Introduction

Since its beginnings in the 1970s, the study of legal discourse has evolved into a sprawling field, with contributions from sociolinguists, conversation analysts, rhetoricians, discourse analysts of multiple persuasions, and lawyers with varying degrees of linguistic training. Little of this work has been done by linguistic anthropologists, though. To illustrate the point, I have just finished co-editing a book about legal discourse called *Lay-Legal Communication: Textual Travels in the Law* (Heffer, Rock, and Conley 2013). Of 21 contributors, only three (including myself and my co-author, Jean Cadigan) are anthropologists; the rest are from such fields as linguistics, pragmatics, communication, and criminal justice studies. There have always been exceptions to this generalization, and there is evidence that things are changing in a significant way. Nonetheless, it is fair to say that linguistic anthropology is a relative latecomer to the legal arena.

This is surprising, given that law was among anthropology’s earliest ethnographic topics (e.g., Malinowski’s 1985 [orig. 1926] *Crime and Custom in Savage Society*) and was the subject of some of the classic ethnographies of the twentieth century (e.g., Gluckman’s 1955 *The Judicial Process Among the Barotse* and Bohannan’s 1989 [orig. 1957] *Justice and Judgment Among the Tiv*). Language, of course, has always been a core focus of anthropology. But the two interests have rarely come together: until recently legal ethnographies have contained little actual discourse, while linguistic anthropology has rarely ventured into legal contexts (see Goldman 1986, 1993).

To define *legal discourse* as I will use it in this chapter, I begin with *discourse*. At one level, “discourse refers to connected segments of speech or writing” (Conley and O’Barr 2005: 6), any unit of language beyond the single sentence or utterance. In another, more abstract sense, discourse refers to “the broad range of discussion that takes place within a society about an issue or a set of issues” (Conley and O’Barr 2005: 7). Legal discourse then becomes speech or writing that occurs within legal processes and practices, very broadly construed, as well as higher-level discussion about law and issues related to law – also broadly construed. Thus, legal discourse in the first sense includes what lawyers, judges, and witnesses say and write in court cases. It also includes all the speech and writing that occurs “in the shadow of the law,” in law-influenced settings as diverse as mediation, negotiation, bureaucratic service encounters, and obtaining informed consent to medical procedures. In its second sense, the term encompasses scholarly
writing about law-related topics, media accounts, public debate, and commentary, and much more. And the term in both senses is cross-cultural, not bound to any particular society’s definition of what constitutes law or legal process.

I will focus throughout this chapter on the related questions of what distinguishes a linguistic anthropological approach to legal discourse from other perspectives, and whether those distinguishing characteristics make a significant difference in the resulting analysis. That is, what can linguistic anthropologists contribute that others might not, and does it matter? I will illustrate the point with reference to several historical examples, review some significant contemporary examples of linguistic anthropologists working on legal discourse, comment on the practical significance of such work, and conclude with some thoughts about future directions.

Historical Perspectives

One way to appreciate the relative paucity of anthropological work on law is to examine the role of law in two books that have been influential in defining the field of linguistic anthropology: Alessandro Duranti’s (1997) *Linguistic Anthropology*, part of the Cambridge Textbooks in Linguistics series, and continually reprinted; and an anthology that Duranti (2006) edited several years later, *A Companion to Linguistic Anthropology*. The words *law* and *legal* do not appear in the index to either book. The concluding chapter to the 1997 text hints at legal discourse, in sections devoted to “Public and Private Language” and “Language in Society” (Duranti 1997: 334–337). Under the former heading, for example, Duranti asks, in reference to language as a “public resource,” “how can we ensure that we can still control it, bend it to our needs, that we as individuals are not crushed under the weight of the socially shared code?” Although Duranti does not do so explicitly, these are certainly questions that we might want to ask about legal discourse.

