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CAN THE LEGAL SYSTEM USE EXPERTS ON MEANING?

LAWRENCE M. SOLAN*

I. INTRODUCTION

So many legal disputes are about meaning. People fight over insurance policies, contracts, statutes, regulations, jury instructions, allegedly libelous statements, recorded and/or transcribed conversations, and just about anything else that is expressed in language. With increasing frequency, lawyers have been consulting with linguists and other language experts in a diverse array of legal cases, including disputes over the interpretation of legally significant texts. When this happens, it raises a profound question that challenges deeply entrenched structures in our system of justice. If linguists can provide assistance that is worthwhile, then one might infer that judges and jurors, who traditionally play the role of interpreter, are not up to the task they have assumed. It should not be surprising, then, to expect initial resistance to the idea of linguistic experts on meaning.

The phenomenon of linguists testifying as experts has not received a great deal of attention in legal academic literature.¹ The little that has been published reflects a mixed reaction. William Eskridge and Phillip Frickey find linguistic analysis useful in coming to grips with various problems in the interpretation of statutes.² And Eskridge has gone so far as to co-author an article with Judith

* Associate Professor of Law, Brooklyn Law School. J.D., Harvard Law School, 1982. Ph.D. (linguistics), University of Massachusetts, 1978. This paper was presented at the University of Tennessee in March 1999. I am grateful to all those who provided me with helpful comments, especially Bethany Dumas and Mike Johnson. An earlier version of the paper was presented at the meeting of the International Association of Forensic Linguists, Duke University, September 6, 1997. I am indebted to many people who gave suggestions there, especially Judith Levi and Peter Tiersma. My thanks also goes to Margaret Berger and Pierre Schlag for bringing relevant issues and examples to my attention. I am also grateful to Cori Browne, Antonella Gallizzi, Lori Mason, and Nicholas Moynes for their valuable assistance in conducting the research. Portions of this article were published as Lawrence M. Solan, *Linguistic Experts as Semantic Tour Guides*, 5 *FORENSIC LINGUISTICS* 87 (1998), and are reprinted with the permission of the University of Birmingham Press. This project was supported by a summer research stipend from Brooklyn Law School.

1. A significant exception is the Northwestern University/Washington University Law and Linguistics Conference, the transcript of which is published at 73 *WASH. U. L.Q.* 769 (1995). A number of the articles referred to in the text are published in that symposium volume.

2. For example, in their casebook that is a standard text for law students studying legislative issues, Eskridge and Frickey make mention of linguistics on a number of occasions. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION*:

Levi, a linguist who is very involved in law and language issues.³ On the other hand, Dennis Patterson writes that linguistics is not likely to be helpful to the courts because interpretive decisions must ultimately be resolved in such a way to make good law, and linguists are not legal experts.⁴ Marc Poirier accuses linguists of attempting to scope out a place for themselves in the legal system for their own enrichment, both in terms of money and professional prestige, even though their services, according to Poirier, are not needed.⁵ And Paul Campos, writing from a postmodernist perspective, takes the position that linguistics is not terribly useful in the legal system because language is basically a matter of social convention, and linguists are no better trained than anyone else in social structure.⁶

Just like the writers in the scholarly community, judges who have faced the question of whether to allow the testimony of a language expert on meaning have exhibited mixed responses. The issue of admissibility often arises on appeal after a trial judge has rejected the language expert, and the party who offered the testimony has lost the case. Because the standard of review is very deferential to the trial judge,⁷ one reading the published case law might get the impression that courts have very little interest in permitting lawyers to use linguists as trial experts. However, that impression is inaccurate. First, the reported cases that deal with this issue are typically ones in which disputes have arisen that concern the testimony of linguistic experts. Linguists frequently testify without objection from the opposing party in cases that do not result in published decisions.⁸ Moreover, read more carefully, the published opinions

STATUTES AND THE CREATION OF PUBLIC POLICY 642 (2d ed. 1995).

3. See William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995).

4. See Dennis Patterson, *Against a Theory of Meaning*, 73 WASH. U. L.Q. 1153 (1995). I take issue with Patterson's analysis which, it seems to me, misconstrues what it is that linguists do. See *infra* text accompanying notes 101-105.

5. See Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025 (1995).

6. See Paul F. Campos, *This is not a Sentence*, 73 WASH. U. L.Q. 971 (1995).

7. See 4 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702.02[2] (2d ed. 1999). The authors explain the standard of review:

The appellate court will sustain the trial judge's decision unless the decision is manifestly erroneous, or, as it is sometimes expressed, is an abuse of the trial court's wide discretion. There is no substantive difference between the 'manifest error' and 'abuse of discretion' standards of review. . . . In short, the trial judge's ruling, whether excluding or admitting expert evidence, will not be disturbed except in rare instances.

Id. In addition, the Supreme Court has recently held that "abuse of discretion" is the proper standard by which to review a district court's decision to admit or exclude scientific evidence. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The Court opined that "[by] applying an overly 'stringent' review . . . [the court of appeals] failed to give the trial court the deference that is the hallmark of abuse of discretion review." *Id.*

8. For discussion of many such cases, see Judith N. Levi, *Language as Evidence: The*

reveal a more complicated array of judicial reactions: cases in which the court permitted the linguist to testify and acknowledged the usefulness of the testimony; cases in which the court permitted the linguist to testify, but then deemed the testimony as relevant in principle, but analytically flawed; and cases in which the linguist was not permitted to testify at all.

The increased use of language experts by lawyers has led a number of linguists to begin taking a phenomenological interest in the legal system as an arena in which their specialized knowledge can be put to practical use. Linguists present analyses of legal cases at various annual conferences.⁹ *Forensic Linguistics*, a journal now in its sixth year of publication, devotes itself almost entirely to this area, as does an electronic journal, *Language in the Judicial Process*.¹⁰ *American Speech*, a dialectology journal, also publishes some of these accounts from time to time. A few anthologies of articles have appeared,¹¹ as well as two books by the sociolinguist, Roger Shuy,¹² which document many of his experiences testifying as an expert, especially in criminal cases. Much of this literature is anecdotal. Nonetheless, when read together with published judicial opinions, it paints a far richer picture of the potential contributions of linguistic expertise to the resolution of legal disputes.

This Article argues that linguistic expertise on meaning can play a useful, albeit occasional role in the resolution of legal disputes. It proposes that linguists be permitted to testify as "tour guides" when legally relevant texts are complicated and the parties have a legitimate basis for disagreeing about interpretation. The expert linguist's job is not to tell speakers of English how they must understand the language that they already speak. To use Steven Pinker's term, linguists are not "language mavens" in that sense.¹³ Rather, the role of the expert linguist is to walk the judge or jury through the linguistically salient portions of the text in order to help convert vague intuitions about meaning into a structured framework. This limited role for linguistic experts

Linguist as Expert Witness in North American Courts, 1 FORENSIC LINGUISTICS 1 (1994).

9. Two such conferences are the Annual Meeting of the Law & Society Association and the biannual conferences of the International Association of Forensic Linguists and the International Association of Forensic Phonetics.

10. *Language in the Judicial Process* is edited by Bethany Dumas, Professor of English, University of Tennessee, and is available at <<http://ljp.la.utk.edu>>.

11. LANGUAGE AND THE LAW (John Gibbons ed., 1994); LANGUAGE IN THE JUDICIAL PROCESS (Judith N. Levi & Anne Graffam Walker eds., 1990); THE LANGUAGE SCIENTIST AS EXPERT IN THE LEGAL SETTING (Robert W. Rieber & William A. Stewart eds., 1990); LANGUE ET DROIT—LANGUAGE AND LAW (Paul Pupier & José Woehrling eds., 1989). The Gibbons book deals principally with cases arising in Australia and the United Kingdom; the Pupier and Woehrling book deals primarily with issues of language and law facing Canada.

12. ROGER W. SHUY, THE LANGUAGE OF CONFESSION, INTERROGATION AND DECEPTION (1998) [hereinafter SHUY, CONFESSIONS]; ROGER W. SHUY, LANGUAGE CRIMES (1993).

13. See STEVEN PINKER, THE LANGUAGE INSTINCT 370-403 (1994). Edwin Newman is perhaps the best known "language maven" or pundit who claims expertise in right and wrong ways to speak. See *id.*

taps what linguists are really trained to do: analyze and explain generalizations in the structure and use of language. I suggest that this role is consistent with the philosophy of the Federal Rules of Evidence as interpreted by the Supreme Court. The need for this kind of assistance should not occur in routine cases, but when it does, it is entirely appropriate for the legal system to welcome such analysis.

Part II first discusses the legal system's use of experts on meaning generally, particularly in patent cases. It then describes a number of areas in which linguists and other language experts offer opinion testimony, much of which is accepted by the courts. Finally, Part II contrasts these areas with proffered testimony about meaning and evaluates courts' reactions to meaning testimony. Part III presents the tour guide model as a useful way of looking at the extent to which linguists can help those charged with interpreting difficult texts to do so more thoughtfully. I will show that the tour guide model is very much in line with other expert testimony accepted by courts, and is responsive to objections to linguistic evidence that have appeared in the scholarly literature. In Part IV, I evaluate the tour guide model in light of the standards under which courts make decisions about the admissibility of expert testimony. Part V is a brief conclusion.

II. INTERPRETIVE EXPERTS IN THE COURTS

A. *The Markman Standard*

When disputes over meaning recur, turf wars arise over whose interpretation will count as authoritative. The traditional combatants in the turf wars over meaning are those who would like the judge to decide (often civil defendants) and those who would like to take their chances with the jury. The winners of many of these battles were declared long ago. Judges decide the meanings of statutes.¹⁴ They also decide whether contracts and insurance policies are clear or ambiguous. If clear, then the judge's interpretation is the one that counts. But if the judge decides that the contract or policy is ambiguous, then the jury weighs the evidence as to which of the possible meanings was the intended one, and becomes the ultimate interpreter.¹⁵ Similarly, while judges initially determine whether an allegedly defamatory statement may be reasonably interpreted as libelous,¹⁶ juries then decide whether potentially libelous statements are actually defamatory.¹⁷ Juries also

14. See, e.g., *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1337 (7th Cir. 1988) ("It is not true that the law is what a jury might make out of statutory language. The law is the statute as interpreted. The duty of interpretation is the judge's.").

15. See, e.g., *Jhaver v. Zapata Off-Shore Co.*, 903 F.2d 381 (5th Cir. 1990) (applying Texas law); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598 (7th Cir. 1989).

