly tongue-tied. In court, Israeli judges occasionally use the third person, as do persons addressing them, but my impression is that judges generally use the second person.

It is also interesting to analyze the third-person terms used to refer to characters in the trial. During the prosecution of Kenneth Edelin, the defense attorney spoke of "the manner in which *Dr. Edelin* performed the hysterotomy . . ." (*Commonwealth of Mass.* v. *Kenneth Edelin* 1975: vol. 5, p. 34), whereas the prosecutor said, "when *this particular defendant* opened up the female patient . . ." (Ibid.: 20). The defense attorney sought to emphasize the defendant's high status outside the courtroom as well as his professional expertise; the prosecutor stressed his doubtful moral character as the defendant in a major manslaughter trial (see Danet, n.d.).

In the Israeli rape trial, the defense attorneys and prosecutor also used sharply contrasting terms when referring to the victim: the prosecution called her a *hayelet* (woman soldier), a *na'ara bat tsha-esrai* (a young girl of 19), while the defense spoke of her as a *bahura bat esrim* (a sexually mature woman of 20).

f. Other linguistic strategies. The list of rhetorical strategies available to speakers is too lengthy to cover here, but I will mention three others briefly: rhetorical questions, manipulation of audience identification, and repetition. Rhetorical questions do just the opposite of declarative questions; they use question form to make an assertion rather than declarative form to ask a question. In the Edelin trial, the prosecutor made dramatic use of rhetorical questions in his summation to the jury. Showing them a grisly photograph of the aborted fetus, which was preserved in formaldehyde, he said:

> Take a look at this picture of the subject. *Is this a subject? Is this just a specimen*? You tell us what it is. Look at the picture. Show it to anybody. What would they tell you it was? Use your common sense when you go to your deliberation room and humanize that. *Are you speaking about a blob, a big bunch of mucous*, or what are we talking about here? *Subjects*? I respectfully submit we're talking about an independent human being. . . . [*Commonwealth of Mass.* v. *Kenneth Edelin*, 1975, vol. 28, p. 108; emphasis added]

To facilitate communication throughout the trial, the prosecutor had agreed to use the ostensibly neutral term "subject" to refer to the aborted fetus; here he dramatically rejects the applicability of the term, using a rhetorical device that heightens the intensity of his assertion.

Another useful strategy is to manipulate the way in which the audience or the decision maker identifies with various people. In the Jerusalem rape trial, the defense attorney tried to use the first person plural pronoun "we" in order to suggest agreement between himself and the judges. In his closing

argument the defense attorney reminded the judges that Dorit Buzo had offered to show the burns on her chest that she said had been made by the rapists.

Judge Hadaya:	She offered and we refused.
Defense attorney Marcus:	She offered, yes, and *we* were not enthusiastic.
Judge Cohen:	*You* said that *you* weren't enthusiastic about it.

[Futerman and Libes, 1979; emphasis added]

Thus, the defense attorney latches onto the "we" of the first judge, but the second judge catches him up on this and explicitly rejects his stratagem.[53]

Repetition is a versatile device. For one thing, it is an effective way to stress critical propositional content. In a dramatic sequence of recross-examination of a defense witness in the Edelin trial, the prosecutor used the form "Were you aware that *p*?" to elicit reluctant "no's" to a series of 20 questions, in each of which he managed to assert before the entire audience a new surprise fact about a famous case of an infant, born very prematurely, which nevertheless survived. Here is a portion of the passage, which is too long to include in its entirety:

Prosecutor:	Were you aware, Doctor, that the [Munro] baby was weighed in a grocery store on a grocery scale?
Witness:	Not personally, sir.
Prosecutor:	Well, you were aware that at the time that the baby was born or shortly after the birth, the nurse gave the baby two drops of brandy in warm water from an eye dropper?
Witness:	No, sir.
Prosecutor:	Were you aware that the baby was born at 10:30 P.M. on June 6, 1973?
Witness:	No, sir.
Prosecutor:	Were you aware that the baby was born without the presence of a doctor?
Witness:	Yes, sir.
Prosecutor:	Were you aware that the child was born in a country region where the facilities or scientific care of a premature infant were completely lacking?
Witness:	Yes, sir.

[*Commonwealth of Mass.* v. *Kenneth Edelin*, 1975]

4. The Management of Language and Silence

a. Cultural and legal rules for language and silence. Both O'Barr and Atkins (1978) and Santos (1977) have suggested that we cannot understand the dynamics of dispute processing

[53] The manipulation of identification is, of course, a well-known feature of oratory. Keenan (1975a, 1975b) describes the *kabary*, or ceremonial speech among the Merina of Madagascar, a genre that is used to negotiate marriage requests, among its other functions. One expression of the move toward greater unity near the end of such negotiations is the use of inclusive "we" and "our" forms, as in "*vita ny raharantsika*": "*Our* business *together* is completed" (1975b: 108).

without analyzing the interrelations between language and silence. They point out that silences, in context, can be as meaningful as speech. When we say that modern dispute processing is highly formalized, we mean, in part, that explicit, detailed rules formally regulate the flow of talk and silence.[54] Specifically legal rules, such as those that allow opposing counsel to interrupt in order to object, operate within a larger cultural context with its own unwritten norms about speech and silence. Cultures differ in the ways they regulate talk and silence (Philips, 1976). When a witness in an American courtroom pauses, even momentarily, before answering a question, the silence may be read as indicative of evasiveness. Among Ojibwa speakers, in some situations, it is perfectly acceptable to respond with silence to a direct, factual, or personal question (Black, 1973).

b. Types of silence. O'Barr and Atkins (1978) distinguish between three types of silence. *Response lag* is the period between question and answer, or between an answer and the next question. Most response lags in trials recorded in a North Carolina courtroom lasted no more than 1.5 seconds; answer-question response lags tended to be somewhat longer. The court was especially tolerant of very long response lags, 30 seconds or more, when a rape victim was being questioned. *Pauses* are intervals of assigned silence within a speaker's utterance. Whereas the "owner" of the silence in a response lag may be ambiguous, pauses clearly belong to the speaker. *Lapses* are a property of the speech-exchange system and include recesses and bench conferences.