The later edited volume does not list legal discourse as the topic of any of its 22 chapters. However, Susan Philips’ chapter on “Law and Social Inequality” (Philips 2006) is largely devoted to discourse that is, at a minimum, law-related. In her introduction, Philips (2006: 475–476) defines several concepts that are central to the operation of legal systems: symbolic capital, “authoritative speech,” the relative reliability of different forms of evidence, and “power relations, or relations of dominance and subordination.” She then briefly reviews her own prior work on how professionals dominate discourse in such bureaucratic settings as “classrooms, courtrooms, and clinics” (Philips 2006: 478) and the attendant consequences for social inequality. Her next topic is “gender, inequality, and language” (Philips 2006: 480), a subject that William O’Barr and I had begun to explore in the courtroom in the 1970s (Conley, O’Barr, and Lind 1978). Her final two topics are “language and political economy” (Philips 2006: 483), which, she shows, has been of concern to linguistic anthropologists since the 1950s, and “the colonial transformation of language and social inequality” (Philips 2006: 486), also a matter of longstanding interest among linguistic anthropologists. Language and political economy necessarily implicates law, albeit indirectly, since many of the status distinctions that result from language differences are encoded in law, enforced by a legal system, or manifest in legal proceedings. The relationship among colonialism, language, and law is more explicit since, as Philips observes, “colonialism entailed the introduction and imposition of the key institutional and ideological complexes or discourses of European religion, education, law, and media” (Philips 2006: 488).

The point of discussing these two significant books is twofold. First, both show that linguistic anthropology has been reticent in claiming legal discourse as a topic of interest and priority. But second, and notwithstanding that reticence, linguistic anthropologists have long had a great deal to say about matters that comprise or relate to legal discourse in both its ground-level and broader societal senses.
In fact, Philips herself has done extensive anthropological work on legal discourse. In an excellent but hard-to-find 1988 paper with the intriguing subtitle of “Acquiring the ‘Cant,’” Philips investigated how law students – typically 22-year-olds just out of a generalist undergraduate education – were socialized into a manner of speaking that seems utterly foreign to most of the rest of the American speech community (Philips 1988). Then, in a 1998 book entitled *Ideology in the Language of Judges*, she used detailed analysis of discourse to refute the notion that Anglo-American judges are neutral arbiters who sit above the fray (Philips 1998). Instead, as she showed, judges are active and often dominant participants in many aspects of the adversary process, using such linguistic devices as turn control to move the unfolding legal discourse in directions they prefer. Here again, the subtitle says it all: *How Judges Practice Law, Politics and Courtroom Control*.

Philips’ 1988 paper represents one of the first efforts by a linguistic anthropologist to deal directly with legal discourse. O’Barr and I had begun to write about the power of language in the courtroom in the late 1970s and early 1980s (e.g., Conley, O’Barr, and Lind 1978), but our perspective then was not fundamentally anthropological. Initially, our work was strongly influenced by conversation analysis, with its intensive focus on the evidence available from the discourse itself. In collaboration with social psychologists, we also conducted controlled experiments to determine the effect of language variation on jurors, something that is outside the ethnographic tradition.

Nonetheless, because we are anthropologists, we were drawn to the cultural context from which our linguistic evidence emerged. Even in our earliest work, we sought to understand the relationship between language and power. By the late 1980s, we had begun to investigate the differences between lay and professional understandings of what constitutes an adequate legal narrative. Our interest in this issue led us to conduct an ethnographic study of small claims courts around the United States in which we did participant observation in courtrooms, interviewed and conversed with litigants and judges, and conducted intensive qualitative analysis of recorded legal discourse. This research was the subject of our 1990 book *Rules Versus Relationships: The Ethnography of Legal Discourse* (Conley and O’Barr 1990), in which we argued for a fundamental distinction between the “rule-oriented” worldview of those who had been exposed to the culture of law and business and the “relational” outlook of those who had not. Rule-oriented narratives describe problems in terms of the violation of specified rules (not always the same as those the law recognizes) and demand concrete forms of redress, whereas relational ones focus on the violation of broader social norms and seek remedies that would mend torn social relations.

Some of the most significant earlier work on legal discourse has involved *language ideology* (used more-or-less synonymously with *ideology of language* and *linguistic ideology*). (For the purposes of this chapter I will define “contemporary” work as having been done within the last 10 years – since 2004 – and everything else as “early” or “earlier.”) In everyday usage, the word *ideology* suggests a body of ideas, a philosophy, or an outlook. It often has political connotations, as in “Marxist ideology” or “conservative ideology.” Applying everyday thinking to the term *language ideology* yields a definition along the lines of “a body of ideas about language,” with a particular focus on political contexts. Although the scholarly definitions of both ideology and language ideology are endlessly debated, the most common social science usages do not differ materially from their everyday counterparts.

