# Is the Language of the Courtroom Unbiased?

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My question, *Is the language of the courtroom unbiased?*, is posed from the perspective of a practicing court interpreter in United States courts. I will begin by establishing a basis from which my comments are directed to you today. First, by 'language of the courtroom,' I mean 'courtroom' in a broader sense, including circumstances such as interviews conducted in jails, during police custody or detention, between suspects and their counsel or the prosecuting official (all of which may be preparatory stages leading up to proceedings held before a judicial authority). Secondly, the existence of a bias or lack of bias presupposes a balance, or imbalance, of power at work in and inherent to the judicial system in question, which in this case is that of the United States.

Over the course of this discussion, I will briefly draw upon French theorist Michel Foucault who has written at length on power in the discursive structures of Western social organizations, such as medical and psychiatry clinics, the penal system, military, schools, and the family. A second theorist, American social scientist Creel Froman, has expounded on Foucault's general theoretical perspective to include an examination of power in language. Clearly, the judge, jury, defense counsel and prosecutor are all vested with power to decide whether an individual brought draw before the courts to answer changes should be sanctioned or not. This is not the overt type of power which I wish to address today; rather, what concerns me far more is the sort of 'invisible' power that goes on in this setting without the parties playing out the roles of its operation being fully aware of it.

A few generalities about the role of the court interpreter in this process are likewise in order. In a nation as ethnically diverse as the United States, it is no surprise that a large number of court cases involve individual defendants whose first language is not English, or who often do not speak any English at all. However, the official records of court proceedings taken by the court reporter are exclusively in English, as Susan Berk-Seligson notes in her influential work, *The Bilingual Courtroom.* This text, along with another important volume, *Fundamentals of Court Interpretation* (González, 1993) details precedent court cases and parts of the U.S. Constitution dealing with a defendant's right to have proceedings interpreted to him during trial and other phases.

First of all, the sixth amendment guarantees all criminal defendants the right to confront witnesses who testify against them at trial, as well as the right to effective legal representation during every phase of judicial proceedings. Thence arose a legitimate legal argument that a non- or limited-English speaking individual, including the hearing impaired, in order to be *linguistically* as well as *physically* present at legal proceedings (and therefore able to assist counsel with his own defense), shall be provided with the services of an interpreter.

A further constitutional basis for such provision lies in the fifth and fourteenth amendments, which guarantee due process of law before depriving any individual of life, liberty or property (Berg-Seligson: 33-4). These amendments, along with a series of related precedent cases, led Congress to pass the Federal Court Interpreters Act of 1978,[1] which established the norm for linguistic accessibility. This law subsequently served as a model to state legislatures

which went on to pass comparable legislation, although its application has yet to guarantee uniform linguistic accessibility to all criminal defendants or civil plaintiffs in need of interpretation. Can it be that a biased application of power lies at the heart of the problem? Let us briefly examine Foucault's insights into the nature of power in discourse.

In his 1976 essay "Two Lectures," as elsewhere, Foucault is instrumental in focusing late twentieth-century social theory on the omnipresence of power throughout social discourse. Perhaps among the more fruitful of Foucault's insights is his affirmation that an identification of power as repression, and its effects as prohibition, is an excessively narrow formulation. Such a formulation, says Foucault, is "a purely juridical conception of … power," but power does more than repress, "it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body… " (1980: 119). Furthermore, the relation of power to truth is a contentious one; power in fact determines the definition and limits of truth. Truth, writes Foucault, is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its *régime* of truth, its 'general politics' of truth, i.e. the types of discourse which it accepts and holds as true; the mechanisms and instances which enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures given value in the acquisition of truth; the status of those who are charged with saying what counts as true, etc. Truth is thus socially constructed, and based upon "the ensemble of rules according to which the true and the false are separated and specific effects of power attached to the true… " (1980: 132).

Creel Froman's theories of language and power are clearly grounded in the thought of his influential French predecessor. His project is "to present a way of looking at reality as a matter of powered language… " (1992). For Froman, language is not only a noun, but also a verb: to 'language' in essence is to order the phenomena of the world, and to order requires *a priori* both the power to order and the power to have the produced order accepted by others. "Power is manifested socially as a relationship of equality/inequality with respect to how any given institution, group, etc. is ordered (structured). Order entails differences in power… It takes power to establish, maintain, resist, and change order. And it takes power to create ordered language—reality and knowledge are ways of ordering the world" (1992: 4). Fundamental to Froman's theory is the overwhelming control exercised over all social institutions and constructions by those who control language, those who 'language,' according to this philosophical approach (1993). Here, I have synthesized one of perhaps multiple lines of Froman's reasoning in how reality is created through powered language. First, he asserts, "If power can produce an answer, it can produce any answer, depending upon who is in power" (1993: 107). Then, as the agents of power see fit, things of the world are defined and ordered according to the kind of reality useful to power, and to its ability to keep itself in power. It follows that the *languager*, i.e. the agent of powered language, enjoys not only the power to construct the oppressed groups, but similarly, to justify this construction.

