

Book Review

Speaking of Language and Law: Conversations on the Work of Peter Tiersma

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*Speaking of Language and Law:
Conversations on the Work of Peter Tiersma*
Lawrence M. Solan, Janet Ainsworth & Roger Shuy (eds.) (2015)
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According to its editors, this book has two main objectives. The first is to provide readers with scholarly discussions of issues key to the study of Language and Law. To accomplish this goal, an international team of experts was assembled to share their thoughts on 15 seminal publications written by one of the field's undisputed pioneers, the late Peter Tiersma, senior law professor at Loyola Law School in Los Angeles, California. The resulting dialogic exchange was designed to accomplish the second major objective of this publication: paying "tribute to a great scholar" (p. xiii).

Peter Meijes Tiersma graduated from the Boalt Hall School of Law at the University of California, Berkeley as a Doctor of Jurisprudence. This was not, however, his first graduate degree. Before studying law, he had already earned a PhD in Linguistics from the University of California at San Diego. Armed with these dual degrees, Tiersma published successfully within both disciplines. From traditional linguistic articles on the complexities of Frisian phonology to lengthy legal treatises about the intricacies of contractual law, his research earned him cross-disciplinary respect and recognition. However, the ultimate power of Tiersma's scholarly legacy lies in his exceptional ability to analyze the natural intersection between jurisprudence and linguistics; and apply the insights won from one field to the betterment of the other.

An excellent synopsis of Tiersma's interdisciplinary journey appears in the preface: "Right from the beginning of his legal academic career, Peter launched into writing a series of articles on the tacit linguistic assumptions embedded in many legal doctrines.

[...] these articles unpacked legal doctrine, demonstrating which elements correspond to the ways people actually communicate, and which ways they do not.” (p. xii). Of course, Tiersma was by no means the first or the last scholar to explore the critical interplay between language and law. But he was most certainly one of the very best. The impressive breadth and depth of his research are effectively reflected in the scope and richness of the essays assembled in this volume.

Had this ambitious project been led by novices, the number and diversity of these contributions could easily have made for a chaotic collection of essays haphazardly thrown together. However, in the skillful and creative hands of the erudite editorial trio of Professors Lawrence M. Solan (Brooklyn School of Law), Janet Ainsworth (Seattle University School of Law), and Roger W. Shuy (Georgetown University, Emeritus) – all internationally recognized language and law scholars in their own right – this publication adeptly takes readers on a fascinating intellectual voyage. Indeed, the editors are to be congratulated for successfully devising and managing an organizational structure intelligent and robust enough to support the enormous expanse of Tiersma’s publications.

Described briefly, the book is organized into five parts: I.) Legal Language and Its History; II.) The Language of Contracts and Wills; III.) Speech and Action; IV.) Interpreting Laws; and V.) Language and Criminal Justice. In line with the sub-title of the volume, each part or “conversations” begins with original essays written by Tiersma over the course of his career. These discursive initiations are then responded to by no less than 32 different international experts from not only linguistics and law, but also literature, medicine, philosophy, anthropology, history, and psychology.

Part I, Legal Language and its History, for example, provides a fascinating historical and philosophical discussion. The deliberation begins with Tiersma’s concise yet engaging description of how Legal English – itself the product of cultural conquest and linguistic assimilation – has progressively infiltrated domains of jurisprudence around the world, despite continual attempts to hinder, control, or at least shape its influence. According to Tiersma, it is precisely this dynamic history that partially explains why today’s Legal English is such “an odd mixture of very archaic features, on the one hand, and quite innovative usage, on the other” (p. 15). Were Part I to continue along this tried-and-true trajectory, its contribution would have been solid yet unspectacular. Luckily, Part I takes a different course.