16. See *Franklin Music Co. v. ABC*, 616 F.2d 528, 541 (3d Cir. 1979).

17. See *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 743 (5th Cir. 1993).

interpret tape-recorded conversations to determine whether a defendant was participating in a conspiracy or other inchoate crime.¹⁸

Not all of the battles to determine who bears the responsibility of interpretation are over. For example, in 1996, the Supreme Court ruled in *Markman v. Westview Instruments, Inc.*¹⁹ that the disputed meaning of a patent claim, which had generally been considered a triable jury issue, should properly be decided by the judge. In that case, the jury decided that Westview, the defendant, had infringed on Markman's patent.²⁰ The trial judge nonetheless granted Westview's motion for judgment as a matter of law, holding that it was up to the judge to construe the terms of the patent.²¹ Under the judge's construction, there was no infringement.²² The court of appeals affirmed,²³ and the Supreme Court affirmed once again.²⁴ Speaking for a unanimous court, Justice Souter explained:

The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis. Patent construction in particular "is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."²⁵

The Court further rejected Markman's argument that a judge's reliance on expert testimony to help in this determination would naturally require "credibility judgments" that are traditionally in the jury's domain.²⁶ Instead, the Court focused on the need for uniform interpretation of patents, which judges can provide far better than juries.²⁷

At the core of the Court's analysis are several claims about the nature of legal interpretation. First, the Court adopted the notion that there are "proper

18. Juries do this routinely in conspiracy cases. See, e.g., *United States v. Fermin*, 32 F.3d 674 (2d Cir. 1994).

19. 517 U.S. 370 (1996).

20. *Markman v. Westview Instruments, Inc.*, 772 F. Supp. 1535, 1537-38 (E.D. Pa. 1991).

21. *Id.*

22. *Id.*

23. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

24. *Markman*, 517 U.S. at 391.

25. *Id.* at 388-89 (quoting *Parker v. Hulme*, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (No. 10,740)).

26. *Id.* at 389-90. For criticism of this point, see Louis S. Silvestri, Note, *A Statutory Solution to the Mischief of Markman v. Westview Instruments, Inc.*, 63 BROOK. L. REV. 279 (1997). In *Markman*, the plaintiff called an expert, but the Court accepted the defendant's interpretation of the patent. 517 U.S. at 375.

27. *Id.* at 390-91.

interpretations” of patents.²⁸ This implies that there are also *improper* interpretations of patents. Second, the Court recognized that interpreting a technical document can be difficult.²⁹ And third, the Court stated that one can get better at interpretation with practice.³⁰ Therefore, the judicial system should take advantage of a judge’s experience in order to increase the likelihood of proper interpretations. The bottom line is that judges who also are specialists in patent construction are more likely to deliver reasoned decisions in these cases.

This perspective is consistent with the frequent use of experts on custom and usage in contract cases. A typical scenario in such a case involves one party to the contract trying to prove that its terms unambiguously favor that party. The other party disagrees. The party claiming ambiguity might offer an expert on custom and usage to show that even if there is apparent clarity on the face of the document, those who engage in such transactions typically have a different understanding.³¹ Alternatively, if both parties acknowledge that the contract is ambiguous, they both may offer expert testimony on custom and usage to support their respective positions. Typically, the custom and usage expert is a specialist in the same field or industry as the contracting parties.³²

28. *Id.* at 388-89. It is beyond dispute that legal texts routinely contain vagueness and ambiguity that result in the availability of more than one interpretation. Souter himself has said as much in another unanimous opinion. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), Souter wrote that the Court could interpret ERISA only by looking “beyond the unhelpful text and the frustrating difficulty of defining its key term.” I understand the Court’s reference to “proper interpretations” in *Markman* to distinguish interpretations that thoughtfully use text, context, and the tradition of patent interpretation to come up with a defensible interpretation from those interpretations that do not. However, I do not understand the Court to be making the insupportable claim that patents are never ambiguous enough to allow anything other than a single “proper interpretation.” For this reason, I will not belabor the point here.

29. *Markman*, 517 U.S. at 388-89.

30. *Id.*

31. Judge Posner has written a number of opinions explaining this phenomenon in the context of the parol evidence rule. See, e.g., *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 614 (7th Cir. 1998) (“[A] contract which might appear to be perfectly clear to someone who read it in ignorance of its context might, once context was restored, seem either unclear, or clear the opposite way.”) (citations omitted). In *United States v. National Steel Corp.*, 75 F.3d 1146, 1149 (7th Cir. 1996), the court stated:

There is a . . . distinction in contract law between ‘intrinsic’ and ‘extrinsic’ ambiguity.

The first is present when from just reading the contract it is apparent that the contract is unclear. The second is present when although the contract is clear at the semantic or literal level, *anyone who knew something about the subject matter would realize that the contract probably did not mean what it said.*

(emphasis added). For further discussion, see Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 256.

32. See, e.g., *Thomas v. Gusto Records, Inc.*, 939 F.2d 395 (6th Cir. 1991) (allowing expert testimony on custom and usage); *Antilles Steamship Co. v. Members of Am. Hull Ins.*

Recently, a new group of expert interpreters has entered the scene. Increasingly, parties in a variety of cases are calling on linguists to render expert testimony about language issues in legal disputes.³³ The passage quoted from *Markman*³⁴ might, if interpreted both broadly and naively, lead one to expect that these newly discovered experts would constitute a welcome addition to the set of legally sanctioned interpreters of language. If judges are more practiced interpreters than juries, and therefore more skilled interpreters, then, in appropriate cases, we might expect courts to encourage parties to seek counsel from linguists, who are more practiced in interpretive enterprises than either judges or juries. This expertise should be especially attractive when the language is contained in long, hard-to-understand documents and tape recordings.

In fact, courts have been generally receptive to the opinions of linguists in many kinds of cases. Linguistic issues of all kinds arise in trademark cases, whether in disputes over phonological questions concerning the likelihood of confusion,³⁵ or whether a particular use of a word occurs often enough to make that use descriptive or generic.³⁶ Linguists routinely are called upon to testify on both types of trademark issues. Courts also take seriously "comprehensibility studies" conducted by linguists with respect to the

Syndicate, 733 F.2d 195 (2d. Cir. 1984) (same); *Zapata Protein (USA), Inc. v. General Jackson Partnership*, No. CIV. A. 96-0980, 1997 WL 411214 (E.D. La. Jul. 18, 1997) (same); *Chevis Pub'g Corp. v. Pizza Hut, Inc.*, No. 92 CIV. 5198, 1993 WL 277517 (S.D.N.Y. Jul. 16, 1993) (same).

33. In fact, linguists are sometimes asked to give testimony on custom and usage when the body of writing in a particular field is substantial enough to allow for lexicographic research. For example, Professor Bethany Dumas testified about the words "hidden decay" in an insurance case involving a construction project; by studying the relevant construction literature, she was able to act as a lexicographer. See Report of Bethany K. Dumas, Ph.D., *Shenandoah Apartments, Ltd. v. Auto Owners Ins. Co.*, No. 129819-3 (Ch. Ct. of Knox County, Tenn., Sept. 4, 1997).

34. See *supra* text accompanying note 25.

35. See, e.g., *Infinity Broad. Corp. v. Greater Boston Radio, II, Inc.*, No. CIV. A. 93-11161-MLW, 1993 WL 740936 (D. Mass. Sept. 16, 1994); *Resorts Int'l, Inc. v. Greate Bay Hotel & Casino, Inc.*, 830 F. Supp. 826 (D.N.J. 1992); *Mister Twister, Inc. v. Jenem Corp.*, 710 F. Supp. 202 (S.D. Ohio 1989); *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 702 F. Supp. 1031 (S.D.N.Y. 1988); *Pathfinder Comm. Corp. v. Midwest Comm. Co.*, 593 F. Supp. 281 (N.D. Ind. 1984); *Jockey Int'l, Inc. v. Burkard*, 185 U.S.P.Q. (BNA) 201 (S.D. Cal. 1975); *Draper Communications, Inc v. Delaware Valley Broad., L.P.*, 505 A.2d 1283 (Del. Ch. 1985).

36. See, e.g., *Conagra, Inc. v. Geo. A. Hormel & Co.*, 784 F. Supp. 700 (D. Neb. 1992); *Quality Inns, Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198 (D. Md. 1988); *Trump v. Caesar's World, Inc.*, 645 F. Supp. 1015 (D.N.J. 1986). For discussion of linguistic issues in the dispute between Quality Inns and McDonald's over the former's effort to create a chain of "McSleep" budget motels, see Genine Lentine & Roger Shuy, *Mc-Meaning in the Marketplace*, 65 AM. SPEECH 349 (1990). Lentine and Shuy consulted for Quality Inns, the losing party.

interpretation of jury instructions and other legal documents.³⁷ For example, in *Doston v. Duffy*,³⁸ Illinois welfare recipients challenged the adequacy of a notice sent to them concerning their right to receive future benefits, claiming that the notice was incomprehensible to them.³⁹ The welfare recipients prevailed by enlisting the help of a linguist, who testified that the structure of the notice made it virtually impenetrable.⁴⁰

Expert linguistic testimony is also routinely permitted when the police claim a non-native speaker consented to a search, but the non-native speaker later argues that he could not speak English well enough to knowingly and intentionally waive his constitutional rights.⁴¹ While the impact of this kind of expert testimony on the courts varies depending on the extent that the linguist tested the defendant—and on the quality of the expert's work generally⁴²—there is no disagreement over its admissibility.

At times, the testimony of a linguist might actually be required. Courts sometimes refuse to permit non-linguists to testify about accents or about the similarities between two voices, particularly when the identification involves voices on tape recordings or when untrained government agents are offered to

37. See, e.g., *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993) (considering, but only perfunctorily, a comprehensibility study of death penalty jury instructions that was influential in district court on a habeas corpus motion); *Milton v. Procnier*, 744 F.2d 1091 (5th Cir. 1984) (containing testimony as to comprehensibility of voir dire questions); *Doston v. Duffy*, 732 F. Supp. 857 (N.D. Ill. 1988) (investigating comprehensibility of forms given to welfare recipients concerning certain rights). For a more complete discussion of the comprehensibility of jury instructions, see Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1. See also Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993).

38. 732 F. Supp. 857 (N.D. Ill. 1988).

39. *Id.* at 863-65.

40. *Id.* at 864. For discussion of this case from the perspective of the linguist who testified, see Levi, *supra* note 8, at 7-9, 16-18.