O'Barr and Atkins hypothesize that highly skilled lawyers develop techniques to imply discrediting interpretations of witnesses' silences. Saunders (19—) showed how police interrogators use "pumps" and pauses to keep suspects talking. Atkinson and Drew (1979) distinguish between the interactional consequences of pauses within or at the end of questions and pauses after answers. They note, for example, that pauses within questions may mark clear segments of material for the audience yet simultaneously confuse the witness about when to begin answering. They are concerned with the significance of silence for how the conversation

[54] The extreme extent to which the flow of talk is regulated in courtrooms becomes apparent only when the rules are blatantly flouted, as in the trial of the Chicago Seven. On many dramatic occasions the defendants defied the rules of decorum and questioned the right of the "system" to silence them (see, e.g., Clavir and Spitzer, 1970; Dellinger, 1970).

"proceeds" rather than with its implications for the imputed moral character of the witness.

c. Number of questions. One variable that has been little studied is the amount of time and talk invested in any given dispute. Over the centuries the Anglo-American legal system has been investing increasing amounts of time in trials. Well into the eighteenth century, the judges at Old Bailey tried between twelve and twenty felony cases per day (Langbein, 1979). One American court tried a half-dozen felony cases in a single day in the 1890s (Friedman, 1979). In 1968 the average felony jury trial in Los Angeles required 7.2 days (Alschuler, 1979). Chief Justice Burger (1973) wrote that British trials take one-fourth the time of those in America. Lacking empirical research that attempts to explain variation in trial length, we can begin to look at a more limited variable, the number of questions asked in sequence. Santos (1977) suggests that one measure of the control a dispute settler exercises over the process is the number of questions s/he asks and the number of times s/he interrupts parties and witnesses. In six criminal trials heard in Boston, lawyers asked an average of just under 200 questions on direct and just over 350 on cross. In a comparable set of six trials in the Jerusalem District Court, only about 50 questions were asked on direct but over 260 on cross. Within each type of examination the more combative Boston prosecutors always asked more questions than defense attorneys, whereas in Jerusalem this was reversed. In both countries, each category of attorneys asked more questions on cross than on direct. The more serious the offense, the more questions were asked by Boston prosecutors and by Jerusalem defense attorneys (Danet and Bogoch, 1980a, 1980b). Seriousness of offense also influenced length of processing in a lower criminal court: more than two-thirds of the petty misdemeanors were processed in one minute or less (!), compared with only 10 percent of the felony cases, most of which took over four minutes (Mileski, 1971).

d. Interruptions. As Santos (1977) suggests, interruptions indicate an attempt to control. In Bresnahan's (1979) pilot study of the opening sequence of cross-examination of a Filipino-American defendant, the prosecutor interrupted her 21 times, whereas this nonnative English-speaking woman interrupted him only three times. Cutler (1979) found the reverse to be true for native English-speaking defendants, who interrupted prosecutors more. On the whole, Lind and O'Barr

(1979) found simultaneous speech by attorney and witness to be rare; in hostile clashes attorney and witness interrupted each other about equally often. An experiment showed that an attorney who speaks at the same time as a witness is perceived to have less control relative to the witness than one who does not do so.

In the adversary system, lawyers can legitimately interrupt a sequence of testimony through the device of the objection. Objections appear to be rare in criminal trials: they were raised in only 6 percent of the Boston question-answer sequences and only 2 percent of those in Jerusalem. Despite the infrequency of objections, there was clear patterning in their use in both settings: each type of attorney used them more in direct examination than in cross. And the more serious the offense, the more often each side objected during both types of examination. Whereas the Boston judge overruled about half of all objections, the Jerusalem judges did so only a third of the time (Danet and Bogoch, 1980a, 1980b). Atkinson and Drew note that "both objections and the judge's response to them seldom include any explicit reference to the legal rules of procedure which occasioned them" (1979: 209). Judges need to be attentive since any question may be met with an objection; consequently, their responses to objections are often delayed or hesitant.

Judges are extremely active in courts, where there are no juries. In six Jerusalem trials, panels of three judges interrupted nearly 10 percent of all question-answer sequences. They were more likely to interrupt defense attorneys than prosecutors, except during direct examinations of victims in rape trials. Judges asked nearly three questions for every ten asked by lawyers during direct examination, and almost one for every ten asked by counsel during cross. The more serious the offense, the more questions they asked on direct; moreover, they consistently asked more questions, relative to the attorneys, when the prosecutor was conducting direct examination than when the defense attorney did so. During the rape victim's testimony on direct examination, the judges asked a remarkable nine questions for every ten asked by the prosecutor (Danet and Bogoch, 1980b).