In a widely cited definition of language ideologies, Alan Rumsey (1990: 346) has characterized them as “shared bodies of commonsense notions about the nature of language in the world” – in other words, ideas about language held by groups of people. Judith Irvine and Susan Gal (2000: 35) extend this minimalist definition to encompass the relationship between language and society:
“the ideas with which participants and observers frame their understandings of linguistic varieties and map those understandings onto people, events, and activities that are significant to them.”

The linguistic anthropologist John Haviland (2003: 764) glosses these two formulations, elegantly and helpfully, as “what ideas the people we work with (and, indeed, we ourselves) have regarding what language is or what language is good for.” In an elaboration that sets up the obvious connection with law, many definitions have focused explicitly on power. Irvine (1989: 255, emphasis added), for example, has defined language ideology as “the cultural system of ideas about social and linguistic relationships, together with their loading of moral and political interests.” Haviland’s (2003: 764) version is “ideas about language and its place in social arrangements or its use and usability for social and political ends.” And in a definition that presumes awareness and intent, Michael Silverstein (1979: 193) has proposed “sets of beliefs about language articulated by users as a rationalization or justification of perceived language structure and use.”

Two illustrations of linguistic anthropology focused on language ideology in legal contexts are Susan Hirsch’s (1998) book about Kenyan divorce courts, Pronouncing & Persevering: Gender and the Discourses of Disputing in an African Islamic Court, and Haviland’s (2003) American Anthropologist article about an Oregon murder trial, “Ideologies of Language: Some Reflections on Language and US Law.” Hirsch (1998) did ethnographic research in the Kadhi’s Courts of coastal Kenya, in which an Islamic judge, or kadhi, is empowered by the state to apply Islamic law in certain cases (including divorce) that involve Muslim parties. Her title captures an ideological contrast between “a Muslim husband pronouncing divorce and his persevering wife silently accepting the decree” (Hirsch 1998: 2). In this stereotype, the husband’s authority to pronounce both reflects and reaffirms his autonomy and agency, whereas women, “devoid of agency” (Hirsch 1998: 1), in language and in fact, “are expected to endure marital hardships without complaint and to accept divorce in the same spirit” (Hirsch 1998: 3).

Lacking the power to pronounce, wives who find themselves in intolerable marriages must go before the kadhi and make a case. There they confront a seemingly irreconcilable dilemma. Women should personify a cultural ideal of respect, honor, and modesty, which includes shielding private matters from public scrutiny; instead of making public complaints about marital troubles, one perseveres quietly. But a parallel cultural ideal – guaranteed by Islam and Islamic law – exalts the concepts of justice and rights. The obvious quandary is that in order to achieve her rights as a wife, a woman puts at risk the very qualities that make her deserving of such rights. But women regularly bring and win divorce cases, meaning that they somehow walk this exceedingly fine line.

The solution seems to lie in the ability to negotiate a minefield of culturally significant and often conflicting language ideologies. Specifically, women invoke ideologies that index, or point to, themselves as proper wives, while at the same time stepping outside the traditional bounds of propriety to assert their rights. As Hirsch (1998: 219) puts it, “Swahili women who complain in court embody a contradiction. Through their participation in cases and mediations, they generally stand in gross violation of appropriate speech, and yet, in so many dialogues, they are also routinely depicted as compliant wives.”

Haviland’s (2003) paper involves an Oregon murder trial in which he served as an expert witness (a particularly compelling form of participant observation). The defendant was convicted of killing a fellow migrant agricultural worker in a field outside the camp where they lived. The critical linguistic feature of the trial was that none of the witnesses to the events in question spoke English. Almost all were native speakers of Mixtec, and few had meaningful competence in Spanish. Nonetheless, the only translator provided by the court was a native speaker of Cuban Spanish (which is quite different from Mexican Spanish), who knew no Mixtec.

Haviland’s account focuses on some beliefs about language that were critical to the outcome of the trial. The first (Haviland 2003: 767) is the notion of “referential transparency,” or “the
assumption that expressions in one language can be unproblematically rendered into propositions and translated ‘verbatim’ into another.” This belief, or ideology, rests on the fallacy that “the truth-functional core of what someone says can be decoupled from the actual saying itself.” In fact, no one language can be mapped directly onto another in “verbatim” fashion. Nonetheless, the judge relied on referential transparency and its underlying fallacy to instruct the translator as well as to instruct the jury about how to deal with the translations. Haviland also analyzes the role that several other comparably absurd language ideologies played in the trial, including the belief that English is not only a standard language, but “is also somehow in the repertoire of skills of a ‘standard person’, one who is socially and, perhaps, morally whole or ‘normal’.” There is a powerful negative implication: those who do not speak English are “abnormal” or “substandard.”

