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BOOK REVIEW: *Forensic Linguistics: An Introduction to Language in the Justice System*, by John Gibbons. Blackwell Publishing, 2003; 309 pp.

Modern legal systems are completely dependent on the written and spoken word; indeed, it would be an interesting philosophical query to ask whether "law" can exist in any meaningful sense apart from language. It is surprising, therefore, that there are not more books on the relation of language and law, or interdisciplinary studies of law and linguistics. Such books are few in number and usually narrow in focus.

John Gibbons has helped fill this gap with *Forensic Linguistics: An Introduction to Language in the Justice System.*[1] Historically, "forensic linguistics" usually described actual courtroom evidence presented by linguistics experts, as in verifying a defendant's authorship of a ransom note or recorded phone threat. Gibbons, however, uses the term more expansively, applying it to the entire field of law & linguistics. His book, therefore, is more comprehensive than the other leading texts in this area (like the well-known books by Lawrence Solan[2] and Peter Tiersma[3]), giving the reader some exposure to

[1] JOHN GIBBONS, FORENSIC LINGUISTICS: AN INTRODUCTION TO LANGUAGE IN THE JUSTICE SYSTEM (2003).
[2] LAWRENCE SOLAN, THE LANGUAGE OF JUDGES (1993).

almost every facet of the discipline. Most readers will find one or two sections more interesting than others, for which more in-depth treatment is available elsewhere. To this extent, the book is successful as an introduction to a large area of knowledge.

Gibbons' book will prove useful to both lawyers and academicians. There are large sections devoted to courtroom presentation,[4] jury instructions,[5] oral testimony by lay witnesses,[6] and examination of written or recorded evidence,[7] all of which practitioners will find enriching. The challenging feature is that linguistics as a science is quite rigorous, requiring some patience – a trait thatbusy, flustered litigators sometimes lack. At the least, judges and practitioners who read Gibbons' work will have a much better grasp of when a linguistics expert could prove helpful or even pivotal in a case. Similarly, academicians and policy makers will enjoy the thought-provoking material on the Plain Language Movement,[8] the dual-audience dilemmafor jury instructions, [9] and the use of language to assert power, position,[10] or one's opponent's disadvantage before the law.[11] Each of these areas begs for more research and development; hopefully Gibbons' overview will spawn further inquiry along these lines.

This essay provides a brief overview of this important new work, explaining in a nutshell the topics covered in Gibbon's chapters. Two issues Gibbons raises are then selected for more in-depth discussion: the "audience design" issues presented by jury

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[3] PETER M. TIERSMA, LEGAL LANGUAGE (1999).
[4] *See* Gibbons, *supra* note 1, at 129-161.
[5] *Id*. at 174-81.
[6] *Id.* at 95-107.
[7] *Id.* at 281-308.
[8] *Id.* at 173.
[9] *Id.* at 177-98.
[10] *Id.* at 74-128.
[11] *Id.* at 200-28.

instructions,[12] and the seldom-discussed problems with our ubiquitous institution of court reporters and trial transcripts.

II. *Language and Law*

Gibbons opens his book with an interesting discussion of the effects of societal literacy on the legal system.[13] Oral legal traditions[14] in traditional cultures are gradually replaced by writing in the form of statutes, judicial decisions, and court motions or filings. Writing transforms the law. Standardization becomes prevalent,[15] producing uniformity across a jurisdiction, as well as more consistent outcomes in legal disputes over time. Greater detail and comprehensiveness become possible as the system depends less on frail human memories. Perhaps most importantly, writing allows planning with the respect to the verbiage used to communicate a rule, on a level usually missing in oral systems.[16] As a professional linguist, Gibbons focuses on the linguistic effects of such planning: one example is "nominalization," where entire ideas (implied subject and verb) become condensed into a single word, like "writing"- or "nominalization," for that

[12] Gibbons mentions audience issues several times. *See id.* at 177-98 (discussing jury instructions and contracts); __ (discussing courtroom arguments). "Audience design" is a newer but growing field of sociolinguistics. *See, e.g.,* Henry Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1133-48 (2003) (applying audience design insights to traditional rules for property transaction recording systems); Herbert H. Clark and Thomas B. Carlson, *Hearers and Speech Acts*, 58 LANGUAGE 2:332-371 (1982); BERNARD JACKSON, MAKING SENSE IN LAW 82-84 (1995); Allan Bell, *Language as Audience Design*, 13 LANG. SOC. 145, 177 (1984). Bell not only surveys a number of studies in this area, but explains how the primary addressee exerts the most influence over the crafting of the communication, while known overhearers have a small effect on the design of the speech or writing. In the context of legal formulations, such as statutes and court opinions, the true addressee- the state- shapes the form of the text.