5. Language, Communication, and Outcome

One might expect empirical studies to examine the relation between language and communication during disputing and the outcome, but thus far only a few address this issue.

a. The organization of persuasive arguments. A classic theme of experimental social psychology is the effect of the organization of persuasive arguments on their targets. Lawson (1970) has summarized the implications of much of this research for the courtroom. He addresses two questions: Should advocates attempt to refute antagonistic arguments or merely ignore them? Is a communication's impact upon decision makers dependent on the order in which its parts are organized? Experiments that compare one- and two-sided arguments find the former more persuasive when presented to a person who initially agrees with the position advocated and is not subsequently exposed to counterargument, and two-sided arguments more persuasive when presented to a person initially predisposed against the position advocated and not later exposed to counterargument, or if there is a subsequent counterargument. With respect to the second question, research findings are equivocal and therefore difficult to apply to the courtroom. This is often called the "primacy-recency" question, i.e., is it better to present favorable arguments first, and unfavorable ones second, or vice versa?[55] Effects of order may also be related to perceptions of the credibility of the speaker.

b. The substance of persuasive arguments: justifications and excuses. We have little systematic knowledge about the circumstances under which justifications and excuses succeed in getting the accused off the hook. In an experimental study, Blumstein et al. (1974) found that factors affecting the honoring of accounts include judgments of the general moral worth of the offender, the offender's penitence, his status relative to the demander of the account, the offensiveness of the violation, and perceptions of the offender's responsibility for the deed. In Mileski's (1971) study of a lower criminal court, drunks who gave excuses were much more likely to be jailed than those who did not. Emerson's analysis of juvenile court procedures led him to conclude that "questioning *is conducted on such terms that no legitimate reason or justification for the act can be maintained and defended*" (1969: 184; emphasis in original). Juvenile courts first elicit the delinquent's own account of what happened, ostensibly implying that this view of things just might be legitimate; then police officers restate things (Cicourel, 1968: 141). In a study of persuasive appeals in

[55] See McGuire (1973) for a review of the literature on persuasion and attitude change.

letters of complaint to the Israeli customs authorities, people of Middle Eastern origin, either unemployed or in low-status occupations, tended to choose altruistic appeals, whereas those of Western origin, employed, and in higher-status occupations, offered more normative appeals. Although members of the former category were more likely to "get a break," it was not because they appealed to the altruism of officials (Danet, 1973).

c. Linguistic form. A large body of empirical research has shown that people's speech styles influence judgments of their social status and personality (Giles and Powesland, 1975). For example, people speaking rapidly and in standard accents are perceived as more competent than those who speak slowly or in nonstandard accents (Scherer, 1979; Miller et al., 1976). O'Barr and his colleagues studied the effects of "power" and "powerless" speech by witnesses on juror evaluations of their competence and credibility. "Powerless" speech involves frequent use of intensifiers ("so," "very"), empty adjectives ("divine," "charming"), hypercorrect grammar, polite forms, and hedges ("well," "I guess"). For both male and female witnesses, power speech led to judgments that the witness was more competent, attractive, trustworthy, dynamic, and convincing. The effect was stronger when witness and subject were of the same sex (O'Barr and Conley, 1976; Erickson et al., 1978; Conley et al., 1978; Lind and O'Barr, 1979).[56] To analyze the speech correlates of attorney success in criminal trials, Parkinson (1979) matched 19 cases ending in conviction with 19 ending in acquittal. The sample consisted of 40 turns of uninterrupted discourse for each lawyer. Success for prosecutors was correlated with verbosity, high frequency of questions explicitly about the witness, and unqualified statements of fact. Success for defense attorneys, on the other hand, correlated with unqualified verbs, the use of legal jargon, specific question lines, as well as specific questions about the witness. Defendants who used polite forms and spoke in complete sentences were more likely to be acquitted (see Parkinson, 1979; Danet, 1980c). The preliminary work of Naylor (1979) and Bresnahan (1979) on linguistic and cultural interference in the testimony of Filipino-American defendants suggests more generally that nonnative speakers of English have difficulty managing both the form and content of replies and therefore make an unjustifiably poor impression. Scherer

[56] Warning subjects to ignore the witness's speech style did not reduce its effects on perceptions (see Conley et al., 1978).

(1979) studied the effects of the voice and speech features of German and American jurors on subjects' evaluations of their influence in decision making. Among Americans, jurors perceived as influential spoke with a more expressive and somewhat louder voice, while there was little relation between voice quality and perceived influence for Germans. The strongest predictor of perceived influence in both groups was the juror participation rate, especially the total number of times the juror took the floor. We saw earlier that experiments on eyewitness testimony demonstrate that manipulation of the wording of a question influences the answer to that and to later questions and even the decision to convict (Kaspryzk et al., 1975).

d. Process as outcome. Thus far I have reviewed studies of language variables and outcome as if the processing of wrongdoing and the outcome were analytically distinct. Indeed, the basic model of

BREACH→COUNTERREACTION→OUTCOME

posited at the beginning of Part IV implied that it is possible to separate the two. But the constructivist, phenomenological view of the legal process developed in this essay breaks down the distinction between process and outcome, which expresses a positivist view of the legal process that identifies with the "doers" of justice rather than those to whom justice is done. The various studies reviewed thus far all ask, in one way or another, "What works?" They therefore lend themselves to application by attorneys in search of tips on how to win cases.[57] But another question is increasingly being asked: "What does it feel like? Does it feel like justice?"

