Language and Law

A resource book for students

Allan Durant
and Janny H.C. Leung

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Chapter A8

Regulation of Language Use

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different aspects of power and require different powers. Critical approaches to law tend to emphasise law's closeness to singular, homogeneous *power*. But most statutes and legal procedures are concerned with plural *powers*: compartmentalised packets of delegated authority and duty conferred on and exercised by different legal actors (e.g. police officers, bailiffs, judges, etc.).

All this makes the functioning of language in law harder to comprehend, partly because of the roles played by polysemy and vagueness in many of the keywords involved. Something of what *order* signifies, for example, that *power* does not, is a reconstruction of coercive power into a system of social regulation observing the **rule of law** (a principle subject to divergent interpretations but often functionally contrasted with the 'rule of man').

Nor does the effect of different uses of keywords in law end with power and order. Introducing the idea of the 'rule' of law in fact extends the semantic task, because implementing the 'rule of law' will only involve 'rules' if rules are how law works (since *rule*, as a general social condition, may be exercised either by a ruler who issues commands or by one who follows rules). *Rule* and *order* can both denote states of affairs, or 'systems', or they can mean what people do to influence the actions of others (as those others carry out commands or comply with general instructions). It is almost impossible to extricate law's relationship with power and order from conceptual problems inherent in the terminology involved. Yet beyond the questions of terminology, how power is exercised in language also depends on how, in practice, rules, commands and orders operate.

REGULATION OF LANGUAGE USE A8

In this unit, we switch to a different perspective on language and law: how language used in situations other than 'legal' contexts – in general communication – is treated if it becomes the subject matter of litigation. Examples of when this happens include cases of alleged bribery, harassment, trademark infringement, insulting or abusive verbal behaviour, defamation, and actions in a number of other fields. How language is treated in such circumstances differs from interpretation of statutes (where the language was drafted in anticipation of being read according to legal norms). It also differs from how oral or written evidence is treated in court (because the significance of evidential language lies primarily in what is reported rather than in effects on an addressee or other person of what is being expressed). In the 'general language' situations we now discuss, the main legal focus is on the meaning and effects of communication in the field of regulated public behaviour.

Communications in trouble

To begin, we outline the many ways in which verbal communication gets into trouble with the law, either by constituting criminal behaviour (i.e. where prosecution may

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follow) or when disputed in a civil case (i.e. where one party, who alleges harm, sues another). We can clarify this range of uses of language, and why they are interesting, by listing the main types. Greenawalt (1989: 3) begins an analysis of the topic by asking an often-neglected question (which he argues is essential in clarifying the boundary of protected **free speech**):

> What is the 'speech' that is to be free and protected? Does it coincide with the category of verbal and written utterances, or is it possibly narrower or broader in some respects?

As a route into this question, Greenawalt lists the main ways in which (under US law) a person may be guilty of a crime committed primarily or exclusively by communicating. His list (Greenawalt 1989: 6–7) is longer than the list below; our point here is less the detail than the range:

1 Agrees with another to commit a crime.
2 Orders, requests or induces another to commit a crime.
3 Threatens harm unless another commits a crime.
4 Puts another in fear of imminent serious injury by physical menace.
5 Participates in a criminal endeavour by communicating (e.g. providing information that makes the crime possible or conveying false information or advice).
6 Warns a criminal how to escape from the police.
7 Threatens harm if someone does not submit to sexual intercourse or perform some other act he or she is free not to perform.
8 Offers to bribe someone or offers to receive a bribe for the performance of an act that should be performed, if at all, free of such inducement.
9 Successfully encourages someone to commit suicide.
10 Entices a child from custody.
11 Uses provocative or insulting language likely to cause angered listeners to commit crimes.
12 Engages in speech likely to lead those persuaded by its message to commit crimes.
13 Makes a false public alarm (e.g. the widely discussed example of falsely shouting 'Fire!' in a crowded theatre).
14 Acquires property or some other material advantage by deception.
15 Pretends to hold a position in public service with the aim of getting someone else to submit to pretended authority.
16 Uses language or representations that are insulting or offensive.

A second list can be produced of ways a person's communications may give rise to civil proceedings. A full list of this kind would be more diffuse and complicated than Greenawalt's, but might begin with categories based on topics in media and intellectual property:

17 Publishes a defamatory statement (i.e. a false statement likely to lower someone it refers to in the estimation of others, or cause them to be avoided or shunned).

18 Publishes or broadcasts an advert that contains false and disparaging comments about a commercial rival.
19 Engages in commercial activity using a verbal trademark sign that is identical to or resembles an already registered mark currently in use for the same class of goods or services.
20 Posts online a parody caricaturing the opinions and mannerisms of a celebrity, so precisely conceived and drafted that it appears to be a genuine post by the celebrity himself or herself.