[13] Gibbons, *supra* note 1, at 1-35.

[14] *Id*. at 1- 15, comparing and contrasting Traditional (oral) law, Roman law, Shari'ah, and Common law.

[15] *Id*. at 23-27.

[16] *Id*. at 19-21.

matter.[17] Other effects include an increased explicitness in the logical structure,[18] more frequent use of passive verbs[19] (which depersonalize a text, making the ideas more abstract and universal). Writing also allows for much longer sentences[20] – too long and complex for comprehension when spoken, but manageable for experienced readers.

I would add to this list some legal effects of the "planning" that the written word offers – more careful selection of words (with ambiguity functioning as a means of delegating discretion or authority to other actors),[21] and forethought about the rule's future consequences. These are essential elements of *stare decisis* and utilitarian jurisprudence or policy making. The availability of verbal planning also encourages the professionalization of legal advocates, with significant educational requirements (i.e., entry barriers), and increasing unintelligibility of the law for laypersons.

Gibbons also emphasizes the important "decontextualization" effect that writing has on the law.[22] Written statements can be read and interpreted by others who are completely removed from the original context, which is rare for the spoken word.[23] This

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[17] *Id.* at 19-20.
[18] *Id.* at 20.
[19] *Id.* at 20-21.
[20] *Id.* at 21.
[21] *See* William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. UNIV. L. Q. 1103 (1995). Eskridge and Levi contend that discretion or decision-making is often delegated through what they call "regulatory variables," linguistic devices in the statute that leave a range of meanings and applications for the one expected to implement the measures. *See id.* at 1107-08 (they eventually shift to the term "regulatory variability" out of fear that readers will imagine a list of magic words that delegate discretion). Certain portions of enabling statutes may be specific and directive, but other provisions contain ambiguity, requiring the authorized official or administrator to exercise discretion to fill in the gaps or flesh out the practical meaning. As Eskridge and Levi observe, "The level of linguistic generality permits an inference about the speaker's willingness to delegate gap-filling discretion to another person (i.e., police officers and judges). The more general the statutory term, the more discretion the directive is implicitly vesting in the implementing official." *Id.* at 1111 (noting that this discretion may be "vested deliberately or inadvertently"). Stronger examples of regulatory variables are "reasonable," "substantial," "good-faith," and the phrase "all deliberate speed." *Id.* at 1113.
[22] Gibbons, *supra* note 1, at 21-23.
[23] Decontextualization is a function of distance as a relative determinate. The relative distance that a writing has from the writing's context will lead to different interpretations, and eventually, in the legal

paragraph, for example, is addressed in part to an unknown audience, who, though never having met the author or having read Gibbon's book, could find the strings of words and phrases intelligible and understandable. This decontextualization fosters the development of ideas like "the rule of law," as opposed to ad-hoc approaches to settling disputes.[24]

A special problem that emerges with a primarily written legal system is the need to transcribe oral testimony or evidence for reference and citation in subsequent legal documents.[25] Transcripts invariably change the content of communication, losing the inflection, emphasis, and other meaningful information signals that are present in speech but difficult to capture in print. Sometimes words reduced to print can communicate a completely different meaning or import when read aloud by another individual in another setting. The issues presented by transcripts are quite problematic and often overlooked, and we shall return to this subject for more deliberation at the end of this essay.

Gibbons moves from this background material to the "pursuit of precision"[26] in legal verbiage, explaining the origins of English legal jargon. Jargon is not always bad; every specialty develops shorthand, shop talk, and technical terms because they allow a more efficient exchange of information. *Miranda* warnings provide an illustration – a standardized speech recited in every case reminds everyone involved of the possible next steps the proceeding may take. Sometimes very archaic terminology is retained simply because its meaning is so well-established. In legal documents, terms with well-settled, narrow meanings reduce the risk of unforeseen interpretations by future readers

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setting, to the idea of autonomous written laws. Legislative drafters attempt to write laws as clearly as possible to combat ambiguity and unintended interpretations, but this endeavor is never entirely successful.

[24] The evolutionary effects of writing on the legal system are presented particularly well in Peter Tiersma's book *Legal Language*, for readers interested in this area. *See generally* TIERSMA, *supra* note 3.

[25] *Id.* at 27-34.

[26] *Id.* at 36-73 (Chapter Two).