In a positivist approach, the doers of justice determine what the messages are. A phenomenological approach, on the other hand, leads us to ask what aspects of dispute processing are read as messages even if not so intended. Gibbs's (1975) typology of legal punishment helps clarify this point. Type I, congruent punishment, is an action prescribed with the intent of inflicting pain and discomfort and perceived as doing so; it is the classic instance of punishment, like imprisonment, and is readily viewed as a substantive outcome of processing. Of

[57] William O'Barr has been swamped with hundreds of letters and phone calls from attorneys wanting to apply the research findings of his team to their trial practice. Similarly, Elizabeth Loftus is in great demand to give workshops to trial lawyers and frequently appears as an expert witness on the manipulability of eyewitness testimony (personal communications from O'Barr and Loftus).

interest here is Type II, unintended punishment, which is not prescribed with intent to inflict pain or discomfort but does so nevertheless. By using the very general terms "action" and "perception," Gibbs breaks down the conventional distinction between substantive and procedural justice, thereby calling attention to the fact that aspects of dispute processing not conventionally viewed as punitive may be so, depending on whose perception and which criteria are used. By collapsing the distinction between process and outcome, then, we come to see as outcomes all sorts of intermediate events along the way to a final decision (answers, perceptions of credibility, effects of direct examination on cross, and so on). We open ourselves up to the question, "What does it feel like?"

e. Cross-examination as punishment. Conversational or discourse analysis of courtroom questioning according to the ground rules of the adversary system reveals what an upsetting experience it is. Whether we look at the experiences of juvenile delinquents (Emerson, 1969) or rape victims (Holmstrom and Burgess, 1978), close scrutiny of criminal trials reveals that they truly are degradation ceremonies (Garfinkel, 1973).[58] Summers (1974) has proposed that we need to look at process values in the law. We should ask not only what is efficient but also what is fair, humane, and respectful of human dignity. There is consensus today that physical torture is a bad means to elicit evidence, not only because such testimony may be unreliable but also because torture is abhorrent. It was not so many centuries ago that torture was considered a perfectly appropriate method of eliciting testimony and not a punishment at all (Langbein, 1977). Can we change our thinking about cross-examination too?

Cross-examination differs dramatically from ordinary interaction. The ethnomethodological work of Atkinson and Drew (1979) on verbal interaction in the courtroom exposes two main differences. First, unlike ordinary conversation, there is "pre-allocation" of *turn order* and *turn types*. In informal, spontaneous conversation (between equals), next turns are situationally allocated on a turn-by-turn basis; either the current speaker selects the next speaker or the next self-selects by beginning to talk. There is no preset order, and each

[58] This is not so surprising since, following Gibbs, we can see punishment as a latent function of the criminal process. But what about civil trials? The experience of being a tort victim (Rosenthal, 1974: 44-45) or a divorce plaintiff, at least under the now largely supplanted fault system (O'Gorman, 1963), is also humiliating. How can we explain this and, even more, justify it?

speaker may, in principle, determine the size (length of time talking) of his or her own turn. In cross-examination, however, the order of speakers is fixed in advance, and whatever else is accomplished interactionally, their discourse must be "fitted" into the mold of question-answer sequences. This means that, in contrast with spontaneous conversation, there is no negotiation over the right to speak or over what may be said.

Linton observed that in ordinary interaction people have "freedom to negotiate and qualify judgments made about them and their conduct" (1965: 2). But in the courtroom, witnesses are denied ordinary techniques of role distancing and withdrawal by which they manage or save face (Goffman, 1967; Emerson, 1969). To some extent this may be true in any mode of "fact"-oriented dispute processing; but in modern settings, where the participants are mainly strangers, cross-examination that denies the right to negotiate one's identity through explanations, qualifications, and the like is harsh, to say the least. Can it be just to deprive a person of the right to negotiate his or her identity through free-flowing talk just when it matters most?

Carlen extends her criticism beyond cross-examination to the entire communication structure of magistrates' courts in Britain:

> The rigid control which facilitates judicial proceedings in magistrates' courts is achieved by: the systematic manipulation of temporal, spatial and linguistic conventions which, situationally, can be contrived to manifest consensualised meanings; collusive and secretive professional communication which reinforces official control of compromised meanings; and repression of the alternative modes of theorizing evocative of unpermitted social worlds. [1976: 128]

We have no information available today on patterns of questioning in inquisitorial processes. Its ideology is a scientific model of hypothesis-testing, in which the judge sets out a tentative understanding at the beginning, then gradually narrows his or her questioning in order to verify (Thibaut and Walker, 1975: chap. 4; Damaska, 1975). In principle, leading questions are forbidden (Damaska, 1975; 1094 n.23).[59] The fact that parties and witnesses are allowed to tell their stories in narrative style first, and only then are questioned by the judge, suggests that this may be a more humane way of establishing

[59] The inquisitorial process does appear to make use of leading questions in practice, which suggests that this system may not work so well either (personal communication from Beatrice Caesar-Wolf). In the adversary model, at least, there is some control on the coercive constraints exerted by one side since the other has the right to fight back. In the inquisitorial model, if the judge is unfair there may be no one to protect the witness. Might lawyers rally to the challenge? In theory they are much more passive than in the Anglo-American system (see Damaska, 1975).

facts. Comparative studies of inquisitorial and adversary questioning are clearly needed.

