

LINGUISTIC EVIDENCE

Language, Power, and Strategy in the Courtroom

WILLIAM M. O'BARR

*Department of Anthropology
Duke University
Durham, North Carolina*



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FOR JEAN

PREFACE

This book reports the work of the Law and Language Project at Duke University. The project began formally in 1974 with support from a National Science Foundation Law and Social Science Program Grant (GS-42742). Although the officially designated period for the research program has ended, research and teaching about law and language continue at Duke and at several other universities where those associated with the project are now located.

When this work began less than a decade ago, the field of law and language simply did not exist. Although we are still far from understanding the full range of issues involved, concern has grown and research has developed to the point where the term *law and language* suggests several types of relations, various theoretical and practical questions, and some competing approaches.

The Law and Language Project at Duke developed out of an effort to examine the following propositions: (1) Linguistic variation in any setting is not random, but socially patterned; and (2) sets of rules of successful strategies and tactics exist for competitive arenas of all sorts, including trial courtrooms. The first of these propositions is basic in sociolinguistics; the second is widely accepted within political anthropology. The Law and Language Project was conceived as an opportunity to relate these propositions, which have seldom been considered simultaneously. Taken together and used to design a study of language in the

courtroom, they have led to the study of the patterns of language used in trial courts and the strategic use of language by courtroom participants.

With the permission of a North Carolina court, more than 150 hours of courtroom speech were recorded for this study. These tapes provided a rich archive for a variety of different types of inquiry, including the ethnography of courtroom speech and social psychological experiments focused on effects of different modes of presenting information in courts of law. Four sets of linguistic variables and related experimental studies have constituted a major portion of the research: (1) "powerful" versus "powerless" speech (based on Robin Lakoff's notions of "women's language," which we found to be generally present in courtroom speech but more closely associated with social class, educational background, and previous courtroom experience than gender); (2) hypercorrect versus formal speech (inspired by the work of William Labov and other linguists on hypercorrection); (3) narrative versus fragmented testimony (based on our observations in court and opinions expressed by lawyers about the significance of long versus short answers); and (4) simultaneous speech by witnesses and lawyers (inspired by work done in the conversational analysis tradition). All four sets of studies focus on the central question of the importance of form over content of testimony.

Although specific findings vary by experiment, the general conclusion reached in all is that presentational style is highly significant in affecting the reception of courtroom testimony, possibly more important than has been generally assumed. The experiments readily confirm that seemingly minor variations in manner of testifying produce major differences in the evaluation of testimony on such key factors as credibility, competence to testify, intelligence of speaker, and the like. In a court of law, factors affecting such evaluations of speakers may in turn affect the entire decision-making process. Thus, this book demonstrates the link between language and its strategic uses in an arena of signal importance for this and most other societies. The principles it demonstrates and the questions it raises extend far beyond the particular aspects of language selected for study, the courtroom, and even the society in which the study was conducted. Yet, at a more practical level, the findings of the Law and Language Project raise fundamental questions about the degree to which certain aspects of the American legal system as presently structured serve the cause of justice.

ACKNOWLEDGMENTS

Many colleagues have been closely associated with the research reported in this book. Several have contributed so much that they are in truth coauthors. I have been greatly assisted by and have learned much from them. E. Allan Lind and Bonnie Erickson provided needed assistance in the design, execution, and interpretation of social psychology experiments. John M. Conley worked closely with the project both as a graduate student in anthropology and as a law student and provided many kinds of help over several years. He has kindly allowed me to include a portion of his Ph.D. dissertation as part of Chapter 3 of this book. Laurens Walker offered useful suggestions based on his own studies of legal behavior and served as legal counsel to the project. Lawrence Rosen gave critical advice and encouragement during the years he was a colleague on the faculty at Duke. Bruce Johnson assisted in the analysis and interpretation of linguistic data. Bowman K. Atkins shared my interest in the social organization of the courtroom and its effects on speech behavior during a year-long tutorial while he was an undergraduate at Duke. Many of the insights concerning silence in Chapter 6 are results of those discussions.

In addition to members of the Law and Language research team, several other persons provided assistance to the Project. Marilyn Endriss, Debbie Mercer, Michael Porter, and William Schmidheiser assisted in the preparation of the experiments during the summer of 1975. The

Durham County (North Carolina) Courts generously cooperated with this research program. Without the help of Judges Anthony Brannon and Maurice Braswell and of Mary Tilley, the courtroom observations on which all later work depended would not have been accomplished so easily. Whereas our presence and efforts necessarily complicated their daily routines, their assistance and toleration made our work possible and much easier. Those persons whose speech we studied in court and those who served as experimental subjects must necessarily remain anonymous. For their assistance, however, we are indeed appreciative.

I acknowledge with thanks those many colleagues in the social sciences who encouraged me to undertake and to pursue the study of courtroom language. I count among those who provided this encouragement some who were my own teachers as well as others whose research has given direction to my work. In lieu of a lengthy list of names, I mention instead some ideas and principles that they contributed: a dedication to the craft of ethnography; an interest in the general relations between language and society; a specific interest in the language used in particular contexts like religion and politics; the challenge to seek out connections between law and other aspects of culture, like language; and the encouragement to consider anthropological and linguistic issues not only in exotic settings but also in my own culture.

Donald Black's conviction that the study of law and language has an important place both in the field of law and society and in his series *Studies on Law and Social Control* is much appreciated. The staff of Academic Press has been supportive and encouraging. In preparing the typescript, Sylvia Ferrell, Anna Stinson, and Dina Grinstead have typed and retyped various drafts through what must have seemed at times to be an unending stream of revisions.