Haviland’s analysis is both powerful and depressing. It is powerful because he is able to explain some otherwise impenetrable things that happened in this trial and that regularly happen in multilingual trials across the United States: judges instructing interpreters to “translate the responses of the witness verbatim, word for word;” or instructing the jury that the interpreter’s “verbatim” translation of a witness’ answers – presumably bereft of any commentary, paraphrases, or, ironically, “interpretation” – was to be their sole source of evidence; or permitting a prosecutor to browbeat and demean a witness who could speak neither English nor Spanish. But despite the power of his insights, Haviland (2003: 773) concludes on a discouraging note. He admits that his readers will inevitably expect “a triumphal cry for linguistic anthropology as an antidote to bad theories of language.” But he concedes that he has no practical solutions, and in that he is probably right.

Hirsch’s book and Haviland’s article share features that mark them as works of linguistic anthropology. First, both projects involve ethnography, and in particular participant observation of events. In both cases, the authors focus on legal discourse as a cultural practice, with its production simultaneously reflecting and helping to constitute broader cultural values. Finally, both use language ideology as a core concept. That concept is not unique to anthropology, as it is a matter of interest across the spectrum of discourse studies. But the way in which both authors emphasize its power implications is clearly anthropological, since the exercise, maintenance, and subversion of power have long been central concerns in political and legal anthropology. I turn next to a more general discussion of what might distinguish the linguistic anthropology of legal discourse from other approaches.

Critical Issues and Topics

What’s Unique about Linguistic Anthropology?

In considering the special value that linguistic anthropology might bring to the study of legal discourse, it is useful to review how linguistic anthropologists define their field. Most definitions stress both orientation and the methods. With respect to orientation, Duranti defines linguistic anthropology in his foundational textbook as “the study of language as a cultural resource and speaking as a cultural practice” (Duranti 1997: 2 [emphasis in original]). Elaborating, he continues:

This means that linguistic anthropologists see the subject of their study, that is, speakers, first and above all as social actors, that is, members of particular, interestingly complex, communities, each organized in a variety of social institutions and through a network of intersecting but not necessarily overlapping sets of expectations, beliefs, and moral values about the world.  

Duranti 1997: 2 [emphasis in original]
Finally, he emphasizes that what ultimately distinguishes linguistic anthropologists from other linguists is “their focus on language as a set of symbolic resources that enter the constitution of social fabric and the individual representation of actual or possible worlds.” This focus in turn allows linguistic anthropologists to address issues that have long been of special interest to anthropology generally, including several that are particularly salient in legal discourse: “the politics of representation, the constitution of authority, the legitimation of power, the cultural basis of racism and ethnic conflict . . . [and] the relationship between ritual performance and forms of social control” (Duranti 1997: 2–3)

With respect to method, one important contribution of linguistic anthropology is simply its cross-cultural focus. Most analysis of legal discourse has been done by Westerners working in their home countries and in their native languages. Many linguistic anthropologists – including me – have done the same. But almost everyone who has studied legal discourse in non-Western contexts or languages is a linguistic anthropologist: Hirsch and Haviland, for example. Thus, to the extent that there is comparative legal discourse analysis, it is linguistic anthropologists who have done most of it.

Ethnography based on participant observation is also characteristic of most anthropological research, including linguistic anthropology. Think again of Hirsch and Haviland, and the work that O’Barr and I did in small claims court. But ethnography is no longer the sole property of anthropology, and has not been for some time. To cite but one example, Douglas Maynard, a sociologist and conversation analyst, relied heavily on ethnography in Good News, Bad News (Maynard 2003), his excellent work on communications between professionals and patients in medical clinics.