41. See *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995); *United States v. Tapia-Perez*, No. 92-30262, 1993 U.S. App. LEXIS 23632 at *5 (9th Cir. Sept. 3, 1993); *United States v. Gutierrez-Mederos*, 965 F.2d 800, 803 (9th Cir. 1992); *United States v. Mescaine-Perez*, 849 F.2d 53, 56-57 (2d Cir. 1988); *United States v. Higereda-Santa Cruz*, 826 F. Supp. 355, 359 (D. Or. 1993); *People v. DeLuna*, 515 P.2d 459, 460 (Colo. 1973); *Tze Poong Liu v. State*, 628 A.2d 1376, 1380 (Del. 1993); *Martinez-Rodriguez v. State*, 393 S.E.2d 748, 749 (Ga. Ct. App. 1990); *Schanberg v. State*, 296 N.Y.S.2d 646 (N.Y. Ct. Cl. 1969) (relying on linguist's testimony about party's linguistic competence in a civil suit). For a discussion of a linguist's testimony concerning the inadequacy of Miranda warnings to a defendant not fluent in English, see John D. Roy, *The Difficulties of Limited-English-Proficient Individuals in the Legal Setting*, in *THE LANGUAGE SCIENTIST AS EXPERT IN THE LEGAL SETTING*, *supra* note 11, at 73, 77-83.

42. Compare *Gutierrez-Mederos*, 965 F.2d at 803 (discounting testimony of expert who never personally tested the defendant's linguistic competence), with *Higereda-Santa Cruz*, 826 F. Supp. at 359 (suppressing evidence based on extensive testing that demonstrated a lack of competence).

make the identification.⁴³ When lay identification is permitted, for example, by the police or by a victim in a voice line-up, linguists are often permitted to testify about the reliability of the process.⁴⁴ However, their testimony may be limited to features of the particular voices or recordings in issue, and is not generally permitted to extend to global problems concerning voice recognition in general.⁴⁵

Clearly, the legal system is not negatively predisposed to hearing from language experts as a general matter.⁴⁶ While there might be disagreements

43. See *Ricci v. Urso*, 974 F.2d 5, 7 (1st Cir. 1992) (holding that a detective did not have expert training in voice identification); *People v. King*, 584 N.Y.S.2d 153, 153 (N.Y. App. Div. 1992) (prohibiting lay witness's testimony about whether defendant speaks with a Jamaican accent). But see *United States v. Locascio*, 6 F.3d 924, 937 (2d Cir. 1993) (permitting federal agent to identify voices on tape even though he had no linguistic training); *People v. Sanchez*, 492 N.Y.S.2d 683, 684-85 (N.Y. Sup. Ct. 1985) (permitting lay witness to testify about perpetrator's accent, but acknowledging that expert linguistic testimony might sometimes be necessary).

44. For discussion by a linguist of a case in which she testified as an expert on voice identification, see Bethany K. Dumas, *Voice Identification in a Criminal Law Context*, 65 AM. SPEECH 341 (1990). For discussion of testimony regarding linguistic evaluation of regional accents that led to acquittal, see William Labov, *The Judicial Testing of Linguistic Theory*, in LINGUISTICS IN CONTEXT: CONNECTING OBSERVATION AND UNDERSTANDING 159 (Deborah Tannen ed., 1988).

45. See *Government of the Virgin Is. v. Sanes*, 57 F.3d 338, 340-41 (3d Cir. 1995) (permitting limited testimony to the effect that voice exemplar was improperly suggestive); *United States v. Turner*, 528 F.2d 143, 166 (9th Cir. 1975) (permitting limited testimony, but not permitting testimony that spectrography is more reliable than aural identification generally). But see *United States v. Kupau*, 781 F.2d 740, 745 (9th Cir. 1986) (refusing to admit expert testimony on the reliability of voice identification). Substantial literature exists on the various difficulties concerning voice identification. See, e.g., Francis Nolan, *Auditory and Acoustic Analysis in Speaker Recognition*, in LANGUAGE AND THE LAW, *supra* note 11, at 326.

A far more controversial area of linguistic expert opinion testimony has been voice identification using sound spectrography, or "voiceprints." Voiceprint analysis has been offered largely to demonstrate that the defendant in a criminal case is indeed the same person as the individual on a tape recording who committed some crime with his words. For discussion of the history of judicial reaction to voice print analysis, see *United States v. Maivia*, 728 F. Supp. 1471, 1473-74 (D. Haw. 1990).

46. I do not mean to imply that this survey is complete. For example, linguists have testified in cases concerning educational opportunities of minorities, such as *Martin Luther King, Jr. Elementary School Children v. Ann Arbor School District Board*, 473 F. Supp. 1371 (E.D. Mich. 1979). See also *Tyler v. Vickery*, 517 F.2d 1089, 1093-94 (5th Cir. 1975) (permitting testimony of linguist in action alleging that bar examiners identified black English dialect and used this information to discriminate in grading bar exams). American courts are not alone in accepting expert testimony on communication issues involving minority groups. For discussion by a linguist about an Australian case, see Diana Eades, *Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina*, 16 LANGUAGE AND COMMUNICATION 215 (1996).

about a court's ultimate decision, the cases discussed in this Part indicate that the structure of the analysis is straightforward: testimony is admitted when a court finds that it is both sufficiently scientific and relevant.

In contrast, courts are more suspicious of language experts when the issue is the disputed meaning of a text. Often, they conclude that the judge or jury is capable of interpreting the language without the help of experts. Put simply, courts are less enthusiastic about the *Markman* argument favoring experts in interpretation when the expert interpreter is a linguist instead of a judge.

B. *What Linguists Say About Form and Meaning*

Linguistics is too broad a field to summarize in a few pages. Nonetheless, it is possible to provide a few examples that give some insight into what linguists bring to bear on meaning and its relationship to form. In thinking about these examples, it is essential to keep in mind that the goal of linguistic theory is to explain the intuitions of native speakers about their language. It is not the goal of linguistic theory to tell people how they *should* understand language. Linguistic theory is concerned not with prescription, but with explanation. People understand utterances within a certain range of possible meanings. Linguists ask what we can infer about the human mind to explain those facts.⁴⁷

The basic premise of linguistic semantics is that there is a relationship between the form of an expression and the ways in which we can understand it.⁴⁸ Linguists try to account for the range of meanings that are possible given a particular form. To take a classic example from the syntactic literature, we know that the subject of a passive sentence, such as *John* in, *John was hit in the face with a basketball*, plays the same semantic role as the object of the corresponding active sentence, *The basketball hit John in the face*. As speakers of English, we know that *John* remains the logical object of *hit* even though it does not appear in object position. Furthermore, we know that we cannot say, **He was hit John in the face with a basketball*, or simply, **Was hit John in the face with a basketball*.⁴⁹

It is tempting to say, "Of course not. Those sentences are not English." But we should not let ourselves off the hook so easily. No one ever told us that the bad sentences are not English. Moreover, if they were English they would be perfectly understandable as meaning, *John was hit in the face with a basketball*. We must have some tacit knowledge that causes us automatically to interpret *John* as the object of *hit* in the grammatical passive sentence, and

47. For a classic statement of these goals, see NOAM CHOMSKY, REFLECTIONS ON LANGUAGE (1975).

48. For a recent text that discusses formal semantics, see IRENE HEIM & ANGELIKA KRATZER, SEMANTICS IN GENERATIVE GRAMMAR (1998).

49. Linguists typically use the "*" as a convention to indicate that a sentence is ungrammatical.

to rule out the other sentences as impossible expressions in English. The question that a linguistic theorist asks is what tacit knowledge speakers of English have that assigns the appropriate interpretations for the grammatical sentences and rules out the ungrammatical ones altogether.⁵⁰

Consider a second example. Adjectives can alternatively be interpreted as modifying an adjacent noun or a series of conjoined nouns. We understand *green eggs and ham* as describing green eggs and green ham ([green [eggs and ham]]) or as describing green eggs and pink ham ([[green eggs] and ham]). Context plays a substantial role in deciding which interpretation we prefer, but both are possible.

Occasionally, legal disputes arise over the scope of an adjective. When jurors are instructed not to be influenced by “mere sentiment, conjecture, . . . prejudice or . . . ,”⁵¹ they can understand “mere” as modifying “sentiment” or as modifying the whole list of nouns. But if “mere” modifies all of the nouns, then the judge has told the jury not to be influenced by mere sentiment or by mere conjecture, or by mere prejudice. The implication is that it is acceptable to be influenced by any of those things in combination with other considerations. But of course it is not acceptable for a jury to be guided by prejudice—whether mere prejudice or otherwise. In *California v. Brown*, the Supreme Court determined that this jury instruction was not ambiguous on its face, and reinstated Brown’s death penalty, which had been overturned by the Supreme Court of California.⁵²

The reinstatement of Brown’s death penalty, to the extent based on linguistic argumentation, was wrong. However, it was not wrong because linguists would disagree with the Court’s analysis of the disputed instruction. Rather, it was wrong because native speakers of English, including those who serve on juries, can easily understand the instruction in more than one way, one of which reflects an unconstitutional instruction. To the extent that linguists can show the availability of some of these interpretations and can demonstrate how they are part of everyday life, they have contributions to make in the resolution of legal disputes.

Finally, linguists also take an interest in the extent to which the structure of language underdetermines meaning, forcing the reader or hearer to use context. Language is not always plain. Linguists attempt to understand when it is not plain, and what the range of available interpretations might be when multiple interpretations are available. For example, we use the genitive-nominative construction to signal possession, as in “John’s book.” However, as the linguist Edwin Williams points out, the semantic relationship between the

50. See PETER W. CULICOVER, *PRINCIPLES AND PARAMETERS* 89-101 (1997), and ROBERT FREIDIN, *FOUNDATIONS OF GENERATIVE SYNTAX* 199-211 (1992), for recent accounts of passive sentences based on the theory of case marking.

51. See *California v. Brown*, 479 U.S. 538, 539, 541-43 (1987), discussed in detail in LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 55-61 (1993).

52. 479 U.S. at 543.

genitive and the nominative that it modifies is entirely indeterminate.⁵³ "John's book" can indeed mean the book that John owns. But it can also mean the book that John wrote, the book that John placed on reserve in the library, the book that John plans to write, the book that John has been eyeing in the bookstore, and so on. This fact about indeterminacy was legally relevant in *West Virginia University Hospitals, Inc. v. Casey*,⁵⁴ a 1991 Supreme Court case interpreting the expression "reasonable attorney's fee" in a statute that requires a state government to reimburse successful civil rights plaintiffs for their litigation costs. The issue in *Casey* was whether a "reasonable attorney's fee" includes expert fees.⁵⁵ The Court concluded that it does not, relying in part on the plain language of the statute.⁵⁶ However, the statute is anything but plain, given Williams's generalization about genitive constructions.⁵⁷ Subsequent to the Court's decision, Congress overrode *Casey* by amending the statute to specify its desire to include a provision for expert fees as part of the Civil Rights Act of 1991.⁵⁸

These examples are not intended to capture the richness of research into meaning. For instance, I have not discussed the fruitful research into word meaning and conceptualization that linguists and cognitive psychologists have conducted over the past twenty-five years.⁵⁹ Legal scholars have drawn on some of this work to demonstrate serious conceptual difficulties with legal concepts. Steven Winter's work has been influential in this regard.⁶⁰ Nor have I discussed work in areas as diverse from each other as formal semantics⁶¹ and pragmatics.⁶² Nonetheless, it should be clear that some legal disputes are disputes over the sorts of interpretive issues with which linguists routinely concern themselves.