The construction of oppressed groups, which Froman defined as 'heterohumanism,' is the construction of subcategories of people based upon race, gender, class, or age, so that the *languagers*, that is, white, male, rich, adults, may constitute and prioritize themselves over non-white, female, poor, and non-adult persons (1993). In my opinion, Froman should and might well have included homosexuals and limited-language speakers of a dominant culture among this oppressed collective. He states:

> This is what makes the leading part so powerful: it has created multiple ways in which the other part can be fractionated. Other parts are kept apart by being "other" in different ways (by different criteria) and by the variety of heterohumans within some criteria groups, for example, non-whites as Blacks, Hispanics, Asians, aboriginal Indians, etc. It is only the leading part which is homogenous with respect to heterohumanisms: in "the West," and in terms of the capitalist world system (Wallerstein; parenthetical comment is Froman's) as core/periphery, first world/third world, north/south, it is white, male, bourgeois, adult.
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> The leading part in social groups is … homogenous … while the subordinate/oppressed are heterogeneous. […] What the other part has in common is that they are oppressed—but they are oppressed in different ways (1993: 115).

The way the subordinate/oppressed group is to resist is not always evident. As Froman indicates,

> that power 'works' is hardly a mystery. Power is always working… Even those who develop alternative languages of resistance … will speak those languages from within institutions/organizations/groups which carry within them classist and/or sexist, and/or racist, and/or ageist power (and/or compulsory heterosexualist power, etc.). Power not only fractionates resistance into multiple and competing alternative languages, it also has those who speak them doing so while participating in kinds of oppression which are not explicitly part of their resistance language: anti-racist groups are likely to be, structurally, gender and class oppressive; feminist groups are likely to be race and class oppressive… While fighting one form of oppression, participants are likely to be simultaneously, structurally, and, most devastatingly of all, unavoidably engaged in others" (1993: 181).

In similar social theory, such as postcolonial theory for example, the phenomenon Froman describes herein is akin to the concept of 'colonization,' whereby the colonized subject comes to identify himself according to the dominant ideology in play. Power effectively divides and conquers.

In the legal arena, the functioning of power obeys a similar pattern. Legal actors—attorneys, judges, juries, probation personnel, police officials—all execute their role according to the conventions of institutionalized relationships already structured in the judicial system. Froman observes that when, "we find ourselves in conventional structures in which what role someone is playing (and hence what role we are to play) … is already known," we tend to react by playing out and reiterating the expected roles. "Language has a meaning only as we treat language as behavior, as it involves implicitly, if not explicitly, a speaker playing a part in a structure" (1992: 7). Not surprisingly, Froman cautions, "Listeners may attribute parts to speakers which they could be thought of as speaking from but which the speakers do not see themselves as speaking from" (1992: 8).

The invisible bias within the social practice of legal institutions springs from its particular language practices and the expected institutionalized version of reality that its members are trained in. "Power directs the content of what we know," writes Froman, "The truth of convention is the power of agreement. It is where power is least evident that it has been most successful" (1982: 10). As long as a participant in a social practice enjoys an advantage somewhere by having the power to impose a language or knowledge over others, that

participant will naturally "enforce language which promotes and protects those advantages. This requires control over the institutions in that society, and most particularly control of the language of those institutions. […] Societies are put together and maintained by the actions of people who create objects in language and work out ways for valuable objects to be disproportionately under their control" (1992: 11). Finally, it is a normal consequence of any participant in a position of greater distributional advantage to proportion a justificative meaning to his advantages (1992). Such a strategy functions to mask, or hide from the perception of the eye, the original imbalance of power held to begin with.

Froman makes an excellent analysis of language and power, but does not explain a resistance strategy to effectively combat power's allocation of power to itself. Nor does Foucault, though he nonetheless points us in a certain direction: globalizing theories may be challenged by "an insurrection of subjugated knowledges" (1980: 81). If you will now allow me a small "insurrection of subjugated knowledge at this juncture," I will briefly present the findings of some fairly recent and significant research into the linguistic register of certain classes of defendants in the judicial system.

In 1975, the socio-linguist Robin Lakoff published an influential work entitled *Language and Woman's Place.* Lakoff's studies suggested that women's speech was marked by certain features, such as tag questions, the use of hedges, predominance of empty adjectives, or rising intonation in non-interrogatives. William O'Barr and several colleagues, inspired by Lakoff's initial analysis and theory that gender differences therefore must represent a consequential distinction in the trial process, recorded over 150 hours of courtroom testimony in North Carolina. During their 30-month study, the authors reached the following conclusion: women indeed displayed a greater incidence of Lakoff's factors marking women's speech, but these features did not mark the speech of all women. Furthermore, some degrees of the features were also detectable in testimony of male participants. As a consequence, O'Barr and his associates opted to restate Lakoff's taxonomy of 'women's language' as 'powerless language,' due "to its close association with persons having low social power and often relatively little previous experience in the courtroom setting… " (1975: 378).