In an exciting move of rhetorical savvy, the editors present a series of thought-provoking essays that challenge the notion that “legal language” is essentially different from “everyday language”. Interestingly, the very first to offer a rebuttal is Tiersma himself. In Chapter 4, he systematically deconstructs “legal language” as a myth all onto itself and concludes that “just about all the features attributed to legal language are also characteristic of formal written prose” (p. 28). He further argues that the suggested use of “plain language” to lend legal language translucence is also futile. With varying degrees of sophistication, the five remaining chapters of Part I offer argumentation to buttress these two points. One of the strongest contributions appears in Chapter 8. Here, Edward Finegan reasons that even if legalese could be stripped of all its “wordiness, redundancy, pomposity, and dullness” (p. 47), the legal implicature endemic of courtroom utterances would necessarily re-introduce much if not all of the original complexity, ambiguity, and general persnickiness. According to Dieter Stein’s compact philosophical

essay, the ultimate source of this resilient complexity is not to be found inside the words of legal texts, but within the socialized meanings ascribed those words.

Where Part I explores the historico-philosophical bases of legal language, Part II examines two concrete examples: contracts and wills. To be sure, for all but the most ardent law lover, initially, these topics might seem prohibitively dry, if not mind-numbingly boring. However, readers will be pleasantly surprised by how sincerely interesting this subject-matter can become in the hands of skillful writers. Evidence of this assertion is given again by Tiersma who first details in Chapter 10 how technological advances in information transcription and storage have profoundly affected the legal possibilities for communicating one's last will. Then, in Chapter 11, the discussion shifts from legally permissible forms of wills to legally valid formulations of unilateral contracts. On their surface, these two text-types may seem to have comparatively little in common. However, underlying both are fundamental questions of intent, volition, wish, and commitment – all constructs that directly relate to Speech Act Theory. As Sidney DeLong asserts in Chapter 13, one of the enduring attractions of Tiersma's scholarship amongst linguists has been the degree to which it “demonstrates the theoretical and practical value of speech act theory to an understanding of the relationship between natural language and the law.” (p. 79).

While most of the essays in Part II echo this praise, Jeffrey Lipshaw's contribution does much more. After acknowledging the utility of Speech Act Theory for the analysis of contract formation, he expresses skepticism that “intent can ever be divined or that the never-never land of offer and acceptance doctrine has anything to do with the real mutual intention of the parties, whether or not manifested in performative utterances.” (p. 89). Regardless of whether one agrees with Lipshaw's reasoning, his criticism is remarkably refreshing; and in many ways profoundly honors Tiersma's academic legacy. Although the scholar's life has come to an end, his intellect continues to provoke and stimulate scholarly debate vital to the fields he devoted his life to investigating.

One of the most adroit academic discussions in this collection appears in Part III, Speech and Action. The conversation begins with “The Meaning of Silence in Law”. Then in four academic turns taken by Peter Tiersma, Elisabeth Mertz, Malcolm Coulthard, and Meizhen Liao, the difficulty in negotiating the legal/linguistic meaning(s) of silence is explored across a variety of situations (e.g. police interactions with Mirandized, silent arrestees; product warnings that remain silent on consumer health risks; burning crosses left outside African Americans' homes). From this comparatively broad set of juridical settings, the conversational focus in the second segment of Part III is narrowed to one, single, provocative topic: rape.

Tiersma's work opens the expert discussion with the classic essay “The Language of Consent in Rape Law”. As Tiersma describes, within many legal systems, a prerequisite for establishing a case of rape is evidence that the alleged victim clearly communicated that sexual contact was undesired. Historically, this expectation (be it formally codified or not) has led to the inference that individuals who remained silent before, during, and/or after the sexual act had essentially provided their consent, thereby undermining the legal basis for subsequent claims of rape. As a result of this widespread inference, many a victim has been left re-traumatized, and many a sex-offender has been set free. To help legally right this moral wrong, Tiersma suggests that rape laws allow for a lexico-semantic differentiation commonly made in other, non-sexual, criminal cases; namely,

the legal distinction between “voluntary” and “involuntary consent”. Using Tiersma’s logic, in cases where a person silently submits to sexual intercourse not out of his/her own free will, but “because it seems like the best choice under the circumstances” (p. 138), the court may then infer that the sexual act was consensual but nevertheless involuntary. The question that would then face the court would be whether the defendant knew, or reasonably should have known, that the consent given was involuntary. The advantage of this redefinition of rape, according to Tiersma, is that court deliberations would be shifted away from interpreting the speech acts or mental state of the victim and towards those of the offender.