(especially judges) and the chances of unintended results.[27] A great deal of law is devoted to the reduction of uncertainty and unintended outcomes.

Some linguistic traditions are true accidents of history. For example, the tendency to use verbal "doublets" in legal English comes directly from the historical period following the Norman Conquest, when official proceedings were conducted in Norman French, while the parties themselves almost invariably spoke Old English, a Germanic tongue. This led to the practice of including both the French and Old English words in every critical phrase in a document; sometimes the Latin term was included as well (especially in ecclesiastical courts), resulting in a triplet.[28] The following are commonplace examples:[29]

- of *sound mind* (OE) and *memory* (L)
- *give* (OE), *devise* (F), and *bequeath* (OE)
- *will* (OE) and *testament* (F/L)
- *goods* (OE) and *chattels* (F)
- *fit* (OE) and *proper* (F)
- *save* (F) and *except* (L)
- *peace* (F) and *quiet*(L)

It is interesting to note that such doublets and triplets occur today in legal contexts that were once the most important in the feudal system – transfers of property and contractual agreements. More modern areas of law, such as environmental regulation or even some areas of criminal law or torts, have fewer occurrences of these linguistic oddities. Doublets and triplets are a relic of a period when our legal system was, of necessity, more bi-lingual.

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[27] *See id.* at 40-42.

[28] *Id.* at 43-44. Gibbons also includes examples from Spanish, without explaining the origin. Hebrew doublets are attributed to poetic aesthetics. *Id.* at 44.

[29] *Id.* at 43. *See also* Tiersma, *supra* note 3, at __-__.

An amusing section of *Forensic Linguistics* is the discussion of quirky police jargon and slang, often consisting of a mixture of "street" terms, numerical code ("Code 10!" or "10-4!"),[30] and over-elaboration, the cumbersome attempt to sound more legal or official through pseudo-precision.[31] "A male suspect exited the vehicle" is a police favorite, where anyone else would say simply say, "A man got out of the car." Over-elaboration is discussed mostly in the chapter entitled "Interaction and Power,"[32] a section that will mostly interest readers who are intrigued by power and subjugations issues generally. Over-elaboration sometimes also characterizes the oral testimony of layperson witnesses (and, unfortunately, a few unbecoming lawyers) who are trying to feign eruditeness or mastery of the confusing legal system around them. To a linguist, the unnecessary verbiage is the earmark of the uninitiated awkwardly attempting to compensate for their lack of verbal prowess.[33]

"Interaction and Power" overlaps with two later chapters, "Language Disadvantage Before the Law"[34] and "Bridging the Gap,"[35] both of which focus on the powerlessness legal language creates for the children, the deaf, the poor, illiterate adults, and (especially) those for whom English is not a native language – most immigrants and many indigenous peoples in the United States, Australia, and Great Britain. Gibbons describes abuses in both the courtroom and the police station, and the growing need for interpreters in legal settings. This is indeed a pressing crisis in Anglophone countries, where English illiteracy creates problems not only in criminal cases, but also in eligibility

[30] Gibbons, *supra* note 1, at 50-51.
[31] *Id.* at 55, 85-88.
[32] *Id.* at 74-128 (Chapter Three).
[33] *Id.* at 91-93.
[34] *Id.* at 200-221 (Chapter Six).
[35] *Id.* at 228-254 (Chapter Seven).

hearings for government benefits, immigration cases, and even the Housing docket in urban areas. A similar concern is the unfortunately commonplace practice of putting non-lawyers "in their place" (i.e., status reduction) by talking over their heads when asking questions to elicit testimony or when dispensing legal advice and information. The downside of these chapters (a third of the book) is that judges or practitioners looking for linguistic help with statutory interpretation or evidence authentication will find few practical tips in these pages, although the social justice considerations are morally compelling.[36]

What judges and litigators *are* likely to find useful and practical, however, are the chapters on "Communication in the Legal System,"[37] "Law on Language,"[38] and "Linguistic Evidence."[39] The latter, which is also the last chapter of the book, is

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[36] *See* Dawn L. Smalls, *Linguistic Profiling*, 15 STAN. L. & POL'Y REV. 579 (2004) (describing the "auditory equivalent of racial profiling").

[37] Gibbons, *supra* note 1, at 162-99 (Chapter Five).

[38] *Id.* at 256-80 (Chapter Eight).