A list of this kind would be extensive, reflecting the complexity of legal causes of action as much as different kinds of verbal action. A third list might also be produced, of kinds of utterance or text that fail to satisfy standards prescribed by **extrajudicial regulatory codes** (e.g. codes used to govern press, broadcasting and advertising standards); and further lists again could be compiled of communicative acts restricted by rules stated in institutional **speech codes** (e.g. corporate or campus speech codes). In legal terms, the lists would relate and overlap in various ways.

Linguistically, the categories of discourse behaviour listed above cut across channels, situations of use, topics or areas of social activity, genres, and types of communicator (the last of these including people engaged in conversation, social media posters, tweeters and bloggers, government, national broadcasters, and the communications divisions of multinational corporations). There is nevertheless a shared question in disputes related to all of them: what is the meaning of the allegedly offending or infringing utterance? Only when that meaning is determined can the law or relevant regulation be applied.

The meaning and effect of ordinary discourse

There is no reason in principle why laws and regulations should not be applied to communicative acts in the same way that findings of fact are made concerning other areas of human behaviour. In practice, however, being certain of the meaning or effect of a disputed communication is made more difficult by the exceptionally complex and nuanced character of language: its ability to talk about past, present and future events, as well as about hypothetical worlds and situations that didn't happen; its ability to convey meanings indirectly, saying one thing but implying another; and its capability to perform one kind of speech act (e.g. a question) in order to perform a different act (e.g. a request or apology). Much of the complexity in communicative behaviour results from our capability to imply something more or different in what we say by anticipating that the recipient will make relevant inferences.

In **content adjudication** (as proceedings related to the kinds of dispute above are known), meaning must often be inferred rather than taken from the words at face value. A standard textbook example in defamation law states, for instance, that while 'Mr X went into 158 River Street' is not in itself defamatory, it becomes defamatory if the relevant readership would be aware that the address in question is a brothel (for an introductory account, see Quinn 2011; for a fuller discussion, see Barendt *et al.* 2014). Defamation law, as we see in Unit B8, has developed sophisticated procedures for dealing with such implied meanings.

The issue of directly stated versus implied meanings also arises in other fields of law. In verbal exchanges during courtroom proceedings, whether someone commits **perjury**, or lying under oath, may depend on implication as much as explicitly expressed statement. President Clinton's famous denial during Grand Jury hearings in 1998 that he had 'sexual relations' with Monica Lewinsky appears more like a lie if the context and purpose of the question he was responding to are taken into account, rather than when interpretation of his answer is restricted to the phrase meaning of *sexual relations* (Solan and Tiersma 2005: 224). Writers including Tiersma (1989) have emphasised the importance of including implied meanings alongside literal meaning in interpreting courtroom answers.

Key questions in a number of otherwise largely unrelated areas of law concern how implied meanings can be precisely described, and how likely any particular indirect meaning is. Neither task is easy. Care must also be taken with utterance effect. One common challenge faced by courts, for example, is what speech act a given utterance is performing (Schane 2006). Some speech acts, as we have seen (e.g. conspiring, bribing, inviting a bribe, threatening), constitute crimes. But while often such acts may take an explicit performative form, in many cases they are more likely to be expressed indirectly. As Greenawalt himself notes throughout his study, borderline cases of protected speech are often created where indirectness is introduced into communications that might in explicit form be criminal speech acts. Indirectness creates the appearance of a statement or opinion that merits at least some minimal level of protection. Given the importance and complexity of indirect speech acts in sensitive areas, it is unsurprising that in jurisdictions hospitable to **expert linguistic evidence**, speech act analysis has been deployed to examine what constitutes a felicitous (or successful) speech act of a particular kind, whether performed explicitly or indirectly. **Bribery**, for example, has been argued to consist of a structure involving several moves, each of which may be realised in largely predictable ways: problem, proposal, completion and extension (Shuy 1993: 20–65).

Protected and unprotected speech

The central question prompting Greenawalt's enquiry into different uses of language concerned why some communications clearly merit and others do not merit protection as free speech, while some communications raise problems at the borderline (e.g. a ranting 'political' diatribe that stirs up angry and potentially vengeful feelings in its audience). Closer analysis should make it possible, Greenawalt claimed, to illuminate this question by relating it to the characteristics of different kinds of utterance.

The generic term Greenawalt uses for communication is *speech*. This is one of two conventional terms (the other being *expression*) used in discussions of the role of communication in democratic social structures. *Speech*, in this sense, is not in contrast with writing, but (as we note in Unit B1) with action or conduct. Varieties of such speech may be distinguished by a combination of topic (political, commercial, personal, etc.) and purpose (to convey new ideas, to discuss or critique other people's ideas or values, to expose, amuse, titillate or gossip, etc.). Different forms of speech, in this specialised meaning, may then be treated as meriting different degrees of protection on the strength of the contribution they make to the democratic and liberal political values on which the principle of **freedom of expression**, or 'protected speech', is

based. *Expression*, often used almost interchangeably with speech, also means communication in general. In European law, it explicitly covers *receiving* as well as imparting information: Article 10(1) of the European Convention on Human Rights (ECHR), for example, states that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. (For comprehensive discussion of the concept of freedom of expression, as well as how it is constructed in different legal systems, see Barendt (2005).)