University of Puget Sound law professor Janet Ainsworth found both Lakoff's and O'Barr's earlier texts provocative. In her well-reasoned article on the Miranda warnings, "In a Different Register: The Pragmatics of Powerlessness in Police Interrogation" Ainsworth observes the presence features such as hedges and indirectness in the speech of individuals in custody who, in an equivocal or ineffective manner, assert their right to have counsel present during interrogation (1993). Noting that researchers almost uniformly agree as to a speaker's manifestation of a female or powerless register in situations in which the speaker finds himself or herself disadvantaged in terms of power, Ainsworth observes that "the disparity in linguistic usage between men and women appears to be greatest among lower socioeconomic classes, the persons who are most likely to find themselves the subject of police interrogation" (1993: 286). In any circumstance of interrogation, the questioning party already enjoys a preferential balance of power. Ainsworth states,

> The questioner has the right to control the subject matter, tempo, and progress of the questioning, to interrupt responses to questions, and to judge whether the responses are satisfactory. The person questioned, on the other hand, has no right to question the interrogator, or even to question the propriety of the questions the interrogator has

> posed. The impact of these factors, present in any interview, is magnified in the highly adversarial context of a police interrogation of an arrested suspect (287).

In addition, police officers usually have other advantages: they are often trained and experienced in interrogation techniques, and can use a variety of tactics ranging from confrontation, trickery and deception, or baiting or humiliating questions; they can isolate the suspect in unfamiliar and intimidating circumstances; they can conduct the interview individually or in pairs, significantly outnumbering the suspect; finally, they control how long the interview lasts. The generally coercive atmosphere lends itself to the production of a powerless register in the speech of the suspect in custody. This speech, in turn, is open to active and passive misinterpretation by the suspect's official interrogators. As Ainsworth describes the situation, "Male police officers, occupying positions of power in interrogation, are unlikely to share the female [powerless] register and the rules of implicature that it entails. As a result, suspects who use the female register are doubly disadvantaged in their attempts to exercise their *Miranda* rights" (1993: 288-9).

Ainsworth goes on to examines a number of cases in which a convicted defendant appealed his conviction on the basis of official objections to respect equivocally or ineffectively-given requests that an attorney be present during questioning. She finds that appellate courts have employed varying standards of precedent in upholding or overturning the suspect's request for counsel, based upon an evaluation of his clarity and directness in making that request. Ainsworth's conclusions are instructive in clarifying the matter at hand, i.e. is the language of the courtroom is biased?

In a majority of jurisdictions, the standard governing the invocation of the right to counsel affords greater protection to suspects who speak in a direct and assertive manner. Implicit in the majority doctrine is the assumption that direct and assertive speech—a mode of expression more characteristic of men than women—is, or should be, the norm. This kind of gender bias, which tacitly treats prototypically *male* behavior and experience (confident, assertive, powerful) as a synonym for *human* behavior and experience, is especially dangerous because it is generally invisible and therefore immune to criticism. The male-centric nature of such legal doctrines can easily be mistaken for true gender neutrality (Ainsworth, 1993: 315-16).

What Ainsworth termed as "asking the woman question," that is 'what would law be like if women had been considered by the drafters and interpreters of the law?', raises a secondary question: "If women were not considered in the framing and interpretation of legal doctrine, are there other groups whose perspectives may likewise be missing from the law ?" (317).

It is not difficult to imagine corollary problems when the suspect in custody does not speak the majority language, or does not have an education above the third-grade level, or does not understand a majority of the cultural or legal concepts, or does not have a competent interpreter to help him communicate with his attorney or comprehend the full extent of the *Miranda* warnings.[2] I cannot hope to answer all these questions in the extent of a brief conference paper, but perhaps we have an idea as to a reasonable answer to the initial question: *is the language of the courtroom unbiased ?*

[1] Berk-Seligson notes the exclusion of civil actions as covered under the provisions of the Federal Court Interpreter Act. As the present study takes as its focus the role of power, especially an invisible power, it is relevant to note Berk-Seligson's citation of a 1978 article by M. R. Frankenthaler and H. L. McCarter, who observe, "In civil actions between private parties, access to the courts may be effectively foreclosed to any non-English speaking litigant who cannot afford to pay for the services of an interpreter, since the Act is silent in this area." Despite the spirit of the law to provide equality in terms of linguistic accessibility, it is clear that the judicial system falls short of full compliance.

[2] In fact, at a California Court Interpreters' Association Convention in February 1995, Roseann Dueñas, in response to a question I asked her to that effect, indicated that a fully "knowing waiver" of the *Miranda* rights requires that a subject's educational level be comparable to that of a typical college sophomore.

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