V. LANGUAGE, LAW, AND CONTROL

A. "Thickening" in Legal Language

We have now examined in some detail the nature of language usage both in written documents and in the talk that takes place in dispute processing. At every turn we have seen how legal language tends to become elaborate, stylized, formalized—differentiated from ordinary language. When we examined written legal language, the available evidence pointed to esoteric vocabulary, syntactic complexity, violations of rules of discourse, and even games legal draftsmen play with the sounds and rhythms of language—the stuff of poetry. Similarly, in the play genres of disputing, we saw a concern with the expressive, emotive, and poetic functions of language—a general trend toward stylization through such means as rhyme, metaphor, alliteration and assonance, parallel structure, and even changes in voice quality having to do with whether the material is sung, shouted, or spoken. In these genres, participants literally play with language.

The "fact"-oriented genres publicly claim to deal with truth and facts but are actually preoccupied with elaborate rules governing the flow of talk and silence and have evolved a highly esoteric professional language, incomprehensible to those whose fate is at stake, that dominates the courtroom. To varying degrees, all these uses of language in legal settings reveal a preoccupation with language rather than the relation between language and the world. This preoccupation is the source of mystification. It obscures the referential function in language, the function that informs us about the world, and instead highlights the poetic function.

> The set . . . toward the MESSAGE as such, focus on the message for its own sake, is the POETIC function of language. This function cannot be productively studied out of touch with the general problems of language. . . . Any attempt to reduce the sphere of poetic function to poetry or to confine poetry to poetic function would be a delusive oversimplification. Poetic function is not the sole function of verbal art but only its dominant, determining function, whereas in all other verbal activities it acts as a subsidiary, accessory constituent. *This function, by promoting the palpability of signs, deepens the fundamental dichotomy of signs and objects.* [Jakobson, 1960: 356; emphasis added]

The result of this *thickening* of language is that referential

meanings are backgrounded (Hawkes, 1977: 81).[60] By using a wealth of linguistic devices, written legal language, and perhaps spoken as well, becomes the very opposite of what it claims to be. Whereas play genres of disputing abandon all attempt at a correspondence between what is said and the real world, the ostensible goals in both written legal documents and "fact"-oriented disputing are clarity, precision, truth, and correspondence between word and reality. But we saw in the Citibank loan form sentence that legal language is precise only when it is in the draftperson's interest to be precise. And there is something ironic about the claim that judicial procedures search for truth when the defendant is denied the basic right to speak freely. The question that begs to be asked is, Why is legal language the way it is?

B. Five Explanations

1. The Lawyer's View

The simplest explanation is that offered by lawyers: legal language has to be the way it is; all the clauses and conditions in contracts are essential for maximum precision. Lawyers therefore see linguistic reform and the Plain English movement as a threat to legal consistency and predictability. To change the language is to make it less precise because lawyers and judges know what the words mean; these words have stood the test of time. To change the language is to create new legal issues, to sacrifice the comforts of precedent (Procaccia, 1979). But if legal language were always so precise, there would never be disagreements over the meaning of contracts, and people would never have to go to court to resolve their differences.

Similarly, if the oppressive control of witnesses during adversarial interrogation and the esoteric language of lawyers and judges were fully functional, why would there be such heated debate about the merits of our judicial procedures?[61]

> There is no reason why the information that a witness gives need be controlled by someone who is determined to avoid the disclosure of evidence favorable to the other side, however relevant to the inquiry. There is no reason why an intense, searching examination of a witness's recollections to ensure their accuracy need regularly be accompanied by deliberately manipulative efforts to obscure or discredit his testimony; or why the duty to be a witness at a criminal trial should require submission to almost any abusive questioning

[60] The notion of "thickening" is similar to the linguistic distinction between transparent and opaque meanings. Transparent expressions are those that speakers can easily "see through," or those that can easily be decomposed into smaller units of meaning (Bolinger, 1975: 411).

[61] I do not mean to imply that all the problems of the adversary system derive from language.

> tactic that an opposing lawyer may devise. There is no reason why rules of procedure designed to ensure a fair trial need systematically to be distorted by lawyers into tactical ploys for which they were not intended. A criminal trial need not be from beginning to end an exercise in the tactics of persuasion rather than an effort to come as close as we can to finding out what happened. [Weinreb, 1977: 108-09]

Given the constructivist position on language taken throughout this essay, we have to acknowledge that there will always be ambiguity about truth. But sociolinguistic work may help us to develop a critique of the adversary system. By using the emerging tools of discourse analysis we may be able to make some reasoned judgments about why the discourse rules of the adversary model of trials are worse than, say, those of the inquisitorial system.

2. The Conspiratorial View

Marxists view language as a powerful tool of domination and repression. Not only the legal profession but also the groups represented by it benefit from legal language, which serves to keep weaker groups in their place. This view could incorporate the earlier critiques of Swift and Bentham as well as contemporary polemics about language by Bankowski and Mungham (1976), Caplan (1977), and Carlen (1976). Whether or not we accept it as a total explanation of the nature of legal language, we should acknowledge the manipulative uses of language within the ground rules of any legal system. Certainly, the very nature of the adversary model encourages self-interested manipulation of whatever resources the system offers, including language. An example is the class action suit in which Labov (1976) assembled linguistic evidence that legal documents prepared by United States Steel had misled the plaintiffs.

A variant of the view that language serves to control others is Bloch's thesis regarding formalization in political and legal oratory in traditional societies.