Special thanks are due to Curt Richardson and Dave Koppenhaver for helping me keep up the pace during the summer of 1981, when most of this book was written.

Several members of my family helped by providing both motives and means for completing this book. My parents, Mary and Jack, first brought questions about language and society into my awareness. My wife Jean unselfishly gave support through both the joyous and the difficult moments of research and writing. My children, Claire and Emily, tolerated my many moods and periods of seclusion and even learned to put aside their own interests to inquire politely about my progress while writing.

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INTRODUCTION

The Importance of Form in Language

It is common knowledge that how something is said may be more important than what is actually said. For example, when a parent scolds a child, *Don't talk to me that way*, the emphasis is on the manner in which the message is being presented. When lovers whisper "sweet nothings" to one another, the important point is not what they are saying but that they are in intimate communication. Similarly, the accusation, *It wasn't what you said, but how you said it*, or the assessment, *His manner betrayed him*, underscore the widely held belief in this culture, and probably in most others, that FORM COMMUNICATES. This assertion does not deny or minimize in any way the importance of what is usually referred to as content. Rather, it points out that unless form—including paralinguistic features (intonation, pitch, etc.) as well as nonverbal clues (gestures)—supports and buttresses content, people question the validity and sincerity of the message. As a consequence, mannerisms can betray what a person might wish to keep secret; how one talks can communicate as much or more than what is actually said; and form may become so important on some occasions that its message overrides other content.

What is not commonly known is much about how important form really is. That form communicates is taken for granted; and that it is

important, in fact very important, is generally acknowledged. For example, a popular song of a few decades ago whose words included *Please refrain from flushing toilet while train is in the station, I love you* shows the importance of form. A suitor lacking words of his own borrows from a sign in the train's lavatory. The "filler" is not heard. What matters is the expression of feelings—in this case through action and form. Most communication does not dismiss content so flamboyantly. Yet it takes only a few words like *whosoever goeth* to connote Biblical solemnity, or a phrase like *know all men by these presents* to suggest the authority of the law. To decipher such information, to hear the message communicated by form, a listener must rely on vast knowledge acquired through membership in a particular culture. Information of this sort is among the hardest to explain to foreigners and among the most difficult to acquire in another culture. But receiving such messages is not dependent on one's conscious acknowledgement or evaluation. Indeed, it is uncommon to discuss form directly. It is usually relegated to the level of feelings, intuitions, and perceptions.

This book is dedicated to the study of the importance of form. The initial working proposition is that form is, at the very least, one important component of the total message and its reception. I intend to demonstrate that form may at times be highly significant, even to the point where a change in form can alter or reverse the impact of a message. The arena chosen for investigating this proposition is the trial courtroom. Other situations might also have been chosen since this is a general proposition about the nature of communication. What makes the court especially interesting is that language strategy is generally recognized by participants, although poorly understood by them. Investigating communication in the courtroom is simultaneously an opportunity to investigate the importance of form and to seek insight into the role of language in the legal process.

Many linguists argue that form and content are inseparable, that form is a part of content.¹ I do not take exception to this position. Indeed, I intend to support it by demonstrating the inseparability of form and content in a setting where it is customary for many or most of those who normally operate in it to think of "facts" and "demeanor" as separable and different. A court may take a witness's assertion that he

¹ Grice (1975), for example, argues that the meaning of an utterance is more than its literal meaning; it includes as well the contextual meaning of the utterance. The difference, for example, between *I think the car hit him* and *The car hit him* might be argued to be merely a matter of style or form, or alternatively, to reflect differences in the implied meaning of the two utterances.

lacked a job as “fact” and deal with it accordingly. But human beings, who are after all the decision makers whether they be judge or jurors, also hear the manner in which a witness presents this information. Clues about trustworthiness, confidence, faithfulness of recall, and so on are to be found in paralinguistic and nonverbal mannerisms. Further information about the speaker is yielded by such seemingly minor variations as these:

- (a) *I don't got no job.*
- (b) *Job, I don't have one.*
- (c) *I ain't got no job.*
- (d) *I don't have a job.*

Unlike the others, sentence (a) suggests a speaker who comes from a background where the native language, like Spanish, requires the use of double negatives. In (b) the syntax is more likely to come from a speaker whose German or Yiddish background demands a word order quite different from ordinary English. In (c) the double negative with *ain't* might be uttered by some black Americans. Finally, (d) is what is expected from speakers of Standard American English. Thus, so-called noncontent features of language in fact carry much information—information about characteristics of the speaker, the situation, and the like which cannot be separated from other parts of the message.

There are both expected and customary forms for messages, and there are often forms that are unexpected and unc customary. Sometimes there are even ritualized formulas for messages, as in greetings. In American English, people asking, *How are you?* expect responses like *Good* or *Fine*, not elaborate statements about health. Such packaged responses are expected, customary, and fit the required formula. How then are speakers to know that others may actually be unwell or have some sort of difficulties? Most often, this information is communicated by the manner of responding. Receivers may then draw their own conclusions and proceed to inquire further IF THEY WISH. It is important to recognize the nonobligatory and somewhat ambiguous information communicated by form. Such information is open to discussion and interpretation in a way that mere “overt content” is not. One may ignore it (not meaning, of course, that such messages of form are not heard), or one may attempt to decipher their meanings by depending on intuitions, asking for further information, checking perceptions against those of others, or using some other means. Customary and expected forms are monitored and heard as such. When expectations are not met, then participants must determine what breaks in form indicate.