What may be nearly unique to linguistic anthropology, though, is the multi-level nature of its ethnography. That is, few discourse analysts of other persuasions have combined the thick description of traditional ethnography, with its focus on culture as a set of symbolic resources, with the fine-grained analysis of text. To quote Duranti once more, linguistic anthropologists “connect the micro-level phenomena analyzable through recordings and transcripts with the often invisible background of people’s relations as mediated by particular histories, including institutional ones” (Duranti 1997: 8). In the end, this enables an unusually rich understanding, not just of how speakers do the work of talk, but of how they use talk to do the work of social action.

What Difference Does This Make to the Study of Legal Discourse?

An initial response to this question is that the perspective of linguistic anthropology need not make any difference at all. Others do ethnography, and everyone who does discourse analysis does the fine-grained study of recorded and transcribed text. But it has made a difference, perhaps because the multi-level, connective approach I have described is driven by the experience of anthropology. Linguistic anthropologists always look at the world in this way; others might, but rarely do.

To illustrate this difference, consider two examples of excellent legal discourse work done by sociologists practicing conversation analysis. The first is J. Maxwell Atkinson and Paul Drew’s (1979) Order in Court, one of the first exemplars of rigorous legal discourse analysis, and a book that has exerted significant influence on the field. The project is based on transcripts of British court proceedings, with much of the material relating to Catholic–Protestant violence in Northern Ireland in the late 1960s. Atkinson and Drew use these legal texts to explore issues that have long been of special interest to conversation analysts, including turn-taking, opening and organizing a proceeding (i.e., generating “order in court”), managing accusations, and offering justifications and excuses.
The project has obvious real-world implications, as evidenced by the final chapter’s discussion of policy and reform implications. Nonetheless, consistent with the norms of conversation analysis and its antecedents in ethnomethodology, Atkinson and Drew (1979: 22) emphasize that the analyst’s task is “not to stipulate what rules members really were ‘following’ or ‘governed by’, but to locate rules that they might be ‘orienting to’ and using in producing a recognizable orderliness in some setting.” While acknowledging that many ethnomethodologists were ethnographers (including Erving Goffman, who coined the former term as a result of his work on the Chicago Jury Project), they argue nonetheless for a fundamental distinction between ethnography and conversation analysis, and seek to identify “some of the advantages conversation analysis has over ethnography” (Atkinson and Drew 1979: 33). Moreover, culture is nowhere to be found.

Linguistic anthropologists are, as I will discuss shortly, perfectly comfortable with this idea of emergent rules. But most, I think, would resist the idea that searching texts for emergent rules is sufficient in itself. In addition, there must be a more holistic consideration of the social action that discourse – and especially legal discourse – helps to constitute. To a linguistic anthropologist, the analysis of discourse may be the core of ethnography, but it is not the entirety of it.

Another milestone in the conversation analysis of legal discourse is Gregory Matoesian’s (1993) *Reproducing Rape: Domination through Talk in the Courtroom*, a study of three rape trials in the US Midwest. Matoesian (1993: 23) roots his method in the early work of Goffman and Harold Garfinkel and calls it “the sociology of talk.” The book is closely attendant to the broader social context of the trials, with an introductory chapter on “The Social Facticity of Rape.” It is also intensely focused on courtroom talk as a means of producing and exercising power, and of disempowering the alleged victim. Indeed, its most compelling chapter is called “Talk and Power in the Rape Trial,” a mind-opening and profoundly disturbing revelation about the power implications of otherwise routine cross-examination techniques in the rape context.

Yet despite all these affinities with linguistic anthropology – the social context, the emphasis on power, the scrutiny of talk as action – Matoesian’s work is different. Not better, not worse, but different. For one thing, it is not ethnographic. This is not a criticism, just a fact: Matoesian analyzed publicly available court transcripts and, in one case, a tape recording that he transcribed. He augmented his analyses with ethnographic interviews of some participants, which he found to be “a rich mine of information” (Matoesian 1993: 60), but he, like Atkinson and Drew before him, takes care to point out ethnography’s limited utility. Moreover, culture is nowhere to be found. It is not in the index, and Matoesian does not employ the concept in drawing connections between the trial and its social context.

These two examples are intended to illustrate the point that linguistic anthropology makes a difference in the analysis of legal discourse. In its fine-grained study of talk in search of emergent rules, it overlaps significantly with conversation analysis and other methods of discourse analysis rooted in sociolinguistics and allied fields. But its defining characteristics also include a multi-level ethnographic method, a focus on talk as social action, and an abiding interest in discourse as simultaneously reflective, constitutive, and subversive of cultural norms and values. Other methods of discourse analysis often share some of these characteristics, but not all of them, all the time.