The scholarly responses to this suggestion are as varied as they are fascinating. Drawing on data taken from the Canadian rape trial, *R. v. Ewanchuk*, 1995, Susan Ehrlich, for example, provides a real-life example of how, just as Tiersma asserted, rape trial adjudicators can and do infer consent on the basis of a complainant’s linguistic and non-linguistic behaviour. By comparison, Tim Grant and Kerrie Spaul contrast Tiersma’s argument with Cowart’s 2004 counter-argument. Although Grant and Spaul agree with their colleagues’ shared assertion that “consent is reactive to another’s plan or proposition”, they conclude that an additional aspect must also be taken into account: consent is not only “an expression of a real choice between permission and refusal of someone else’s plan” but also “requires an external expression of which option has been selected” (p. 147). In cases where an individual has remained silent, they reason “that unexpressed or uncommunicated consent is not consent at all” (p. 147). In Gregory Matoesian’s subsequent turn, the argument is made that, regardless of whether one agrees or disagrees with Tiersma’s proposed rape redefinition, the patriarchal logic inherent to all legal language inescapably taints and perpetually reproduces the hegemonic structures of the phallophilic society-at-large.

Finishing this discursive set is Gail Stygall, who rather unexpectedly applies Tiersma’s re-conceptualization of consent to an entirely different legal context: the enforcement of contracts of adhesion. According to Stygall, in blatant contrast to rape cases, the law “has rarely addressed the question of consumer consent to contract terms. Instead, the consumer’s consent to the terms is assumed or taken for granted” (p. 155). Once the reader adjusts to the initially jarring juxtaposition of consumer rights and sexual violations, Stygall’s contrast becomes both intellectually intriguing and socially unsettling. Although numerous scholars and laypersons alike have taken issue with rape laws that automatically infer agreement when no verbal protest was made, much less public attention given to the potential dangers of the court automatically inferring consumer consent when producers have remained silent on potential liabilities and risks.

Part IV, as the title implies, shifts focus to Interpreting Laws. Here again, two excerpts from Tiersma’s long list legal publications serve as a discursive opener. The first, “Dynamic Statutes”, describes how modern technology has revolutionized the manner in which legal texts may be written. The second offers several precedent-making examples of such “textualization”. The remaining chapters of Part IV provide an eye-opening and at times deeply disturbing description of the real-life consequences of judicial textualization. For example, in Chapter 32, “Talk about Text as Text”, Solan expands upon Tiersma’s work and concludes that, despite their collective repudiation, “judges act as much as lawgivers as the law interpreters they profess to be” [emphasis added] (p. 201). Jeffrey Kaplan’s contribution “Textualization, Textualism, and Purpose-stating pream-

bles” goes further and presents cases where the court’s holding about statutory meaning dramatically exceeded the expected interpretative boundaries. One of Kaplan’s most interesting examples involves the interpretative dispute between Justices Rehnquist and Scalia in *U.S. v. X-Citement Video*. Readers interested in such interpretative disputes are pointed to Frank Ravitch’s contribution, “Philosophical Hermeneutics in the Age of Pixels”. In this tantalizingly short excursion into Gadamerian philosophy and the law, Ravitch examines how the meaning of a legal text is shaped by all those preconceptions and predispositions that each interpreter brings into the interpretative act. Had Ravitch’s chapter been included here as opposed to Part I, it would have offered a highly effective philosophical counterbalance to the other case-driven chapters in Part IV.