[39] *Id.* at 281-309 (Chapter Nine). Chapter Four, entitled "Telling the Story," seems a bit out of place in the book, with its focus on sociological genres, narratives, and legal events, rather than hard linguistics. In this sense, it is reminiscent of *A THEORY OF THE TRIAL* BY ROBERT BURNS (1999), and readers who like this chapter will probably find Burns' book more thorough and satisfying. For a review of Burns' text, *see* Dru Stevenson, Book Review, *A Theory of the Trial*, 28 CRIM. JUST. REV. 435 (2003).

Gibbons uses this chapter primarily to discuss "genres" of the legal process. These are :the past genre (unresolved dispute or crime), and the present genre (the interplay of actors in the courtroom and legal system). A third "genre" discussed is the law itself, which interacts with the other two "genres," such as in the police interrogation, or the courtroom examination-in-chief. Gibbons discusses the positive and negative aspects associated with genres, as well as the possibility that there are underlying genres with have patterns to help one decipher situations more easily. Case reports are examined in detail, and their importance in law. The case report is constructed of many genres within genres, such as prefatory material, keyword summary, summary of the judgment, references, civil or criminal procedural notes, judgment, issues, decisions, and possibly an obiter or moral to other judges and attorneys. These genres have extreme power that influences subsequent cases and case reports.

Gibbons also examines the "conversation genres" that compose the attorney/client relationship and police/interviewee relationship. Both the attorney and the police officer attempt to establish rapport and follow a formalistic structure in order to extract the information they require. The second genre Gibbons highlights, that of the actors and procedural legal world, is described as the cognitive interview genre. Both formalistic and informal devices are discussed, as well as the effects that such methods create in the party answering the questions. Free-flowing exchanges in interviews, as Gibbons points out, enable better recounting of memory and therefore more factually accurate stories. Jury trials are comprised of three separate genres- the trial itself, or macro-genre, and two secondary genres- the master narrative and the witnesses' narratives. A major difference between normal narratives and legal narratives, according to

Gibbons' treatment of what others often mean by the term "forensic linguistics": the admissibility of linguistic evidence in court,[40] the most acceptable "meaning" of certain words (where words themselves are in dispute in the case),[41] and identification of the true author or speaker of certain verbal evidence.[42] Forged suicide notes, anonymous death threats, ransom letters, purported confessions, and even harassing phone messages can all require the help of a linguist to tie the communication to a given individual. Gibbons discusses several interesting cases where he or his colleagues provided expert testimony that became dispositive of the case. Judges and practitioners in all areas of litigation should be familiar with the principles governing such evidence and the situations where a linguist could contribute significantly to the accuracy of the factual findings.

"Law and Language" (Chapter Eight) is about regulating and restricting speech – crimes of "hate speech," perjury, solicitation offenses (like bribery), threats, and conspiracy. Despite the so-called "act requirement" that supposedly constitutes an essential element of crimes in our legal system (along with the *mens rea* requirement), many crimes are, in fact, committed by mere words. Those listed above (each of which Gibbons discusses) inherently involve words or speech of some sort. Many other crimes can be perpetrated by mere words under the right circumstances,[43] such as larceny by trick, extortion, or even homicides where words are used to induce or cause behavior that puts in the victim in peril.[44] Much of the chapter, however, focuses on vilification crimes (usually called "hate crimes" or "hate speech" in the United States). This is an area

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Gibbons, is that legal narratives attempt to establish blame. The opening argument, examination-in-chief, cross-examination, and closing arguments attempt to portray the attorneys' overall narrative in a formalized manner. Several tactics are discussed by which attorneys try to foster this portrayal.

[40] Gibbons, *supra* note 1, at 282-84 (focused especially expert testimony by linguists).

[41] *Id*. at 288-90.

[42] *Id.* at 296-308.

[43] For more discussion of this area, *see* R. SHUY, LANGUAGE CRIMES (1993).

[44] *See* WAYNE R. LAFAVE, CRIMINAL LAW 207 (3rd ed. 2000).

receiving considerable attention in the academic literature at present, and Gibbon contributes a unique perspective as a linguist.

Apart from forensics or evidentiary issues, the real heartland of the law & linguistics movement is the study of verbal communication issues in the legal system; this is the subject most covered by Lawrence Solan and Peter Tiersma.[45] Gibbon's takes up this subject in earnest in Chapter Five. Although the author subtitles his entire volume "*An Introduction to Language in the Justice System*," this chapter could stand alone as a primer on the field, especially for time-pressed attorneys; it addresses the problem with the overall incomprehensibility of legal language, even for well-trained lawyers.[46] A full page is devoted to the Plain English Movement, which has many zealous advocates[47] and a few lonely detractors (including this author),[48] and cites several examples of codes and legal forms being updated so that they are easier to understand.