53. Edwin S. Williams, *The NP Cycle*, 13 LINGUISTIC INQUIRY 277, 283 (1982).

54. 499 U.S. 83 (1991).

55. *Id.* at 84.

56. *Id.* at 101-02.

57. See *supra* text accompanying note 53.

58. See 42 U.S.C. § 1988(c) (1994).

59. This literature is far too extensive to summarize here. For a good statement of current thought with references to much of the literature, see Edward E. Smith, *Categorization*, in 3 AN INVITATION TO COGNITIVE SCIENCE: THINKING 33 (Edward E. Smith & Daniel N. Osherson eds., 2d ed. 1995).

60. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989). For recent work in this genre, see generally GARY MINDA, *BOYCOTT IN AMERICA* (1999), and Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

61. See, e.g., HEIM & KRATZER, *supra* note 48.

62. See, e.g., GEORGIA M. GREEN, *PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING* (2d ed. 1996).

C. *Why Courts Reject Opinion Testimony on Meaning*

As noted earlier, courts often allow linguists to testify on a variety of linguistic issues that arise in legal contexts.⁶³ However, fundamental disputes arise when parties offer testimony from linguistic experts regarding meaning. Courts have rejected linguists' expert testimony offered to prove the meanings of statutes,⁶⁴ insurance policies,⁶⁵ recorded conversations,⁶⁶ and allegedly libelous statements.⁶⁷ Although this record has never been closely examined, commentators have observed the relative infrequency of court appearances by

63. See *supra* Section II.A.

64. See, e.g., *Motor Vehicle Admin. v. Mohler*, 567 A.2d 929 (Md. 1990); *Body-Rite Repair Co. v. Director, Div. of Taxation*, 446 A.2d 515 (N.J. 1982). *But see* *Pre-Fab Transit Co. v. United States*, 262 F. Supp. 1009 (S.D. Ill. 1967); *State v. Azar*, 535 So. 2d 441 (La. Ct. App. 1988); *Smith v. City of Akron*, Nos. 13010, 13011, 1987 Ohio App. LEXIS 9022, (Ohio Ct. App. Sept. 30, 1987); *State v. Apex Steel & Supply Co.*, 375 N.E.2d 598 (Ind. Ct. App. 1978).

65. See, e.g., *National Auto. & Cas. Ins. Co. v. Stewart*, 272 Cal. Rptr. 625 (Cal. Ct. App. 1990); *Suarez v. Life Ins. Co. of N. Am.*, 254 Cal. Rptr. 377 (Cal. Ct. App. 1988); *Rusk Aviation, Inc. v. Northcott*, 502 N.E.2d 1309 (Ill. App. Ct. 1986).

66. See, e.g., *United States v. Carr*, 965 F.2d 408 (7th Cir. 1992); *United States v. Edelman*, 873 F.2d 791 (5th Cir. 1989); *United States v. Aguon*, 851 F.2d 1158 (9th Cir. 1988); *United States v. Valverde*, 846 F.2d 513 (8th Cir. 1988); *United States v. Kupau*, 781 F.2d 740 (9th Cir. 1986); *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985); *State v. Hill*, 601 So.2d 684 (La. Ct. App. 1992); *State v. Horton*, No. 90-1362-CR, 1991 WL 44626 (Wis. Ct. App. Feb. 27, 1991); *State v. Conway*, 472 A.2d 588 (N.J. Sup. Ct. App. Div. 1984); see also William D. Wallace, Note, *The Admissibility of Expert Testimony on the Discourse Analysis of Recorded Conversations*, 38 U. FLA. L. REV. 69 (1986) (discussing some of these cases and arguing that discourse analysis should be accepted by courts).

67. See *Tilton v. Capital Cities/ABC Inc.*, 938 F. Supp. 751, 753 (N.D. Okla. 1995), *aff'd*, 95 F.3d 32 (10th Cir. 1996) (holding that proffered testimony about the common meaning of ordinary words is within the common knowledge of the average juror); *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1264 (S.D.N.Y. 1989) ("A layman is perfectly capable of reading Cosell's book and comparing it with the articles he claims to have relied on, without the 'help' of a linguistics expert."); *Brueggemeyer v. ABC*, 684 F. Supp. 452, 466 (N.D. Tex. 1988) (considering expert testimony by linguist, but not finding it helpful or convincing); *Seropian v. Forman*, 652 So. 2d 490, 497 (Fla. Dist. Ct. App. 1995) (holding that trial court's allowance of political science professor's testimony about meanings of words was erroneous); *James v. San Jose Mercury News, Inc.*, 20 Cal. Rptr. 2d 890, 900 (Cal. Ct. App. 1993) (stating that although linguistic testimony need not be excluded in principle, it was not helpful in the instant case). *But see* *Fong v. Merena*, 655 P.2d 875 (Haw. 1982) (holding that exclusion of linguist's testimony explaining potentially non-libelous meaning of allegedly defamatory sign was reversible error); *Weller v. ABC*, 1008, 283 Cal. Rptr. 644, 655 (Cal. Ct. App. 1991) (permitting linguist to explain disparities in meaning and stating: "Although the average juror no doubt could also listen to the broadcasts and understand their meaning, he or she is not as well equipped as is a linguist to explain the disparity between the words expressly stated and the implicit meaning conveyed.").

linguists when the issue is semantics.⁶⁸ Courts articulate two reasons for becoming suspicious when linguists are asked to testify about the meanings of legal texts. First, they sometimes hold that linguists are not needed because the members of the jury are just as able as the linguist to interpret ordinary English. Second, in cases where the judge is responsible for deciding meaning as a matter of law, courts sometimes make an institutional argument to the effect that experts have no place in the process. I discuss these critiques in turn.

1. We Have a Jury, So Who Needs a Linguist?

It is not unusual for courts to reject testimony about meaning because it appears to present expert opinion about something that the jury can interpret without the help of experts. The following language from a 1995 federal case rejecting expert linguistic opinion testimony about the meaning of an allegedly libelous statement in a television program is typical:

In the instant case, the Court concludes that [the linguist's] proposed testimony relates to matters within the common knowledge of an average juror. Similar to the courts in [other cases], the Court finds that [the linguist's] testimony would not assist the jurors in reaching a determination as to whether Plaintiff was defamed or placed in a false light by the *PrimeTime Live* broadcasts. In the Court's view, the jury is clearly capable of determining what the average viewer from a one time viewing understood as expressed or implied by the *PrimeTime Live* broadcasts in regard to Plaintiff.⁶⁹

One California appellate court went as far as to hold that it was reversible error for a trial court to permit a linguist to opine about the meaning of an insurance policy.⁷⁰ In contrast, another held that it was reversible error *not* to permit a

68. In her thorough survey of expert testimony by linguists, Judith Levi observes: Not surprisingly, semantic complexity at both the lexical and sentential levels can lead to interpretation disputes in legal contexts.

One would thus imagine that there could be thousands of contract cases every year in which semantic analysis by a trained linguist could be useful to the court. Nevertheless, the most recent bibliographic record of forensic linguistics (Levi, 1994) shows very little in the way of published reports on *semantic* analysis as the focus of a linguist's expert testimony. (It would be reasonable to speculate, however, that many more cases in which a linguist consults on a semantic issue occur each year than those which are written up by that linguist subsequently.)

Levi, *supra* note 8, at 9-10. The reference in the text is to Judith N. Levi, *Language and Law: A Bibliographic Guide to Social Science Research in the U.S.A.* (American Bar Association 1994).

69. *Tilton v. Capital Cities/ABC Inc.*, 938 F. Supp. 751, 753 (N.D. Okla. 1995), *aff'd*, 95 F.3d 32 (10th Cir. 1996).

70. *National Auto. & Cas. Ins. Co. v. Stewart*, 272 Cal. Rptr. 625, 629 (Cal. Ct. App. 1990). The court explained:

linguist to testify in a libel case.⁷¹

An examination of what linguists have to say about meaning helps to explain the courts' equivocation. At the heart of the matter is the fact that linguists generally are not experts in meaning as one might intuitively understand that expression. Rather, linguists are experts in the nature of meaning. That is, they are more experts in the *how* of meaning than in the *what* of meaning. Thus, as a trained linguist, I can opine about what in the structure of English causes the ambiguity in the classic sentence, "Visiting relatives can be annoying." Perhaps more significantly, I believe that I can explain my analysis to those not trained in linguistics. But my understanding of the sentence as ambiguous does not come from my training as a linguist. Rather, it comes from my being a native speaker of English. My linguistic training has in all likelihood made me more sensitive to possible interpretations that others might not notice—a useful skill in many legal settings. It also provides me with tools for investigating the different ways in which particular expressions are used in different contexts, which is sometimes legally relevant. But once I point these out, we should be on equal footing.

None of this is any secret within the linguistics community itself. Noam Chomsky, for example, starts from the perspective that "[a] person who speaks a language has developed a certain system of knowledge, represented somehow in the mind and, ultimately, in the brain in some physical configuration."⁷² Native speakers' intuitions about the set of possible meanings of an utterance and about the grammaticalness or ungrammaticalness of various utterances form part of the underlying data that linguistic theory attempts to explain.

When a linguist takes the witness stand to tell the members of a jury what their intuitions ought to be, that linguist is ordinarily not giving expert testimony at all. Rather, he is reciting the data upon which linguists build theories: the intuitions of native speakers of a language about possible meanings and about grammaticalness. Judges are appropriately skeptical about such offers of proof. However, there is no institutional reason for preventing jurors from hearing the testimony of a linguistic expert if that expert will help to clarify interpretive problems in the jurors' minds. While jurors will not need such assistance in most cases, linguists can play a useful role in disputes in which both parties appear to be taking plausible positions on difficult interpretive issues. Linguists are good at talking about language. From time to time, it will help the jury to hear, for example, just how and why a dispute over a contract or other text might reflect broader linguistic phenomena that the

The interpretation of the terms of the written policy, in the absence of a relevant factual dispute, is typically a question of law. The opinion of a linguist or other expert as to the meaning of the policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person.

Id.

71. Fong v. Merena, 655 P.2d 875, 877 (Haw. 1982).

72. NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE 3 (1988).

jurors use in everyday life.