> The formalization of speech . . . dramatically restricts what can be said so that the speech acts are either all alike or all of a kind, and thus . . . there is hardly any *choice* of what can be said. Although the restrictions are seen usually as restrictions of form rather than of content, they are a far more effective way of restricting content than would be possible if content were attacked directly. Formalization goes right through the linguistic range. It leads to a specially stylized form of communication: polite, respectful, holy, but from the point of view of the creativity potential of language, impoverished. . . . the abandonment of the freedom implied by natural discourse is in the direction of rare forms of everyday discourse. . . . a secondary result of formalization becomes the typical archaism of the language of traditional authority and even more the language of ritual. [1975: 17]

Although he deals with materials that differ radically from those analyzed by, say, Carlen (1976), Bloch's conclusions are

much like hers. "Because the formalization of language is a way whereby one speaker can coerce the response of another . . . it can be seen as a form of social control" (Bloch, 1975: 20). "Formalization is . . . a form of power for the powerful rather than simply a tool of coercion available to anybody" (Ibid.: 23).

3. The Need to Make Words "Count"

Another explanation for the thickening or poeticization of legal language is that this is what gives it "body" and ensures that *speakers* will take it seriously. Some would argue that the origins of thickening lie in the oral tradition and ritual of preliterate society and that this thickening continues to be important in written as well as spoken legal language today. I have stressed several times that many utterances in serious legal settings count more than they would in other settings and that these utterances tend to be cast in verbal formulas or rituals.

The anthropological literature on ritual, especially verbal ritual, and on sacred language offers promising leads for further investigation. Mellinkoff saw the roots of legal language in primitive beliefs about the magic power of words. He pointed out that in pre-Norman times

> under the law, a man might lose his tongue for perjuring himself or for speaking a bad word. A word was a dangerous thing—more difficult to handle than a stick or stone, and its effects not as predictable. If a word was dangerous, it could also work magic, and word magic is one of the law's inheritances from its primitive past. [1963: 41]

He cites an early Anglo-Norman oath of fealty to a lord, a long formula designed to commit the fief. The words were important not for their precise meaning but because they were "magical words that could stir a God or wreck a soul" (Ibid.). Only repetition in exact form would produce the desired effect.

> Folk wisdom also takes a hand here. For in an illiterate society only word-for-word repetition will insure survival of ideas too important to risk losing. And if the words are cast in a form pleasing to the ear, retention and repetition are made the easier. [Ibid.: 42]

An analysis by Tambiah (1968) of the uses of language in a Sinhalese exorcism ritual sheds further light. The first part is a spell, muttered entirely in obscure prose. The second sequence is chanted in rhythmic prose composed of intelligible language meant to be heard and understood by participants. The third part consists of rhyming verses that are perfectly intelligible but couched in a distinctive literary language. The concluding part, a mixture of eight different languages, is extremely difficult, though not totally unintelligible to the outside expert. One portion, in what is known as "demon language," is largely

unintelligible yet considered functional as a means of influencing those believed to understand it—the demons. As Tambiah points out (1968: 181-82), many of the world's great religions have held that religious ceremonies must be conducted in the authorized sacred language, which may not be comprehensible to their congregations. Just as reformist movements in religion call for the use of vernacular to make religious experience more accessible to the public, so today we have proposals that law be rendered more accessible through linguistic reform.

Within the Mayan Indian oral tradition analyzed by Gossen (1974) there is a genre the Chamulas call "Language for Rendering Holy," which includes all ritual speech not addressed directly to supernatural beings and has an easily identifiable set of features, including the use of couplets. Both style and syntax vary only slightly from use to use.

> Each and every Chamula adult knows and uses some formulas belonging to the genre. Highly loaded symbolic statements are reinforced by the rhythm and various repetitive devices used to express them. It seems that multiple meanings of ritual symbols are encoded in the mesh of symmetry, parallelism, and metaphoric stacking. A few key words arranged formally, as in a series of metaphoric couplets, convey more information than a simple prose exposition of a concept. The greater the symbolic significance of a social transaction, the more highly condensed and redundant is the language used to conduct it. Also, the more invariant that transaction, the more invariant and stylized are the formulas of the condensed language. [Ibid.: 188]

Court language is only somewhat less stylized. This analysis of the relation between language, cosmos, and social order in Chamula oral tradition suggests more generally that words meant to control the environment become formalized and poeticized.[62]

An extension of this theory that the function of thickening is to make words count would focus on written rather than spoken language. A case can be made that it is the written word that has the magical aura (Goody, 1968: Introduction). Santos (1977: 47) has suggested that "writing is a ritual with its own dynamic, oriented to the creation of a mythic legal fetish";

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[62] In Chamula

> verbal expression moves in a clear continuum from lesser to greater stylistic formality, invariance, redundancy, and metaphoric heat as it moves from ordinary discourse to ancient words. The complexity of semantic reference also changes from one-word-one-referent relationships in ordinary discourse, through punning and verbal play with multiple ambiguous referents in the marginal genres and recent words, to multivocal ritual and religious symbolism in ancient words. In every case the style of a genre of language has metaphoric value of its own, enabling a speaker to establish the mood and symbolic significance of his utterance by the way he speaks. [Gossen, 1974: 239]

typing and printing enhance the impersonality of written documents still further.

4. Thickening as Anachronism

A variant of the preceding theory would be that thickening is necessary in oral language but not in writing and that poetic devices, lexical archaisms, and elaborate syntactic complexity are therefore all anachronistic in contemporary written LE. Proponents of this view would acknowledge that thickening infuses serious uses of spoken language with symbolic meaning and helps people to remember what they are saying, but would insist firmly on reform of modern legal language. Such a view would stress the need to give priority to referential meanings and to promote accessibility of legal language and legal procedures to the public.