Of particular interest to those who frequent the courtroom is a substantial discussion of linguistic problems with jury instructions. Jury instructions are one of the most common grounds for reversal on appeals. Some of the problems that Gibbons lists should be unsurprising, such as the confusing use of technical legal terms, double negatives, endless subordinate clauses, and odd positioning of phrases. These are all linguistic malefactions for which lawyers are notorious. Other items Gibbons identifies as deleterious in jury instructions may be new revelations to many readers. For example,

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[45] *See* SOLAN, *supra* note 2; TIERSMA, *supra* note 3.

[46] Gibbons, *supra* note 1, at __

[47] *See also* SOLAN, *supra* note 2, at 133-138 (1993); TIERSMA, *supra* note 3, at 211-230; Andrew Serafin, *Kicking the Legalese Habit: The SEC's Plain English Disclosure Proposal*, 29 LOY. U. CHI. L.J. 681 (1998); George Hathaway, *The Plain English Movement in the Law*, 50 J. MO. B. 19 (1993); Carol Blast, *Lawyers Should Use Plain Language*, 69 FLA. B.J. 30 (1995); George Gopen,*The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987). It should be noted that articles along these lines abound in state bar journals, and are found only occasionally in academic journals.

[48] *See* Dru Stevenson, *To Whom Is The Law Addressed?* 21 YALE L. & POL'Y REV. 105, 148-50 (2003).

"as to" prepositional phrases (e.g., "if you find the defendant negligent as to his duty….") are so commonplace in legal writing that they become second nature for attorneys, almost unnoticeable, but they are nonetheless confusing and unconventional for laypersons in the jury. "Whiz deletion" is another daily peccadillo for lawyers: condensing phrases in order to omit the words "which" and "that." Gibbons offers the following real-life example of "whiz deletion" from a contract: "The cost of any such arbitration shall be in the discretion of the arbitrator and the award of such arbitration shall be a condition precedent to any legal proceedings in a court of law in respect to any matters hereby agreed to be the subject of arbitration."[49] There are many things wrong with this horrible sentence, but Gibbons draws our attention to "hereby agreed to be the subject of arbitration" – a shortened version of "*which are* hereby agreed to be the subject…" This is whiz deletion – lawyers love it for tightening up documents, including proposed jury instructions, but repeated studies have shown that each occurrence reduces the hearer's comprehension of the text.[50] The most common form of whiz deletion is the use of a partial passive immediately following the modified noun or nominalization, as in "assume the truth of the *answers given*," instead of "*answers that were given.*"[51] Sometimes whiz deletions create problematic ambiguities and misunderstandings: "the man accused," as an interrupted phrase, can mean either "the man lodged an accusation against someone," or (more commonly for lawyers) "the man that is accused of this crime." Questions of witnesses can have two meanings, such as, "How many times did you approach the man on the ground?"[52] This can mean either, "approach the man who

[49] Gibbons, *supra* note 1, at 169.
[50] *Id*. at 194.
[51] *Id*. at 194-95.
[52] *Id*. at 106, paraphrased.

was on the ground," or "crawl toward the man" (i.e., approach, on the ground, the man). Sometimes, the lawyers as a group would lean toward one meaning (the former) and non-lawyers as a group would tend toward a different understanding – one that does not recognize the whiz deletion.

Lawyers and law students are familiar with certain words, like "consideration" in contracts that have completely different meanings from their everyday usage. What is less commonly recognized is that certain grammatical constructions could also have this legal-everyday meaning divide, and be interpreted by most lawyers and mean something different than most non-lawyers would understand from the same phrase. Settings plagued by frequent interruptions (like objections by opposing counsel, or agitated cross-examiners) are more likely to leave many sentences unfinished, exacerbating the ambiguities created by whiz deletions. Gibbons applies similar linguistic problems (whiz deletions as well as other confusing grammar) to statutes, contracts, *Miranda* warnings, and police interrogations.

III. The Two Audience Dilemma

An additional problem with jury instructions (and other legal writing) is what Gibbons calls the "two audience dilemma." Obviously the jury instructions, whether written or spoken, are intended to communicate *something* to the jurors themselves.[53] At the same time, judges know that these instructions are often scrutinized by an appellate court, and may want to tailor the instructions to please the readers at the next echelon. It is very difficult to write effectively for two audiences at the same time, particularly when

[53] Studies have shown, however, that even at its best juror comprehension rarely passes fifty-four percent. Only about twelve percent of the lost comprehension is due to the difficulty of the legal concepts – the remainder is due to poor communication or phrasing in the instructions. *Id.* at ___.

the audiences have vastly different levels of legal training and expertise. Normally an attempt to cater to one audience automatically detracts from the linguistic expectations of the other audience.