Part V Language and Criminal Justice is one of the longest segments of the volume and is divided into two thematic sub-sections. The first contains chapters devoted to the “Crimes of Language”. Not unexpectedly, this sub-section deals with two prototypical “word crimes”: perjury and threat. However, if there is one lesson that Tiersma’s scholarship teaches, it is that much of what appears to be straightforward is anything but. Precisely this point is exemplified in Chapter 35 where Tiersma presents a series of puzzling cases that will leave readers scratching their heads. For instance, in *Bronston v. United States*, a defendant is found guilty of committing perjury because his court testimony, though literally true, was found to constitute a falsehood by implication. A similarly intriguing but far more disturbing example appears in Chapter 36 where Solan and Tiersma recount private emails between two men who disclose their mutual desire to abduct and sexually torture a young girl. For most readers, the men’s correspondence clearly transgresses the line between shared fantasy and concrete plan. The court, however, concluded that the communication did not legally constitute threat. The juxtaposition of such counterintuitive cases with Ainsworth’s brilliant assessment of “how we play games with words in the law” (p. 230) offers readers a profound appreciation of the disjoint between the deceptively simplistic models of human communication and the messy reality of authentic courtroom discourse. Consequently, as Susan Berk-Seligson powerfully demonstrates in her study of Central American organized crime, the potential investigative scope required for interpreting potentially criminal discourse may far exceed the physical realms of the courtroom.

While the first sub-set of chapters in Part V focusses on the interpretation of language produced by lawyers, plaintiffs, and defendants before the court; the second sub-set centers on the language of the court itself. Like any other participant in the criminal justice system, the court has, as Tiersma outlines in Chapter 40, its own perspective and agenda. However, unlike the other participants, the court alone has the authority to control not only what is said, but also how what is said is to be interpreted. Given that the analysis of language is essential to that process of legal interpretation, one might assume that linguists’ expertise would be eagerly and frequently accepted into the court’s deliberations. Based on the experience of law professor and former federal prosecutor, Laurie Levenson, however, just the opposite seems to be the case. According to Levenson, judges generally “consider themselves to be masters of words” who neither require nor welcome outside expertise in discerning linguistic meaning(s) (p. 260).

The deliberative rigidity is not only evident in texts of traditional legislative preambles, but also in the conservative wording of jury instructions – the subject of the sixth and final part of the volume. In many legal systems around the world, judges are not

the only courtroom decision-makers; jurors may also play a role in deciphering and applying legal language. To help compensate for their lay colleagues' lack of legalese expertise, judges may sometimes offer 'jury instructions'. This practice is not without juristic pitfall, however. As Tiersma summarized with his trademark alacrity in Chapter 46 "Capital Instructions": "Poorly instructed jurors will render poor decisions." (p. 281). The last three chapters of Part V are devoted to examining some of the causes and effects of impoverished jury instructions.

According to Bethany Dumas, one reason why judges often fail to effectively communicate with jurors is that "legalese is really a domain-specific social dialect" that is largely foreign to laypeople (p. 287). While difficult, this dialectal impasse could be bridged. Doing so, however, would, as Chris Heffer reminds us in Chapter 48, require addressing the power differential that reinforces and demarcates the linguistic disconnect between judges and jurors. As Tiersma rightly predicted and Nancy Marder confirms, for better or worse, the resulting informational void is increasingly being filled via technology, as frustrated jurors turn to "the Internet and social media to find answers to questions they have about the[ir] instructions." (p. 296).

Although the bipartisan misunderstanding amongst judges and jurors is undeniably critical to how and whether justice is dispensed, the ultimate impact of Part V would have been significantly increased had the overall thematic focus been extended to other courtroom language-users (e.g. defendants and plaintiffs, translators and interpreters, lawyers and transcribers, expert and lay witnesses). This observation is, in many respects, more an accolade to the expansive relevance of Tiersma's work than it is a criticism of the current volume.

That does not mean to say, however, that this reference is without weakness. As with any edited volume, there are a few contributions that would not have been missed had they been omitted. Readers may also at times find themselves wishing that authors had been warned against beginning their contributions with summaries of the very Tiersma publications provided at the start of every part. And, in all fairness, linguists or lawyers with little expertise or interest in issues beyond their immediate specialization may find that the fine-grained arguments make for unusually turgid reading. However, for anyone interested in or passionate about language and the law, this volume will be an indispensable resource that will doubtlessly become an international standard against which others are measured; an intellectually challenging and deeply-inspiring example of true academic excellence... in short, a brilliant and moving reflection of the man who inspired this work: Professor Peter Tiersma.