2. We Have a Judge, So Who Needs a Linguist?

Courts give a second, structural reason for rejecting testimony by linguists about meaning. In rejecting linguistic testimony, courts sometimes argue, as an institutional matter, that legal decisions are for judges and not for linguists. Lawyers and judges might express this position by stating that the linguistic testimony is only "argument" since we are dealing with matters of law, and that argument is the job of lawyers. A California case interpreting an insurance policy exemplifies this position:

The interpretation of the terms of the written policy, in the absence of a relevant factual dispute, is typically a question of law. The opinion of a linguist or other expert as to the meaning of the policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person.⁷³

Similar statements can be found in the context of statutory interpretation,⁷⁴ although courts are more receptive to permitting linguists to assist them in the interpretation of statutes.⁷⁵

Notwithstanding such statements, there is nothing in the distribution of responsibility in the legal system that should preclude in principle such expert testimony from linguists when it is helpful. To the contrary, *Markman*⁷⁶ tells us that courts at times do need experts to help them with interpretive issues. In fact, the Supreme Court itself quoted an article written by Professor Clark Cunningham and a group of three professors of linguistics in several cases involving statutory interpretation.⁷⁷ In reviewing my book, *The Language of Judges*,⁷⁸ Cunningham and his co-authors took issue with my legal realist approach by suggesting that judges might well be receptive to the kinds of linguistic analyses that I criticized the Court for not using.⁷⁹ They presented analyses of several statutory cases then pending before the Court. The Supreme

73. *National Auto. & Cas. Ins. Co.*, 272 Cal. Rptr. at 629; see also *Pietrzak v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 670 N.E.2d 1254 (Ill. App. Ct. 1996).

74. *Motor Vehicle Admin. v. Mohler*, 567 A.2d 929 (Md. 1990); *Body-Rite Repair Co. v. Director, Div. of Taxation*, 446 A.2d 515 (N.J. 1982).

75. See, e.g., *State v. Azar*, 535 So. 2d 441 (3d Cir. 1988); *Pre-Fab Transit Co. v. United States*, 262 F. Supp. 1009 (S.D. Ill. 1967); *Smith v. City of Akron*, Nos. 13010, 13011, 1987 Ohio App. LEXIS 9022 (Ohio Ct. App. Sept. 30, 1987); *State v. Apex Steel & Supply Co.*, 375 N.E.2d 598 (Ind. App. 1978).

76. 517 U.S. 370 (1996). For a discussion of *Markman*, see *supra* Part II.A.

77. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (book review).

78. SOLAN, *supra* note 51.

79. Cunningham et al., *supra* note 77, at 1588.

Court indeed found their linguistic analysis useful, citing the article in several cases.⁸⁰ Perhaps a linguistic analysis of “attorney’s fee” in *West Virginia University Hospitals v. Casey*⁸¹ might have influenced the Court’s decision, or at least might have influenced the majority to abandon its plain language perspective. We never will find out. But there certainly should be no prohibition against a court’s gaining access to that kind of analysis. In that case, it might have helped judges structure their thinking by relating the range of interpretations of “attorney’s fee” to the range of interpretations available for such linguistic structures generally.

This is not to say that courts will always benefit when linguists offer advice about meaning. When linguists are asked to testify about the meanings of words that everyone understands without expert help or to offer opinions about linguistic structures that conflict with our actual understanding, there is no reason for courts to pay much attention. But neither is there any institutional reason for rejecting linguistic analysis when it is helpful. The Supreme Court has turned to linguistics on occasion, and in *Markman* rightly told the courts that expertise may be of value when interpretation is difficult.

III. THE LINGUIST AS TOUR GUIDE

A. *A Model for Expert Testimony on the Meanings of Texts that Are Difficult to Understand*

Does the judicial reaction to expert testimony on meaning suggest that the linguist should stay off the witness stand when the issue is interpretation? For simple statements and short, straightforward discourses, the system really calls for a jury’s intuitions. If a linguist can tell the members of a jury that they should be offended by everyday speech that they understand perfectly well and do not find offensive, then it is hard to see why we need juries at all.

The balance changes, however, when we turn to tricky passages—passages about which the parties argue sensibly in favor of conflicting positions. Jurors have intuitions there, too, but a juror is not obliged to act only on intuitions. If a juror has access both to intuitions and to an explanation for how her intuitions are as they are, she will have more confidence in the rightness of her position.

80. See *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994); *Staples v. United States*, 511 U.S. 600, 623 (1994) (Brennan, J. concurring); *United States v. Granderson*, 511 U.S. 39, 53 (1994); see also Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of “Use a Firearm,”* 73 WASH. U. L.Q. 1159 (1995) (containing statutory analysis which appears to have been followed closely by Justice O’Connor in the Supreme Court’s unanimous opinion in *Bailey v. United States*, 516 U.S. 137 (1995)). Although the Court does not cite the Cunningham and Fillmore article, it was brought to the Court’s attention in the briefs. For relevant history, see Solan, *supra* note 31, at 276 n.160.

81. 499 U.S. 83 (1990); see also *supra* text accompanying notes 54–58.

And if a party can give a juror more confidence in the rightness of her position by converting, at least in part, an intuitive sympathy into a structured understanding, then Rule 702 of the Federal Rules of Evidence says that the party should be allowed to do so.⁸²

The same holds for long transcripts or documents in which the relevant interpretive problems are spread out. Of course the jury can read the document. Of course the jury can listen to the tape. But not all jurors, without help, can focus on a phrase in paragraph 24 of a contract that may have impact on how another word should be interpreted in paragraph 55, some forty pages later, and keep it all together. In fact, not all jurors can read the documents carefully enough even to notice the problem at all. And not all jurors, hearing two people talking about a murder, can reflect on exactly which of the two raised the issue each time the subject arose, and what each person said. In *Markman*, the Supreme Court correctly noted that the technical language of patent claims is difficult to understand without a great deal of practice.⁸³ Experts are needed to assist the judge, who, "from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury."⁸⁴ Our everyday experience tells us that patents are not the only documents that are hard to understand. If someone can explain to the judge or jury what about the document makes it difficult, then the interpretive process will be a more informed and thoughtful one. This can only benefit the legal system.

I do not mean to say that a linguist is the only person who can offer help on these matters. However, I do believe that a linguist is one person who can offer that help, and can do so in a manner that will serve the goal of expert testimony, which is to "assist the trier of fact to understand the evidence."⁸⁵ Linguists are by training skilled at talking about language. When a case requires that the judge or jury be able to talk about language to evaluate the issues fully, then an expert in linguistics can help. In other words, the linguist can serve as a semantic "tour guide."

Note that the linguistic tour guide should not be called to insist upon his "expert" interpretation of a document. Rather, the linguist is being called to assist the trier of fact by explaining how intuitions shared by native speakers about possible meanings have a basis in the structure of our language faculty, and just what that basis seems to be. I personally have testified as an expert linguist, explaining all of this to the trier of fact, and I have not had the

82. "If scientific, technical, or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. For discussion of how the "tour guide" model of expert linguistic testimony fits into recent Supreme Court jurisprudence interpreting Rule 702, see *infra* Part IV.

83. See 517 U.S. 370, 388-89 (1996).

84. *Id.* (quoting *Parker v. Hulme*, 18 F. Cas. 1138, 1140 (1849)).

85. FED. R. EVID. 702.

experience of causing confusion about the difference between my role and that of the trier of fact in coming to an understanding of the text on which I was asked to comment. Rather, at least in my experience, people are capable of understanding how it is that they might be the ultimate interpreters, but still benefit from a technical tour of the text. I say at the outset that if the trier of fact does not find my interpretation to be a plausible one in the first place, then my explanation of why that interpretation is available is obviously beside the point and my testimony should simply be disregarded.

Moreover, Rule 702 imposes a "gatekeeper" role on the judge,⁸⁶ who must determine in advance of the proffered testimony whether to allow it. This determination is very much akin to the judge's role in deciding whether allegedly defamatory statements in a libel case should go to the jury or be dismissed as a matter of law.⁸⁷ This function should be sufficient to shield the jury from bogus statements offered to explain how it is that we understand things in ways that we really do not understand them at all. It should also be sufficient to keep from the jury explanations of simple texts fully within the jury's grasp when a party attempts to call a linguist solely to gain authority for propositions that are clearly intuitive in any event. But the gatekeeper role should not be used to keep out guided tours of legally relevant text that is difficult to understand, and whose interpretation is disputed by two parties with defensible positions.

As with any tour guide, it will be up to those who take the tour to decide how good a guide the linguist really is. If a guide to a bird-watching expedition tells a sophisticated ornithologist that a common robin is actually a rare finch, then that guide should be exposed as a charlatan. Similarly, if a linguist explains to the jury how it is that a passage means *x*, but after careful consideration, the members of the jury find *x* to be a strained reading, or not even a possible reading at all, then the linguistic guide should go the way of our finch expert. Again, the judge can keep out obviously unhelpful analyses through her gatekeeper role.

But guides sometimes teach us a lot. The ornithological guide might really teach us a great deal about how it is that we are able to find our rare bird in one tree instead of another. And the linguist might walk us through a document, pointing out linguistically salient moments that can help us to notice new things, and to hone and to better understand our intuitions as we go along. This is what experts do. If a jury is forthrightly told about the limits of a linguist's expertise, there is no reason why the system should not benefit from this

86. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993) ("[U]nder the Rules the trial judge must ensure that any and all . . . evidence admitted is not only relevant, but reliable."); see also Christopher H. Buckley Jr. & Charles H. Haake, *Separating the Scientist's Wheat From the Charlatan's Chaff: Daubert's Role in Toxic Tort Litigation*, 28 ENVTL. L. REP. 10293 (1998); Shelly Storer, Note, *The Weight Versus Admissibility Dilemma: Daubert's Applicability to a Method or Procedure in a Particular Case*, 1998 U. ILL. L. REV. 231.

87. See *supra* notes 16-17.

knowledge. Judges should recognize this, and permit the testimony of linguistic experts when the testimony is appropriately circumscribed.

Overlap between the jury's everyday, practical knowledge on the one hand and the linguist's specialized knowledge on the other (the overlap is the set of intuitions that they all have as speakers of the language) should not disqualify the linguist. To the contrary, the tour guide model is the system's answer to this problem when it occurs in other contexts. *Weinstein's Federal Evidence* illustrates this point with experts who interpret surveillance photos.⁸⁸ For example, in *United States v. Everett*,⁸⁹ the Second Circuit held that it was not error for the trial court to admit expert testimony on "photogrammetry," or "calculating the heights of objects from their photographic images."⁹⁰ The court rejected the defendant's argument that "the agent's testimony confused the jury, was within the jury's common understanding, and was repetitious and cumulative,"⁹¹ which is precisely the same argument made against testimony by linguists:

Even were the jurors well-equipped to make judgments on height based upon photographs (a doubtful proposition given the distortions produced by the lighting and positioning of the camera), testimony from experts may still be admissible if they have specialized knowledge to bring to bear on the same issue which might be helpful.⁹²

Courts virtually always allow such testimony provided that it is "sufficiently detailed to assist the trier of fact within the meaning of Rule 702,"⁹³ much the same as courts' response to expert linguistic testimony on aural voice identification.⁹⁴

Consistent with the tour guide model, courts do not always allow opinion testimony on the identity of an individual in a photograph.⁹⁵ What makes the expert an expert is her ability to examine the details of the photograph carefully, so that she can reach a more thoughtful, analytical conclusion than could someone less practiced in photographic comparisons. After the expert has shared this knowledge with the jury, the expert and the jury are on equal

88. See 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702[02] (Joseph M. McLaughlin ed., 2d ed. 1999).

89. 825 F.2d 658 (2d Cir. 1987).