Another way of framing the "two audience dilemma" with regards to jury instructions (and here I respectfully depart from Gibbons' description), is to view this as a single audience situation comprised of both "addressees" (the jury) and "bystanders" or "overhearers" (the appellate judges).[54] When one knowingly communicates to both at once, the communication can be crafted to convey different meanings to each group of the audience.[55] The jury knows (sort of) what the judge said; but the appellate tribunal knows what the judge said to the jury – and the judge, in turn, knows they know this. We handle these verbal orchestrations in everyday conversation; we shoot a knowing glance to a colleague or make a comment that is an "inside joke" to some of the bystanders, even though the humor is lost on the addressee.

What we cannot do, however, is convey multiple meanings to multiple addressees at once.[56] The multiple layers of communication that occur in jury instructions can be distinguished by looking at the intended audience and the intended meaning. A helpful

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[54] *See* Clark & Carlson, *supra* note 12, at 344 ("The addressees are the ostensible targets of what is being said. Ordinarily, they are the participants for whom the speaker has the most direct and obvious goals in designing his utterances."). Addressees and other participants are often distinguished "through the content of what is being said." *Id.* at 347.

[55] *See id.* at 342-43:

> If speakers relied solely on conventional linguistic devices to convey what they meant, everyone who knew the language should have equal ability to understand them. But the examples we have offered suggest quite the opposite: when speakers design their utterances, they assign different hearers to different roles; and then they decide how to say what they say on the basis of what they know, believe and suppose. This is a fundamental property of utterances we call AUDIENCE DESIGN. . .The speaker defines who are the addressees, who are audience participants, who are overhearers. . .

[56] Of course, multiple addressees may subjectively misunderstand our intended meaning, but this is inadvertent, not intentional communication. Clark & Carlson note, "A party can address an individual addressee within a group of audience participants without necessarily knowing which individual is the addressee: Charles, to Ann and Barbara: 'Please return my map, whichever of you has it.'" *Id.* at 338.

analytical tool for this process is the concept of *m*-intentions developed by H. P. Grice. Grice used the phrase "m-intentions" to describe the subjective meaning effect a speaker intends to produce in the hearer.[57] For example, the "m-intended effect" of imperative communication is that "the hearer should intend to do something (with of course the ulterior intention on the part of the utterer that the hearer should go on to do the act in question)."[58] The "m-intentions" must be the same for all, even if there is an indeterminate set of possible addressees.

When a form of communication has a composite audience, as do jury instructions, someone must be in the position of the addressee – the recipient of the first level of meaning or *m*-intentions – and the others must be bystanders or overhearers.[59] Suppose, for example, that the jury instruction is (taken from a recent Supreme Court case): "A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder."[60] The first level of meaning for the jury (the *m*-intention) is something like, "You should not convict the defendant of murder if you decide that she actually

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[57] H.P. Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, reprinted in PRAGMATICS 65, 68 (S. Davis, ed. 1991); for an application of Gricean principles to property law, *see* Smith, *supra* note 12, at 1131-33.

[58] *See* Grice, *supra* note 57, at 68.

[59] As Clark and Carlson explain, "Speakers can have m-intentions (that is, how they want to be understood) toward one or more hearers at a time, but not toward a collection of hearers." Clark & Carlson, *supra* note 12, at 357; for a detailed explanation of m-intentions, *see* Grice, *supra* note __, at 68-69. In a similar vein, Professor Witteveen compares the law to a symphony. Just as a symphony has a composer (sender), a score (message), and an orchestra that reads/plays the score (the receiver), statutes have a sender (legislature), message (text), and the receivers (civil servants, judges, enforcement officers, etc.). The most interesting feature of this metaphor is that it helps illustrate that the end recipients are those who interpret and implement the laws (as the orchestra does with the score), rather than the orchestra's patrons attending the concert. Willem J. Witteveen, *Significant, Symbolic, and Symphonic Laws: Communication Through Legislation*, in SEMIOTICS AND LEGISLATION: JURISPRIDENTIAL, INSTITUTIONAL, AND SOCIOLOGICAL PERSPECTIVES 30-48 (Henneke van Schooten, ed. 1999).