One further “historical” example from linguistic anthropology that confirms this point is Laurence Goldman’s (1986) study of cases involving illicit premarital sex in village courts in the Huli society of Papua New Guinea. Like Matoesian, Goldman did fine-grained analysis of actual trial talk about sexual encounters. His analytical conclusions are in many respects strikingly similar: in particular, both researchers found power and coercion in the ostensibly mundane details of question-and-answer sequences. But Goldman’s work was both ethnographic and
cross-cultural, and it led him to challenge widely accepted cultural ideas about gender relations, in Huli society and elsewhere.

**Current Contributions and Research**

In this section I will briefly review several more current examples – one book by a senior scholar and three very recent papers by more junior authors – of the linguistic anthropology of legal discourse, in an effort to illustrate the special contributions that our discipline can make. The first is *The Language of Law School: Learning to “Think Like a Lawyer,”* by Elizabeth Mertz (2007), who is both an anthropologist and a lawyer. Her research site is the first-year law school classroom in several American law schools, and her objective is to investigate law students’ initial exposure to “thinking like a lawyer.” Lawyers claim this process as their intellectual hallmark, often describing it in terms of a logical rigor that stands in stark contrast to the sloppy emotionalism of the nonlegal world. Critics, on the other hand, have derided “thinking like a lawyer” as nothing more than a superficial language game that mystifies the simple and thereby reinforces the legal profession’s unwarranted monopoly power – merely “acquiring the ‘cant,’” as Philips (1988) put it. Critical legal theorists have also questioned the deeper effects of the process on students, arguing that legal education strips students of the values they bring to law school while subtly inculcating new and troubling ones that may undermine empathy for people and their problems.

Working in the ethnomethodological tradition, Mertz initially steps back from such questions and asks what thinking like a lawyer actually means in practice. What happens, linguistically, when law professors set out to teach student beginners how to do it? How do the students respond? What apparent rules and structures emerge when one explores the linguistic details of classroom interactions? In a nod in the direction of the Whorfian tradition, she explores the thought processes that are connected to the language of teaching law – a possible “deeper message about how the world operates, about what kind of knowledge counts, about how to proceed” (Mertz 2007: 23). This, in turn, provokes a further round of original thinking about the nature of the law itself and the prospects for change in legal education. Throughout, Mertz gives special attention to the concepts of language ideology and text, shedding new light on the ways in which legal practice depends on entextualization, reentextualization, and the management of the fuzzy text–context boundary.

What distinguishes Mertz’s work as anthropological? First, it is ethnographic, in fact a multi-sited ethnography. Mertz and her collaborators attended, observed (making notes), recorded, transcribed, and coded an entire first-year class at eight American law schools chosen for their diverse locations and relative prestige. Moreover, Mertz herself was a “native” participant observer, having been through the process herself as both law student and law teacher. Second, her ultimate focus is on understanding the *culture* of legal practice and the role of law schools as sites and agents of acculturation. Her legal discourse analysis is directed very specifically at the question of how the language of law school works to reproduce the power relations at the core of the social fabric of law in practice.

Finally, Mertz’s suggestions about the possibilities for change are also fundamentally anthropological. Many, many people in legal education have been arguing for some time that legal values (or, colloquially, “legal culture”) are in decline, that law school plays a critical role in this decline, and that the law school experience must therefore be reformed. But Mertz is the first, to my knowledge, to connect the social practice of language with these broader concerns. By discovering the specific ways in which language functions as an essential constituent of legal culture, she is in a position to identify the points at which things are going wrong, and to suggest
concrete changes. To me, her ability to appreciate language as a cultural resource is indispensable, and it derives from her anthropological sensibilities.

Next is Shonna Trinch’s (2013) linguistic ethnography of how Latina women report rape to legal authorities when seeking protective orders against their husbands or partners. As in much of the linguistic anthropology of legal discourse literature, Trinch emphasizes the themes of culture and ideology. Her analytical starting point is a widespread cultural stereotype according to which Latina women would be expected to show shame, stigma, fear, and isolation. Yet the narratives that these women co-produced with their legal interlocutors, “situated in a larger cultural and political context yet created locally within a particular speech setting” (Trinch 2013: 290), reflect a different reality. The women were “well-dressed, composed, and few cried at all . . . [n]or did their narratives in any way suggest that because they were some man’s wife they were required by culture to submit to his will” (Trinch 2013: 293 [emphasis in original]).