5. The Illusion of Certainty in an Uncertain World

A fifth interpretation views legal language as creating the illusion of certainty in a world of uncertainty, a view that is compatible with symbolic interactionism (Edelman, 1972, 1977; Gusfield, 1976, 1980) and legal realism (Frank, 1930; Arnold, 1935). This resembles the thesis that thickening ensures that words will be taken seriously. Both views encourage application of the religious metaphor to the law, frequently using terms like "priesthood," "sacred," "unquestionable," and the like. Both stress the symbolic rather than the referential or representational aspects of language. They highlight the idea that legal language is meant to be *experienced*, not understood. One could argue that even if talk in "fact"-oriented disputing allows room for doubt, questioning, and argument, written documents are supposed to create certainty. Rappaport has written that

> religious discourse . . . is often, if not usually, cryptic. In some cases the ultimate sacred statements are themselves cryptic; in others they may seem clear, but they are abstracted from cryptic contexts . . . and an apocryphal quality is often characteristic of the discourse which sanctifies certain sentences concerning particular social forms or containing specific directives by connecting them to ultimate sacred propositions . . . it is perhaps necessary that considerable ambiguity and vagueness cloak the discourse from which sanctification flows. If a proposition is going to be taken as unquestionably true, it is important that no one understand it. [1971: 71][63]

[63] Moore and Meyerhoff (1977) offer another promising model for analyzing legal language as a form of ritual or, more precisely, of a striving toward ritual. They comment that among the formal properties of ritual are repetition, acting (lack of spontaneity), stylization (extraordinary actions or symbols or ordinary ones used in an unusual way), and order (ritual, by

Where the view presented above argues that formalization and thickening make words count for speakers, here the emphasis is on effects on *hearers*. Paradoxically, the former view might claim that stylization heightens involvement and commitment, whereas the latter would argue that it creates mystery and distance.[64]

Earlier I summed up the discussion of play disputing with an insight by Abrahams about joking in the Caribbean. Perhaps it holds for all legal language: "the conventions of joking are crucial . . . because they provide a sense of artificial ordering [of words] in the face of disorder [of concepts or themes]" (1972: 238). The Wittgensteinian aphorism with which Gossen (1974) opens his book may say it all: "Ethics and Aesthetics are One and the Same." Language, then, provides control—but control for what, and for whom?

VI. TOPICS FOR DEBATE AND RESEARCH

This essay has assumed throughout that societies are linguistically homogeneous, an assumption which is patently false in most cases. In the United States alone, more than 40 million persons reported in the 1970 census that their mother tongue was a language other than English (U.S. Bureau of the Census, 1973: 492). Many of the themes outlined in this essay therefore need to be expanded, qualified, and reworked in order to incorporate situations in which the communication difficulties separate not just speakers of different dialects or registers of the same language but speakers of drastically different languages. Some of the issues raised are purely

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definition, is ordered and bounded; order and precision are often what set it apart).

> In the repetition and order, ritual imitates the rhythmic imperatives of the biological and physical universe, thus suggesting a link with the perpetual processes of the cosmos. It thereby implies permanence and legitimacy of what are actually evanescent cultural constructs. In the acting, stylization, and presentational staging, ritual is attention-commanding and deflects questioning at the time. All these formal properties make it an ideal vehicle for the conveying of messages in an authenticating and arresting manner. [Ibid.: 8]

[64] Whichever of these interpretations is more correct, two further examples may strengthen the "case" for stylization as a form of control. According to Clinton Bailey, the Bedouin of the Sinai Desert recite rhymed legal maxims during their trials. Second, Hadassah Haas called to my attention an Israeli children's game called *Nyarot Mastikim* ("Gum Wrappers") which uses a variety of nominalizations to refer to various moves or events in the game, such as *sáder, Kápel, yásher, nága*, etc. Each of these departs from ordinary usage. For example, the usual noun for *kápel* (fold) is *kéfel* ("e" as in "men"), and *ńaga*, meaning "touched," "the state of being touched," would ordinarily be expressed as *n'giyá*, a noun. These nominalizations are distinctive in the rules of this game and, in addition, most are marked by unusual patterns of stress.

theoretical; others have direct applications. What would a general theory of law and language look like? What kinds of basic research could contribute to its development? How should we properly use our emerging knowledge?

A. The Reform of Legal Language

What linguistic changes are Plain English reformers seeking to make in legal documents? We need quasi-experimental studies of the comprehensibility of such documents, carried out by professional linguists in collaboration with scholars in law and social science. Can linguists establish reasonably adequate criteria for Plain English? Since most linguists still do not want to be involved in such issues, social scientists may have to recruit them. But the first priority should be a systematic linguistic description of legal English, using carefully selected samples from a variety of settings, written and spoken. How differentiated is the legal register in other modern languages? Is legal Swedish or French or Italian like legal English? In what respects? What criteria can we use to compare them? How does the differentiation of legal language correlate with other aspects of the legal process and legal institutions in modern society? Is it a direct measure of the power of the legal profession? Do societies with similar structural differentiation have equally differentiated legal registers?

Historical studies would also be worthwhile: when did legal English begin to diverge from other forms of English? To what extent was it present before the Industrial Revolution? How has modern occupational specialization contributed to it? Can we use old form books to trace the development of the legal register over time?