Ultimately, Greenawalt's concern with communicative acts is legal rather than linguistic. The borderline between speech and conduct is important in his analysis because it is where many difficult legal questions arise in US First Amendment jurisprudence (where balancing is undertaken between the constitutional benefit of the speech and the harms to which it might give rise, with a presumption in favour of expression). The same is true in Europe, where free speech rights allow necessary and proportionate restriction on expression (as listed in ECHR Art 10(2)). Linguistically, however, what is interesting in Greenawalt's analysis is a central insight: that virtually all the kinds of communication whose restriction seems *not* to raise free speech issues are what he calls 'situation-altering utterances'.

Influenced by the work of Austin and Searle (see Thread 7), Greenawalt offers a generalisation based on speech act types and the expression value accorded to them legally. But he avoids a simplification that might have followed from simplistic contrast between **performative** and **constative** utterances. A contrast of that kind, Greenawalt recognises, would suggest that Austin's abandoned category of constatives (which state facts, describe states of affairs or articulate thoughts) convey ideas and are therefore candidates for legal protection, while 'performatives' are social actions for which language is simply a vehicle, and so should be treated as actions, not 'speech'. Even a simplified contrast of that kind, Greenawalt points out, helps to clarify the celebrated US judge Justice Oliver Wendell Holmes's explanation, in a US Supreme Court judgment, of why falsely shouting 'Fire!' in a crowded theatre brings responsibility for the false warning and enjoys no free speech protection. But it leaves the problem of indirectly expressed meanings that create the borderline cases in terms of constitutional protection.

The distinctions Greenawalt advances on the basis of his analysis of speech acts help to illuminate a central doctrine of US First Amendment thinking: that there is an important boundary between communications that add to a socially valuable **marketplace of ideas** by their expression or critique of ideas and values, no matter how unpalatable, and communications that are primarily kinds of conduct: acts of harassment, first moves in a fight, verbal actions of subordination, and subjugation or intimidation of others. That boundary has been repeatedly tested and examined through concepts including **fighting words** (as kinds of provocation, or **inchoate action**) and **speech plus** (communications embedded in threatening behaviour or incitement; for detailed history and discussion, see Kalven 1988). In a later work, Greenawalt (1995) examines how similarly difficult issues arise in **hate speech**; in that context, the concept and implications of 'performative' utterances – principally that, as actions, performatives may be regulated without interfering with free speech values – have been significantly, and controversially, extended by MacKinnon (1993) in relation to pornography, and more broadly in Butler (1997).

Language and freedom of expression

The concept of free speech or freedom of expression is, in the end, a political or philosophical topic more than a linguistic one (for a short introduction, see Warburton 2009). That topic, however, is central to understanding how language functions – and what its value is – in modern democratic societies. Where the boundaries lie between protected and unprotected speech depends on analyses that depend on linguistic assessments, whether the distinctions made are formulated in terms familiar in linguistics or in an alternative, separately developed legal **metalanguage**.

Freedom of expression has become particularly controversial over the last two decades, not only because of obvious political examples of its curtailment. The concept is crucial in understanding new forms of language behaviour on the Internet, especially given widespread misapprehension that language use online is not regulated in the way that face-to-face interaction, print publication, broadcasting or film exhibition all are. Online verbal communication poses major challenges to regulation, including at least the following:

- New kinds of **speech event** are being created, blending formats of one-to-one dialogue, centre–periphery publication, variable participant and overhearer groupings (McQuail and Windahl 1993).
- Current and archived discourse are accessible together to an unprecedented degree, flattening different historical contexts into a continuous present.
- Communicators and recipients may have vastly different belief systems and background knowledge, challenging face-to-face notions of mutual background knowledge.
- Communicators and recipients are often located in different legal systems, with sometimes very different norms and restrictions regarding what can and cannot, or should or should not, be communicated.

A9 FORENSIC EVIDENCE

This unit describes how linguistic knowledge can in some circumstances contribute to the functioning of law through an applied channel: that of forensic linguistics. There are two main ways this happens. First, linguistic evidence is sometimes presented in particular cases, assisting the police, courts and regulatory bodies. Second, analysis of language use in the legal system and insights that follow from it can help to improve **access to justice**. In this unit, we illustrate the variety of linguistic work that takes place under the heading **forensic linguistics**. In Unit B9, we exemplify techniques involved in forensic linguistic analysis in several fields. Our overall aim is to show how expertise has been brought to bear by forensic linguists on evidential questions. In doing so, we also note difficulties associated with use of specialist linguistic evidence in law.

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