90. *Id.* at 662.

91. *Id.*

92. *Id.*

93. *United States v. Barrett*, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983). See *United States v. Alexander*, 816 F.2d 164, 168-69 (5th Cir. 1987) (holding it to be reversible error to deny a defendant the opportunity to use a photographic expert as part of his defense that he was not the individual in the photograph despite superficial similarities that could enhance the likelihood of mistaken identity).

94. See *supra* note 18.

95. See, e.g., *United States v. Snow*, 552 F.2d 165, 168 (6th Cir. 1977).

footing, and opinion testimony is beside the point. This is not to say that ultimate opinions must be excluded as prejudicial in every case. Once a photographic expert has testified about the similarities⁹⁶ or differences between the person in the photograph and the defendant, her opinion will be obvious, whether or not it is stated outright. Nonetheless, the core of the photographic expert's testimony is the tour of the photograph and not the expert's conclusion.

Similarly, a linguist who is asked to examine a tape-recorded conversation between a defendant and another about a murder for hire should be permitted to bring to the jury's attention the fact that the defendant never raised the issue himself and reacted only a few words at a time when the other participant in the tape spoke. The linguist should be permitted to organize the conversation around each instance in which the topic arose, and to show the jury exactly who said what each time. The linguist should also be permitted to tell the jury, based on the literature relating to the structure of discourse, that people confronted with uncomfortable suggestions in conversation frequently make small statements of acknowledgment to let the speaker know that they are listening without committing themselves any more than they must under the circumstances.

But the linguist should not opine as to the intent of a particular party. That is up to the trier of fact.⁹⁷ Since, being human, the linguist draws inferences about intent on the same basis as do other speakers, there is generally no purpose served by such opinions. The failure of lawyers who proffer linguistic experts to recognize this fact is, I believe, the principal reason for courts' rejecting linguistic testimony on meaning, especially in the area of discourse analysis. The linguist is, in contrast, indeed an expert in the kinds of information that we use in drawing such inferences. If a linguist can show where this information appears in a particular corpus that is too large or too complicated for jurors to grasp as a whole without assistance, then the linguist has helped the trier of fact to understand the evidence.

Sometimes, it will be impossible for the expert to avoid stating his opinion on meaning, because the explanation offered will naturally entail the range of meanings being explained. For example, a linguist who explains to the trier of fact in a contract case ambiguities that could lead the parties to disagree about their obligations implies that those ambiguities are really present. In that situation, the jury should be told of the distinction between the linguist's expert analysis on the one hand and his native speaker intuitions on the other. I do not believe that this distinction is the least bit confusing to a jury, and it should serve to put the guiding nature of the testimony in proper perspective.

96. See *United States v. Quinn*, 18 F.3d 1461, 1464 (9th Cir. 1994); *United States v. Barrett*, 703 F.2d 1076, 1080 (9th Cir. 1983).

97. I thus agree with the court's decision in *United States v. Kupau*, 781 F.2d 740, 745 (9th Cir. 1986), to disallow expert linguistic testimony on a defendant's intent based on discourse analysis. It is not clear from the opinion whether some more limited, tour guide testimony would have been appropriate in that case.

This model of expert linguistic testimony about meaning should also put to rest concerns expressed in the scholarly literature about linguistic analysis of legal texts. One such critique by Paul Campos focuses on an alleged failure of linguistics to recognize that meaning is so context-sensitive that it is not predictable in anything like a scientific way.⁹⁸ On this view, meaning is a matter of convention, much of which is outside the scope of any sort of “theory” that linguists or anyone else might offer.⁹⁹ Even if Campos is right (and I think he overstates the situation),¹⁰⁰ we should welcome a linguist who attempts to help people hone their intuitions about what an author intended by focusing on those elements of structure and context of the text that we, as speakers of English, “conventionally” use to make these determinations. If meaning is conventional, it can only help for someone to point out to the trier of fact or to the statutory interpreter the conventions that people typically use. In simple cases, the interpreter should not need to have the conventions pointed out, because they will either be transparent or will apply unselfconsciously in a noncontroversial way. In more complicated cases, such expert assistance can at the very least lead to more thoughtful decision making without privileging the interpretation of the “theorist,” a result that would be offensive to Campos’s position, and rightly so.

On the other side of the coin, Dennis Patterson attacks the mentalistic foundations of linguistics.¹⁰¹ He criticizes linguists for insisting that interpretation is relevant at all.¹⁰² Patterson suggests that what we need are legal theories—not linguistic theories—if we want to understand rules.¹⁰³ Even with a room full of linguists present, if we want to come up with a theory of tort law, sooner or later we will have to stop talking about interpretation *qua* interpretation and start talking about torts: “If the meaning of every utterance cannot be discerned without interpretation, then what is to stop us from asking after the interpretation of the interpretation?”¹⁰⁴

The answer to Patterson’s question is another question: Why should we

98. See Campos, *supra* note 6, at 973.

99. See *id.* at 981-82.

100. Any disagreement I have with Campos in this regard may just be terminological. The problem can be described as follows. Let us agree for the sake of argument that language is simply a matter of convention. What are the conventions? Some of them are phonological conventions. In English, for example, we aspirate syllable-initial unvoiced stops. (Hold your hand to your mouth and say “spit” and “pit.” You will feel a burst of air after the “p” in “pit.”) Our convention now uses the concepts syllable-initial, voiced, aspirated, and stop. Let us further say that many of these “conventions” use a small set of linguistic primitives, and that some of them are universal, in that all languages use them. Our “conventions” now begin to look like a theory of cognitive organization. One can continue to refer to this aspect of linguistic knowledge as conventional, but it is a strange type of convention indeed.

101. See Patterson, *supra* note 4.

102. *Id.* at 1154-55.

103. *Id.* at 1156-57.

104. *Id.*

want to stop asking? If linguists were in the business of handing down definitive interpretations, Patterson would be right: we would want to stop. But linguists are not in such a business. Linguistic theory seeks to describe and explain ordinary psychological processes. To the extent that an understanding of these processes contributes to our ability to ascribe meaning to legal texts, there is no reason for not wanting to understand these processes. The matter is empirical. If we find that guided tours give us some insight into legal texts, we should take the tours even if, as Patterson correctly insists, we will still need substantive legal theories to determine how to resolve whatever uncertainties we discover in the text. But we certainly should not refuse to take the tours in principle because we have decided, contrary to our everyday experience in dealing with linguistic uncertainty, that “interpretation” is not part of the process.¹⁰⁵

B. Some Examples of Good and Bad Guides

Most judicial opinions that deal with the question of expert linguistic testimony on meaning do not contain a very detailed description of the expert testimony that was offered.¹⁰⁶ But a few opinions and a number of accounts by linguists in the linguistic literature do provide more detail.¹⁰⁷

Linguists acting as guides are sometimes helpful to courts faced with tricky contractual or statutory provisions in which both sides seem to take reasonable positions. One trial court accepted a linguist’s analysis of an employee stock option agreement that had to be exercised no later than the “expiration of 30 days from the date of termination of the optionee’s employment *by the company*.”¹⁰⁸ The employee left voluntarily and tried to exercise the option

105. Campos also criticizes Patterson for his antimentalistic approach to meaning. See Campos, *supra* note 6, at 980-81. Again, Campos takes a somewhat stronger position than I do here.

106. One such case, *United States v. Schmidt*, 711 F.2d 595 (5th Cir. 1983), is full of interesting linguistic issues. In *Schmidt*, the defendant was prosecuted for perjury committed during a grand jury investigation of “bid-rigging” practices. *Id.* at 596-97. Schmidt allegedly lied when he answered “no” to questions about whether he had been “asked” to engage in certain bid-rigging practices. *Id.* at 597. But the indictment says only that in reality, he “agreed” to and had engaged in these practices. *Id.* Consequently, the court took the position that agreeing to do something necessarily entails being asked to do it. *Id.* A linguist could have helped to show that this is not so by presenting examples of language that bring the issue into focus. The trial court rejected the linguist’s testimony. *Id.* at 598. The Fifth Circuit called the issue “a close question” and conceded that the proffered testimony was “arguably relevant and admittedly important to defendant’s case.” *Id.* Nonetheless, the court deferred to the trial court judge. *Id.* at 599. Because it is not clear to me how much of the above the linguist was going to bring out, and how much of the linguist’s testimony was being offered about other matters that might have been less important, I cannot evaluate the court’s decision to reject the testimony.

107. Many of these accounts are discussed in Levi, *supra* note 8.

108. *Dodds v. Surety Indem. Co.*, 1 Phila. 611, 1978 Phila. County Rptr. LEXIS 77, at

about one year later.¹⁰⁹ The company rejected the attempt, arguing that "the optionee's employment by the company" had ended more than thirty days ago.¹¹⁰

To me, the contractual language is ambiguous. It can refer either to the company's termination of the optionee's employment, or to the termination of the company's employment of the optionee. The first of these readings means that the employee was fired. The second one does not, at least not necessarily. It is only under the second reading that the employee can violate the contract by exceeding the thirty-day deadline for exercising his options.

The employee called a linguist as an expert witness to testify about the structure of the disputed language. Agentive *by*-phrases, like "by the company,"¹¹¹ are not fixed in position syntactically. Thus, we can say, "the destruction of the city by the enemy," or "the destruction by the enemy of the city."¹¹² In this case, the position of the *by*-phrase creates an ambiguity. Compare the following:

the termination by the company of the optionee's employment
the termination of the optionee's employment by the company

The first example means that the employee was fired. The second is ambiguous. It can mean that the employee was fired ([the termination of the optionee's employment [by the company]]), or it can mean that his employment ended ([the termination [of the optionee's employment by the company]]). The *by*-phrase can be associated either with "termination" or with "employment," creating different readings.