Exploring the origins of the cultural stereotype, Trinch discovers narratives of rape that have traveled through law, literature, and media. These narratives have been influential in defining the ideologically salient categories of “victim” and “survivor” and in shaping the interaction of those categories with the legal concept of rape. Trinch’s contribution here is to challenge and disrupt the stereotype with evidence drawn from women’s own narratives. Her ambition, largely realized, is to “travel with women who have been sexually assaulted to new discursive territories where we can develop a richer understanding of rape . . . [and] see, in women’s words, what they do afterwards, and how they themselves move forward after rape” (Trinch 2013: 303).

The second example is Hadi Deeb’s (2013) analysis of the California Supreme Court oral arguments in an important case about same-sex couples’ right to marry. The court ultimately ruled that prior state restrictions on same-sex marriage violated the state constitution and were thus invalid and unenforceable.

Oral arguments in appellate cases follow the submission of written briefs and involve unscripted, often-intense give-and-take between the judges (here, the seven justices of the California Supreme Court) and the parties’ lawyers (there are no witnesses). Lawyers begin with prepared statements but are usually interrupted by questions almost immediately. They rarely get to finish an answer before the next question. As happened here, the judges often interrupt each other with follow-up questions. Questions tend to be argumentative and frequently involve hypotheticals intended to test the strength and limits of the lawyers’ positions.

Deeb uses video recordings of the arguments to conduct a detailed and sophisticated analysis of both the linguistic and visual aspects of the proceedings, and situates that analysis in its broader cultural context. Using principles developed in other anthropological and linguistic settings, he dissects “a series of stance-taking displays” in which speakers – both lawyers and judges – make and comment on arguments and punctuate the “complex weave and flow” of the discourse (Deeb 2013: 46). In an unusually vivid and persuasive example, he shows speakers using a repertoire of gestures to comment on such key legal concepts as joining, excluding, and allowing. The result is a demonstration of “the integration of pragmatic displays with the words that participants used to take, and tie, blended stances toward the case and one another” (Deeb 2013: 57).

Deeb then uses this analysis to illuminate “the relationship between communication among participants within a courtroom and the surrounding social context.” Thus, he interprets the gestural display of one of the justices as “target[ing] social indexes of a sexual minority” (Deeb 2013: 57). On a theoretical level, he sees his findings as complementing “insights from existing linguistic-anthropological scholarship on how legal language helps define group identities” (Deeb 2013: 57). Deeb cites specific connections to the work of Haviland, Hirsch, and Philips, discussed earlier in this chapter, as well as to Richard Bauman’s (1975) seminal “Verbal Art as Performance,” Michael Silverstein’s (1998) work on ideology, and Justin Richland’s (2008) ethnography of Hopi tribal courts.
The final example is Robin Conley’s (2013) ethnographic study of decision making by jurors in Texas death penalty cases. Her analysis and findings have a good deal in common with Deeb’s, though her focus is on trials rather than appeals. Her research is based on classic ethnography: she traveled throughout Texas, attending capital murder cases; sitting in on lawyers’ meetings; talking formally and informally with prosecutors, defense lawyers, defendants, and court and prison personnel; and finding and interviewing jurors in the weeks after they rendered their verdicts. This article focuses on the transcripts of trials and juror interviews.

Like Deeb, Conley sees the courtroom – here, the trial courtroom – as an arena of intense verbal and visual communication. She emphasizes the “embodied experience” of participants, noting that “[t]he legal subject in practice . . . whether a defendant or juror, is intersubjectively and bodily entwined with others throughout the course of a trial” (Conley 2013: 506). She sees a fundamental conflict between this experience of intimacy between the defendant and the jurors and the jurors’ duty, conveyed to them in the judge’s instructions, to put aside empathy and emotion and decide the defendant’s fate on the basis of a rational assessment of the evidence. In simplest terms, how do jurors manage to decide to kill another human being who has been sitting ten feet away from them every day for a week or more?