[60] Middleton v. McNeil, __ U.S. __, 124 S.Ct. 1830, 1831 (2004) (holding that state appellate court did not unreasonably apply federal law by deciding that jury instruction's single incorrect statement of "imperfect self-defense" standard did not render instruction reasonably likely to have misled jury).

believed she was acting in self defense, even if she was obviously incorrect." The message to the appellate court, on the other hand, is something like, "The judge informed the jury that a person, who kills another person . . ." This is the second level of meaning. It includes or incorporates the first message (the *m*-intention), but contains the additional information that "this was told to the jury."[61]

The distinction is important, because referring to a "two audience dilemma" can create the mistaken impression that judges must simultaneously communicate to two addressees, with somewhat different messages to each. This is not an accurate model. The jury is the addressee here, and their comprehension of a certain meaning is essential; otherwise the statement is a misfire, a betrayal of what linguists call the "felicity conditions." Appellate judges are bystanders or overhearers. The meaning conveyed to them must contain the element "*X* was conveyed to the jury." For the jury, however, there is no need – no felicity conditions – that the given message is also being sent to other judges. This is irrelevant to their receipt of a completed communication. The address to the jury stands on its own; the message to the appellate court requires the presence of a jury as the original addressees.

By way of analogy, think of the communication from a judge to his "audience" as an electrical circuit. When the judge transmits the instructions to the jury, a circuit is complete, and the current can flow to power a lamp. It is irrelevant to their accurate comprehension whether anyone subsequent to them receives or understands the message. Legal "addressees," then, are the members of a audience who can apprehend the intended

[61] *See* supra note 55 and materials quoted therein.

message without regard to other hearers.[62] "Bystanders" or "overhearers" – let us call them "reviewers" in the context of jury instructions – are in receipt of a message that is contingent on another hearer. In fact, it is contingent on another hearer who is *non-contingent*, an "addressee."

The problem of audience design for jury instructions, therefore, is not so much a dual audience dilemma as much as a matter of a single audience comprised of addressees and reviewers. These two groups are not mutually exclusive, when viewed properly. There does not have to be a "dilemma" at all. The dilemma, if present, is that dual but distinct "addressees" (as opposed to audiences) are indeed mutually exclusive, and judges framing their own task in such terms will be unable to perform both communications effectively. Improper framing of the task or goal will force judges to shortchange the jurors' comprehension, or to ignore the reviewers' legitimate expectations.

IV. Audience Design and Statutes

Gibbons, however, avoids using of the phrase "two audience problem" in connection with statutes, although he does not disavow the idea, either.[63] I have argued elsewhere[64] that statutes are inherently addressed to the state itself, not to the citizenry; the citizenry are in the position of bystanders or overhearers (but not necessarily

[62] Of course, addressees also receive a tertiary message, when they are aware of the presence of bystanders/overhearers: "The message just communicated to us as addressees was spoken in the hearing of *Y*." This may, in certain contexts, be important information – as when a person is warned in the presence of an official "witness" to the confrontation, as some employers do when terminating an employee. But it does not change the original, non-contingent message that was communicated to the addressee directly, without circumstantial implications.

[63] *See* Gibbons, *supra* note 1, at 183, discussing the application of the two audience dilemma to contracts. Contracts may present the closest example to dual addressees (the other party and the courts and enforcers of the terms), but our legal rules explicitly favor the original "meaning to the parties themselves," making this more akin to jury instructions. The contract is a communication to the parties themselves about their promises and duties, with a consciousness of the "reviewer"- the courts.

[64] *See generally* Stevenson, *supra* note 48.

"reviewers"). This reversal in audience design is an important distinction between statutes and jury instructions, with important linguistic implications for each. The fact that Gibbons does not apply the two audience dilemma to statutes is actually unusual (but fortunate, in my view). A prevailing school of thought holds that statutes have dual distinct addressees, both citizens and judges;[65] this position was famously advanced in an influential article by Meir Dan-Cohen about "acoustic separation" in criminal statutes.[66] Dan-Cohen argued, as have many subsequent writers, that each criminal statute contains "conduct rules" (portions addressed to the person on the street), and "decisions rules" (portions addressed to judges regarding the proper disposition of cases). These messages, directed to distinct addressees, are supposedly interwoven seamlessly, and sometimes lie latent within the same words or phrases;[67] the two sides of his "acoustic separation"

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[65] *See, e.g.*, Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*," J. LEG. STUD. 257, 261 (1974):

> Rules are addressed to two audiences: people who might violate (or be accused of violating) the law, and participants in the process of determining whether a violation has occurred (judges, lawyers, etc.). the effects of the choice between rule and standard on the first group we shall call effects on "primary behavior," as contrasted with the effects of the choice on law enforcement and other activities in the legal system.