Of course, the trier of fact would have to decide whether she senses this ambiguity, just as the reader of this Article must. But the process of relating the ambiguity in the contract to the transportability of agentive *by*-phrases should clarify in the minds of the readers (as it did for the jury in the case) just why one of the parties might claim to have relied on such an interpretation. Such analysis serves to help the trier of fact understand the evidence, and thus should be admitted. To the extent that it appears that the linguist offered an expert opinion about meaning, a limiting "tour guide" instruction should be given, as I suggested above.¹¹³ If, despite this analysis, a reader (or juror) simply cannot get both readings, then the analysis should be ignored as irrelevant. Without question though, the analysis passes muster under the

*6 (C.P. Ct. Nov. 3, 1978).

109. *Id.* at *4.

110. *Id.* at *5.

111. *See id.*

112. The classic linguistic article on this issue is Noam Chomsky, *Remarks on Nominalizations*, in *READINGS IN ENGLISH TRANSFORMATIONAL GRAMMAR* 184 (R. Jacobs and P. Rosenbaum eds., 1970).

113. *See supra* Part III.A.

court's gatekeeping function under Rule 702.¹¹⁴

Roger Shuy's writings on discourse analysis also provide some good examples. Shuy wrote of an Oklahoma case in which a husband was accused of killing his wife.¹¹⁵ There was very little evidence, circumstantial or otherwise.¹¹⁶ The government's strongest point was what it considered to be inconsistent statements made by the defendant in various statements to the police and in testimony.¹¹⁷

Shuy's contribution to the case was to perform what sociolinguists call a "topic analysis." Shuy sorted the record into instances in which the defendant spoke about particular topics, instances in which the police characterized what the defendant had said about those topics, and instances in which the police admitted not remembering what was said because of the stress of the moment.¹¹⁸ It turned out that some "inconsistent statements" emanated from the 911 operator's misreporting to the police the substance of the defendant's call.¹¹⁹ It also turned out that the police officers investigating the case really did not remember much of what had happened.¹²⁰

Under the tour guide model, Shuy was properly permitted to testify. He was able to organize the various statements that the government argued were so incriminating in such a way that the jury could see them in a light favorable to the defendant.¹²¹ That is a perfectly legitimate way to defend oneself. While Shuy should not have been permitted to opine, or to overstate the inferences that one should draw from his work, it was entirely appropriate to allow him to restructure the evidence and to go through the chronology of each topic that the defense considered relevant in such a way as to bring out his point.

One might argue that a lawyer can do what Shuy was asked to do. Some lawyers can. But those linguists who specialize in the structure of discourse can do this too, and most often can explain their taxonomic decisions more cogently than can lawyers.¹²² Moreover, the linguist is in a good position to

114. See *supra* text accompanying notes 86-87.

115. See SHUY, CONFESSIONS, *supra* note 12, at 17.

116. *Id.* at 18-19.

117. *Id.* at 24-25.

118. *Id.* at 32.

119. *Id.* at 33.

120. *Id.*

121. This was not enough. The defendant was convicted anyway. See *id.* at 17-33.

122. For an excellent description of how linguistically motivated categories might provide a useful means for sorting conversations to make them more easily analyzable by a jury, see Georgia M. Green, *Linguistic Analysis of Conversation as Evidence Regarding the Interpretation of Speech Events*, in LANGUAGE IN THE JUDICIAL PROCESS, *supra* note 11, at 247. For discussion of how categorization by the police can lead jurors to misunderstanding, see Ellen F. Prince, *On the Use of Social Conversation as Evidence in a Court of Law*, in LANGUAGE IN THE JUDICIAL PROCESS, *supra* note 11, at 279. Both of these articles are consistent with the tour guide model. That is, it is possible to bring to the jury's attention aspects of the structure of the discourse without actually opining on what an individual meant

decide which linguistically motivated categories to use in presenting the evidence: topics, speech acts, statements of knowledge, and so on. These analyses meet the Rule 702 requirement of assisting the trier of fact to understand the evidence. By limiting them to guided tours, the risk of juror confusion is diminished as well. By subjecting them to cross-examination, the jurors will be in an even stronger position to draw informed inferences from the evidence.

Linguistic analysis might have been useful to the Supreme Court in interpreting "mere" in *California v. Brown*¹²³ and "attorney's fee" in *West Virginia University Hospitals v. Casey*.¹²⁴ It is not that the Court should have deferred to a linguist's expertise. Rather, the Court might have used linguistic analysis to its advantage in discussing the range of possible interpretations to which the disputed phrases were subject. As noted earlier, the Supreme Court has done so on several occasions in cases involving statutory interpretation¹²⁵ as the result of articles co-authored by a law professor and various linguists.¹²⁶ The articles were written on cases that the Supreme Court had accepted for review and were published quickly so that they might be available to the Court during its evaluation of the cases.¹²⁷ Obviously, that kind of academic activity will occur only sporadically. My argument here is that the legal system should be ready to accept this kind of assistance at earlier stages within the cases themselves when it might help a court deal with thorny statutory problems.

In contrast, the tour guide model suggests that the Fifth Circuit properly affirmed the *exclusion* of linguistic expert testimony where the expert was being offered to opine that a contract killer "was not authorized by any client to contract for [the victim's] murder."¹²⁸ This linguist was not walking a jury through complicated passages. Rather, he was being offered to draw the very inferences from those passages that the jury should be permitted to do. It might have been possible for defense counsel to offer linguistic testimony in keeping with the tour guide model in that case, but it did not happen, and the court acted appropriately.

By the same token, expert linguistic testimony was properly excluded in a libel action brought by the World Boxing Council against the late sports journalist, Howard Cosell.¹²⁹ In a co-authored book, Cosell accused the Council of awarding the most lucrative fights in an improper manner. When the Council sued for libel,¹³⁰ Cosell's defense was that he believed his statements

to say at a particular moment.

123. 479 U.S. 538, 539 (1987); *see also supra* text accompanying note 51-52.

124. 499 U.S. 83, 84 (1990); *see also supra* text accompanying note 54-58.

125. *See supra* note 80.

126. For reference to both the articles and the cases, *see supra* notes 77-80.

127. *See id.*

128. *United States v. Edelman*, 873 F.2d 791, 795 (5th Cir. 1989).

129. *World Boxing Council v. Cosell*, 715 F. Supp. 1259 (S.D.N.Y. 1989).

130. *Id.* at 1260.

to be true, based on adequate research, and that he therefore did not act with the malice required to prove defamation.¹³¹ On motion for summary judgment, Cosell said that sources he interviewed related these improprieties to him, and that he had read of them in various articles, some of which were far harsher on the Council than he was.¹³² In rebuttal, the Council attempted to offer an expert linguist's testimony on Cosell's state of mind when he wrote the book based in part on a comparison of the book and the source articles.¹³³ The court quite properly rejected this offer: "A layman is perfectly capable of reading Cosell's book and comparing it with the articles he claims to have relied on, without the 'help' of a linguistics expert."¹³⁴ For one thing, the expert was acting as an authoritative interpreter rather than as a tour guide. For another, the court was almost certainly right in concluding that the materials were sufficiently straightforward so that no guide was needed at all.

I do not agree with all of the court decisions rejecting the expert testimony of linguists. But I do agree with many of them, particularly those in which the linguist's testimony appears to be offered to give weight to one party's position by having an expert testify that she understands simple English expressions the same way that the party does. Moreover, in cases where the reviewing court has found actual testimony of little help, I frequently find the decision intuitively correct.

In many of these cases, the problem appears to lie in the fact that lawyers at times ask linguists to do too much. They do this either because they do not understand what linguists do or because they do understand what linguists do but choose to take their chances with the rules of evidence anyway. Courts, reacting only to what has been offered, then find the proffered linguistic testimony of no use and reject it. Judges have little patience with parties who attempt to create the illusion of science by asking an expert to testify about the meaning of ordinary language that the judge and jury can understand without any help. This, of course, damages the legal community's perception of linguistics as a field that can be of any help to the courts, making it harder for relevant linguistic evidence to be accepted in subsequent cases. As for the lawyer who offered the linguistic testimony in the first place, he has now moved on to other cases, without much regard for the broader implications of his failed effort to get expert testimony on the meaning of ordinary language before the jury.

IV. THE ADMISSIBILITY OF EXPERT TESTIMONY ON MEANING

In this part of the Article, I will show how expert evidence on meaning fits into recent case law interpreting Rule 702 of the Federal Rules of Evidence.

131. *Id.* at 1261.

132. *Id.* at 1263-64.

133. *Id.* at 1264.

134. *Id.*

Until the Federal Rules of Evidence were adopted in 1975, the predominant standard for the admissibility of expert testimony was the *Frye* test, named for a 1923 United States Court of Appeals decision.¹³⁵ *Frye* involved a court's refusal to admit the results of a defendant's lie detector test (called a "systolic blood pressure deception test") offered through an expert to prove the defendant's veracity in a murder case.¹³⁶ The court of appeals affirmed, articulating a standard for admissibility that was followed routinely for some fifty years, and is still followed today in some jurisdictions. The court held:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*¹³⁷

Despite its wide acceptance, over the years the *Frye* standard faced increasing criticism as being too tough to meet. Science is about controversy, and many significant scientific theories never gain general acceptance. The critics argued that when controversial but arguably helpful expertise is offered, it would make more sense for the trier of fact to hear arguments on both sides and to weigh the evidence, than to be precluded from hearing the evidence at all.¹³⁸ The *Frye* test was ultimately replaced in 1975 by Rule 702 of the then newly adopted Federal Rules of Evidence.¹³⁹

Rule 702 permits two kinds of expert testimony: "opinion" and "otherwise."¹⁴⁰ For both types of expert testimony, the standard is that the expert "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁴¹ On its face, this is a more relaxed standard than *Frye's* requirement of "general acceptance in the particular field in which it belongs."¹⁴²

135. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

136. *Id.* at 1013.

137. *Id.* at 1014 (emphasis added).

138. I recite this history only in the broadest strokes. It is detailed by a number of writers. See, e.g., 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE §§ 1-2.0 to 1-3.4 (1997); *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481 (1995) [hereinafter *Confronting the New Challenges*]; Margaret G. Farrell, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemology and Legal Process*, 15 CARDOZO L. REV. 2183 (1994). The Supreme Court discusses much of this history in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 n.4 (1993).

139. FED. R. EVID. 702. The text of Rule 702 is set forth *supra* note 82.

140. *Id.*

141. *Id.*

142. *Frye*, 293 F. at 1014.