Conley discovers potential answers in the details of language. Working with the language of the judge’s instructions, the testimony from the witness stand, and the lawyers’ arguments, jurors develop linguistic strategies to overcome the impact of their shared embodied experience with the defendant and ultimately to distance themselves from the life-or-death decision they must make. Specific strategies she identifies include the manipulation of deictic references to the defendant and the construction of agency in ways that mitigate jurors’ personal responsibility. Her conclusions combine microlinguistic analysis, an understanding of the local culture of the Texas capital trial, and an appreciation of broader culture contexts in a way that is uniquely and strikingly anthropological.

All three of these recent papers illustrate the difference that the anthropological perspective can make to the analysis of legal discourse. All three are ethnographic: Trinch’s and Conley’s in the traditional way, Deeb’s in an unconventional yet recognizable way. Most importantly, all three analyze legal discourse in a way that is faithful to Duranti’s definition of linguistic anthropology: “the study of language as a cultural resource and speaking as a cultural practice” (Duranti 1997: 2 [emphasis in original]). Trinch sees the potential of the rape narratives she studies to challenge and change broader cultural stereotypes about rape and its victims. Deeb connects communication in the appellate courtroom to broader cultural issues, in particular the definition of social identities. And Conley embeds her microlinguistic analysis in multiple layers of cultural context, from the local environment of the trial to legal culture more generally, and ultimately to pervasive social norms. Again, others may generate similar insights, but to anthropologists they are the first priority.

Recommendations for Practice

Looking ahead, I have three specific recommendations for the practice of legal discourse analysis by linguistic anthropologists. The first is: do more of it. As I have noted throughout this chapter, linguistic anthropology can make unique contributions to understanding legal discourse and its broader significance. But linguistic anthropologists have, until recently, been bit players in this endeavor. So I hope that more linguistic anthropologists will turn their attention to law and legal processes.

My second recommendation – and this will sound odd, directed at anthropologists – is to be more cross-cultural. Legal anthropology has followed a trajectory of starting out in small-scale societies (see the references above to Malinowski, Gluckman, and Bohannan), then turning...
its lens on the legal systems of Western countries, and then returning to a global perspective. The linguistic anthropology of law seems to be following a slightly different path. Earlier work involved a mix of Western (O’Barr and J. M. Conley) and traditional (Hirsch) sites, as well as projects that examined cross-cultural interactions in Western legal systems (Haviland, for example). The most recent work in the field (as illustrated by the previous section) seems to be largely focused on problems in the US legal system. This is good: turning anthropology’s critical perspective on any system can only be illuminating. But at the same time, anthropology is by its nature a global enterprise, and linguistic anthropologists studying law should not forget that.

A recent example that illustrates the point is Justin Richland’s (2008) ethnography of Hopi justice, *Arguing with Tradition: The Language of Law in Hopi Tribal Courts*. Though set within the boundaries of the United States, the project is in fact about the emergence of a new culture of tribal law, and with it a new conception of tribal sovereignty. In an intriguing irony, Richland’s micro-analysis of Hopi courtroom discourse shows how each evocation of tradition – conventionally, something excavated from a static past – in fact contributes to cultural change, helping to shape a continually evolving sense of Hopi justice. The details of discourse also suggest an unexpected reversal of the arrow of agency in the relationship between the Hopi and the U.S. legal systems: rather than simply reacting and adapting, the Hopi system is exporting its values to its nominal suzerain. It is inconceivable to me that these insights could have been produced by anyone other than an anthropologist.

My third recommendation is that in studying legal discourse, linguistic anthropologists should strive to be more applied. The decline of the “public anthropologist” has been a source of great angst in recent years. Even as our core concept of culture gets hijacked by just about everyone, it is rare to see anthropologists shaping public debate about important issues. The legal arena presents an opportunity to change that.

All of the projects I have reviewed in this chapter have yielded powerful theoretical insights, new ways of looking at law and legal practice. But all of them also have important implications (whether or not realized) for the pursuit of justice. Recall that Haviland did his ethnographic work while serving as an expert witness; similarly, Richland has advised Hopi legal officials, while Conley has shared her insights with defense lawyers seeking to understand how jurors reason. I turn next to some evidence that this trend may be accelerating.

**Future Directions**

Related Topics

- **8** Language Ideologies (Kroskrity)
- **19** Language and Political Economy (McElhinny)
- **22** Language in the Age of Globalization (Jacquemet)

References


Further Reading