Is poeticization a fairly common phenomenon, or was it just a fluke that I found so many poetic devices in the Citibank sentence? Is there poeticization in the legal register of other modern languages? If so, perhaps it would be worthwhile to consult ethnomusicology on the psychological effects of sound, particularly rhythm, in tribal societies.

What are the linguistic and sociolegal limits on language reform? How do we balance the need for comprehensibility and transparency of legal communications against what may be a deeper need—the illusion of certainty? Might linguistic reform increase access to civil law but endanger respect for criminal laws—is mystery necessary to induce obedience? How can we measure the impact of linguistic reform on the

accessibility of legal procedures to various subgroups of the population? Will only the advantaged benefit? Can linguistic reform contribute to deformalization, deprofessionalization, and delegalization? Will more people read insurance policies even if they cannot negotiate their conditions? How should we accommodate the millions of people who do not speak the official language used in legal settings? In how many different languages should legal documents be written? What criteria can be used to make such a decision?

B. Language and Dispute Processing

How are the domains of ritual, play, and the serious related generally, and how do they relate to the phenomena of order and dispute in society? Why do only some societies seem to have play genres of disputing? What are their linguistic features? Why do modern societies abandon play genres? Is it because they lose the ability to play generally, as Victor Turner recently suggested in a lecture in Jerusalem? What is it about modernization that makes us so "fact"-oriented? Do societies (like the Turkish) with pure play genres of disputing for adolescents, also have play genres for adults? What is the status of the Eskimo song duels today? When societies have both play and serious genres of disputing, what aspects of social structure, economy, etc. account for who participates in which types of disputing? What is the range of rituals of reconciliation found around the world? To what extent do they feature verbal formulas?

What is the role of argument and questioning in tribal disputing? In general, what role does questioning play in preliterate societies? Detailed ethnographic studies providing transcripts of tribal disputes could help us understand communication processes in these settings. What are the differences between cross-examination in tribal societies and the modern adversary system? Does tribal "fact"-oriented disputing leave room for negotiation of the self and of the conditions of conversation? What is the repertoire of justifications and excuses recognized in different cultures? How are they used in disputing, and when are they honored? Does legal reasoning in tribal societies resemble modern Western legal reasoning, as Gluckman claimed?

One promising lead would be to apply emerging techniques of discourse analysis to trials in the hope of advancing the critique of the adversary system. Methods developed by Labov and Fanshel (1977) expose and make explicit the propositions

in a sequence of talk, removing the mitigating devices. This highlights the interactional work that is being accomplished and sharpens the conflict between the parties, perhaps even beyond what they may be experiencing. This might be useful in exposing what happens in cross-examination and making explicit the discrediting techniques the skilled cross-examiner uses when demolishing witnesses who may well be telling the truth.

Comparative studies of the adversarial and inquisitorial processes are badly needed. How is the ideology of the inquisitorial model realized in practice? Might linguistic research lead to proposals for humanizing the adversary model?

What are the formal features of tribal disputing? How are question form, mitigation, norms of address, registers, and other strategies manipulated in these disputes? What explicit and implicit rules regulate language and silence in dispute processing? What more can be said about process as outcome? How do communication-process variables relate to justice?

Do all societies recognize certain categories of utterances as offensive? How universal is insult or slander? What criteria do societies use in making decisions about accountability when offenses consist of nothing but words? When are words themselves considered offensive, and when does the offense reside mainly in the intention behind them? How do tribal societies regulate indirect speech acts?

How do lawyers learn to become competent in legal language? To what extent is law school a course in linguistic socialization? How can we assess the communicative competence of parties and witnesses in modern courtrooms? To what extent do they feign comprehension because they are intimidated (see Carlen, 1976)? How do they feel in court—anxious, afraid, upset, or self-confident? What registers do participants use in trials, and what strategic use do they make of them? What role does language play in modern dispute processes other than trials, such as labor arbitration, Congressional hearings, appeals to ombudsmen?

We badly need studies of lawyer-client communication along the lines pioneered by Rosenthal (1974) and Cain (1979). How do clients conceptualize the troubles they bring to lawyers? How is lay discourse translated into legal disourse? Do clients understand their lawyers? Do lawyers speak ordinary English, or do clients try to speak LE? Can we develop methods to observe and analyze the ways in which

ideologies about lawyer-client relations are realized in practice? Any serious attempt to evaluate the quality of service to clients must pay close attention to language and communication variables.

C. Law, Language, and Control

Of the five highly speculative theories about why modern legal language tends to be so differentiated, complex, and obscure, which can be verified empirically? Or do basic ideological biases that defy empirical test underlie them?

In the developing basic theory on law and language perhaps the most promising lead is to carry out a systematic comparison of the role of language in religion and law. Over and over, throughout this essay, we encountered suggestions of important connections between the two. The emerging sociolinguistic literature on language and religion may contain useful leads.

D. Ethical Dilemmas

We saw in Part IV that social science is identifying the ways in which language and communication features in dispute processing can be manipulated. It is my impression that no one has yet given serious consideration to the ethical questions raised by such research. Should social scientists be helping lawyers win cases? Should they sell their services to the highest bidder? It is not sufficient to respond that knowledge ought to be available to all. Expertise about how to manipulate eyewitness testimony, for instance, like all other resources marshalled in the adversary confrontation, is differentially distributed. It also seems evident that linguists will increasingly be called to testify in court on linguistic issues such as the comprehensibility of legal language. It is essential to ponder now how linguists can help to make the legal system more just and humane.

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