The adoption of Rule 702 did not lead, however, to the immediate demise of the *Frye* standard in the federal courts. Rather, it led to a period of confusion as to just what the standard really should be. While some courts understood the Rule as replacing *Frye*, others continued to abide by the old standard, which was deeply entrenched after all those decades.¹⁴³

This lack of consensus continued until 1993, when the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁴⁴ The issue in *Daubert*, a products liability case, was whether Bendectin, an anti-nausea drug taken during pregnancy, had caused birth defects in the plaintiffs' children.¹⁴⁵ The epidemiological literature said that it did not.¹⁴⁶ The plaintiffs in *Daubert* wanted to call experts who would attack the inferences drawn from the data in the published literature and draw contrary inferences based on animal studies.¹⁴⁷ The trial court rejected the experts on the grounds that their work had not been published and therefore failed to meet the standards of scientific reliability under *Frye*.¹⁴⁸ It thus granted summary judgment to the defendant, Merrell Dow.¹⁴⁹ The court of appeals affirmed the trial court's decision.¹⁵⁰

The Supreme Court reversed, holding that the Federal Rules of Evidence replaced *Frye*.¹⁵¹ The Court interpreted Rule 702 as requiring courts to engage in an inquiry that "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."¹⁵² To be "scientific" the proffered evidence need not be accepted without controversy in the scientific community. Rather, "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science."¹⁵³ The Court did not attempt to state conditions that are both necessary and sufficient to achieve this

143. The Supreme Court summarized this state of affairs in *Daubert*:

Like the question of *Frye*'s merit, the dispute over its survival has divided courts and commentators. Compare, e. g., *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978) (*Frye* is superseded by the Rules of Evidence) . . . , with *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1111, 1115-1116 (5th Cir. 1991) (en banc) (*Frye* and the Rules coexist), cert. denied, 503 U.S. 912 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03], pp. 702-36 to 702-37 (1988) . . . (*Frye* is dead), and M. Graham, Handbook of Federal Evidence § 703.2 (3d ed. 1991) (*Frye* lives). See generally P. Gianelli & E. Imwinkelried, Scientific Evidence § 1-5, at 28-29 (citing authorities).

509 U.S. at 587 n.5.

144. 509 U.S. 579 (1993).

145. *Id.* at 582.

146. *Id.* at 584.

147. *Id.* at 583-84.

148. *Id.* at 584.

149. *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 576 (S.D. Cal. 1989).

150. See *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128 (9th Cir. 1991).

151. *Daubert*, 509 U.S. at 587.

152. *Id.* at 592-93.

153. *Id.* at 590.

level of grounding. It did suggest, however, the following four non-exclusive indicia: whether the theory offered has been tested; whether it has been subjected to peer review and publication; the known rate of error; and whether the theory is generally accepted in the scientific community.¹⁵⁴ As for relevance, the Court stated: "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful."¹⁵⁵

The *Daubert* opinion has been the subject of much discussion, mostly critical.¹⁵⁶ The most obvious complaint is that the standard set for what constitutes scientific knowledge is so general as to give little guidance to trial judges, who have great discretion in any event. The result is that *Daubert* standards are not specific enough to predict the outcomes of all evidentiary disputes.¹⁵⁷ Making a study of the law governing the admissibility of expert testimony even more complicated is the fact that some states have retained the *Frye* test or tests like the *Frye* test.¹⁵⁸ Thus, the case law based on the *Frye* standard continues to be relevant. The choice of standards is particularly significant when a court must determine whether proffered expert testimony is based on a scientific foundation that is sufficiently grounded to render the testimony useful.

One question that *Daubert* left open was its applicability to testimony that was not strictly scientific.¹⁵⁹ One could argue, for example, that while the tour guide testimony espoused here is made possible by the scientific study of language, the testimony itself is more descriptive than theoretical, therefore rendering *Daubert* inapplicable. In *Kumho Tire Co. v. Carmichael*,¹⁶⁰ a products liability case concerning automobile tires, the Supreme Court has

154. *Id.* at 593-94.

155. *Id.* at 591 (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 702[02] at 702-18 (Joseph M. McLaughlin ed., 2d. ed. 1999)).

156. FAIGMAN ET AL., *supra* note 138; *Confronting the New Challenges*, *supra* note 138; Farrell, *supra* note 138.

157. I do not believe that one should place all of the blame for this uncertainty on the Supreme Court. Rule 702 refers to "scientific knowledge." The Supreme Court, by providing a list of non-exclusive, relevant factors, appears to be treating "scientific knowledge" as a Wittgensteinian family resemblance category. See Solan, *supra* note 31, at 236-37 (discussing this issue more generally in connection with the interpretation of statutes). Many concepts (Wittgenstein used "game" as his example), *see id.*, have the property of not being definable as such, but of being characterized by containing a significant subset of features that make up members of the class. This is quite appropriate when it comes to dealing with a concept such as "scientific knowledge." The disagreement at the margin is more a function of the nature of the concept than the failure of the Supreme Court to "get it right" in some Platonic sense.

158. See *People v. Leahy*, 882 P.2d 321, 331 (Cal. 1994); *People v. Wesley*, 633 N.E.2d 451, 454 (N.Y. 1994).

159. See *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1039 (S.D.N.Y. 1995) ("[I]t is unclear whether *Daubert* provides, or was intended to provide, useful guidance for nonscientific expert testimony.").

160. 119 S. Ct. 1167 (1999).

recently rejected this type of argument.¹⁶¹ In affirming the trial court's exclusion of a tire expert whose opinion was offered based on his experience in the industry, the Court held that "*Daubert's* general principles" apply not only to experts offering scientific evidence, but also to experts basing their testimony on experience.¹⁶² While the Court emphasized that particular *Daubert* factors may not all be applicable in a given case, it stressed that the overall approach to evaluating reliability should be followed.¹⁶³ Furthermore, the Court held that the key to evaluating the admissibility of expert evidence is whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."¹⁶⁴ We therefore cannot avoid asking how the kind of expert testimony espoused in this Article stands up to the *Daubert/Kumho Tire* factors.

For the most part, linguistic evidence on meaning fares quite well. Linguistics is a robust field that relies heavily on peer-reviewed journals for dissemination of new work. Furthermore, much of the expert testimony that I discuss in this Article is in keeping with very basic literature in the field. One interesting problem that does arise, however, is what courts should do about proffered testimony based on a theory that is controversial among linguists. That was the issue in *Daubert* and is at the heart of the *Frye* standard.

For example, I discussed in Part II the passive construction in English.¹⁶⁵ Within the linguistic community, lively controversy exists over how passives really work. Are they formed by transforming active sentences into passive ones, or are they formed more or less the way they appear, with other rules telling us how to relate them to corresponding active structures? There are linguists in both camps.¹⁶⁶ However, this controversy is entirely tangential to any testimony that a linguist might give on the range of interpretations available to sentences with passive constructions. Although there is significant debate among linguists about how to account for various phenomena, the resolution of that debate in favor of one side or the other would not affect the expert's testimony on the range of available meanings. This crucial fact distinguishes most linguistic testimony on meaning from the concerns in *Daubert*. Thus, while there may be disagreement as to why we understand a given linguistic structure to have a particular range of meanings, the fact of the range of meanings, which is the core of the tour guide testimony, is not in issue. For this reason, it seems relatively straightforward that linguistic testimony based on the

161. *Id.* at 1175-76.

162. *Id.* at 1173.

163. *Id.* at 1175-76.

164. *Id.* at 1176

165. *See supra* Part II.B.

166. *Compare* FREIDIN, *supra* note 50 (illustrating the transformational approach), with Joan Bresnan, *A Realistic Transformational Grammar*, in LINGUISTIC THEORY AND PSYCHOLOGICAL REALITY 1, 23-36 (Morris Halle et al. eds., 1978) (generating passive constructions lexically).

kinds of analyses that linguists use in the scholarly literature should meet both the Rule 702 and the *Frye* standards. As discussed above, the bigger issue with respect to testimony about meaning is whether such evidence is relevant in light of the jurors' ability to understand English as native speakers.¹⁶⁷

In contrast, cases like *World Boxing Council v. Cosell*,¹⁶⁸ in which parties offer linguists to opine on state of mind, surely will fail both tests. Not only is there no consensus in the literature that such inferences can be made reliably, but there is also no testing of their reliability, at least as far as I know. The tour guide model, then, seems consistent with both the *Frye* approach and the Federal Rules of Evidence.

The Federal Rules of Evidence actually anticipate the need for tour guides in Rule 1006, which permits the use of summary charts when the underlying testimony is too voluminous to be examined conveniently in court.¹⁶⁹ How voluminous must the evidence be to trigger Rule 1006? The Fifth Circuit held that when "the average jury cannot be rationally expected to compile on its own such charts and summaries which would piece together evidence previously admitted and revealing a pattern suggestive of criminal conduct, summary/testimony charts [offered by the prosecution in a criminal case] may be admitted."¹⁷⁰ Obviously, the same standard should apply to criminal defendants and other parties where the charts would reveal a pattern suggestive of events other than criminal conduct.

Rule 1006 is entirely consistent with the notion of the expert linguist who guides the trier of fact through complicated passages. In fact, there are two cases that discuss using charts when the evidence is linguistic in nature. In one case, the court excluded the use of charts because their headings "impermissibly reflected the expert's opinion as to the content of the recorded testimony that had previously been presented to the jury."¹⁷¹ By implication, the charts would have been admitted had the headings served more as maps through lengthy passages than as opinion about the meaning of ordinary language. In the other case, the chart was admitted, but truncated by the court.¹⁷²

In sum, the most important evidentiary issue concerning testimony on meaning is its relevance, which was the issue discussed in Part III of this

167. See *supra* Part II.C.1.

168. 715 F. Supp. 1259 (S.D.N.Y. 1989); see also text accompanying notes 129-34.

169. The rule reads:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

FED. R. EVID. 1006.

170. *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991) (citation omitted).

171. *United States v. Evans*, 910 F.2d 790, 803 (11th Cir. 1990).

172. *United States v. Shields*, No. 90-CV-1044, 1992 WL 43239 at *33-34 (N.D. Ill. Feb. 20, 1992).

Article, in which I proposed the tour guide model. In contrast, there typically should be no significant issue concerning whether linguistic evidence passes either the *Daubert* or *Frye* tests for admissibility.

V. CONCLUSION

Linguists are indeed welcome in the courtroom as experts—but often not as experts on meaning. In *Markman*, the Supreme Court forthrightly admitted that some matters are best kept from the jury because they are technical and difficult to understand.¹⁷³ But our language capacity does not operate in such clearly defined categories. Some, perhaps most, legally relevant texts require no special expertise to interpret. Others are not so difficult that a trier of fact should not interpret them at all, but difficult enough for the trier of fact to benefit from some guidance. It is around this notion that I believe that the admissibility of expert testimony on meaning should be organized. To do this, I have suggested the model of the tour guide. It pays proper respect to the system's key players and at the same time allows the system to benefit, as needed, from a group of experts that may have something to contribute to the fair resolution of legal disputes.

173. See *supra* Part II.A.