At the same time, elsewhere in their article, Ehrlich and Posner emphasize the importance of specificity in the rules for state actors (like prosecutors and law enforcement), because of the increased efficiency of court proceedings; this fits nicely with the model presented here. *See id*. at 264.

[66] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Dan-Cohen assumes the law is addressed to the citizenry, and seeks to show that it is *also* addressed to the courts. *See id.* at 628 ("We can successfully account for the normative constraints that the law imposes on judicial decision making only if we impute to the legal system an additional relevant norm whose norm-subject is the judge and whose norm-act is the act of judging or imposing judgment."). Confusingly, after positing a theory of statutory audience design, the examples he uses are mostly judge-made rules, not statutes: the common-law excuse of duress, the "act at your own peril," principle, and the maxim that "ignorance of the law is no excuse, but vagueness in the law can be." He also focuses on a practical application for statutory rape, an anomaly in our legal system.

[67] *See id* at 631:

> First, conduct rules and decision rules may often come tightly packaged in undifferentiated mixed pairs. . . [R]adical separation is unnecessary in the real world. As Bentham pointed out, a single statutory provision may simultaneously guide both conduct and decision and may thus function as both a conduct rule and a decision rule. A criminal statute, to use Bentham's example, conveys to the public a normative message that certain behavior should be avoided, coupled with a warning of the sanction that will be applied to those who engage in the prohibited conduct. The same statutory provision also speaks

really become indistinguishable. Under his model, judges must use the entire "conduct rule" portion of the statute to determine how the "rule" applies to the facts.[68] Similarly, criminal defendants argue that the case against them should be dismissed because the state violated the rules prescribing its behavior.[69] Both parties, in other words, must listen to and heed both sides of the "acoustic separation" model, which seems to collapse the distinction and undermine the model's usefulness.[70] From a linguistic perspective, this binary-addressee model is very problematic.

> to judges: it instructs them that, upon ascertaining that an individual has engaged in the forbidden conduct, they should visit upon him the specified sanction.

[68] *See* HANS KELSEN, PURE THEORY 234-35. Kelsen argued that all "application" of the law by judges was, in a technical sense at least, "making" law for the specific arrangement of facts in that case. Interestingly, he asserted that this was true whether the judge was operating within a common-law system or the "code" systems prevalent in Europe and South America. Interestingly, Bentham saw the "law-making" function of common-law courts as very undesirable and pushed for the Continental model to replace it. Kelsen argues in this section that there is not as much practical difference between the two as one might think, or as much as Bentham thought.

[69] For example, even though *Miranda* warnings are clearly a requirement placed upon the police (to the extent that this requirement is still upheld by the courts), this state-actor-addressed rule is so important to citizens that people speak of "Miranda Rights." Where is the "decision rule" and where is the "conduct rule" here? The same rule is perhaps equally important for both parties, albeit in different ways. It is important to police as a direct rule about how to conduct themselves. It is a life-saving rule for many defendants, but only indirectly, to the extent that it invalidates the actions of the arresting officers. Paul Robinson alludes to the same problem:

> [M]any people cannot discern the rules of conduct. And many people who think they know the answers will be wrong. Can one lawfully shoot a basement burglar? Must one help the burglar when he is bleeding and helpless? The rules governing the justification of force in the defense of one's property or premises and the rules defining one's affirmative duties to act are notoriously complex. In other instances, principles of adjudication are drafted in a form that may be appropriate for a rule of conduct but that does not accommodate the complex and multifaceted analyses that determine an actor's blameworthiness for violating a rule of conduct.

PAUL H. ROBINSON, CRIMINAL LAW 63 (1997).

[70] Dan-Cohen is not the first to argue for a dual-addressee model for statutes – he cites important earlier writers like Jeremy Bentham: "To say to the judge, 'Cause to be hanged whoever in due form of law is convicted of stealing,' is, though not a direct, yet as [sic] intelligible a way of intimating to men in general that they must not steal, as to say to them directly, 'Do not steal.'" JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. 17 §2, n.7 § VIII. Bentham's true position on this is confusing; a few paragraphs earlier, he offers the same example to distinguish different addressees of the laws, asserting that different addressees requires two different laws:

> A law confining itself to the creation of an offense, and a law commanding a punishment to be administrated in case of the commission of such an offense, are two distinct laws, not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, "Let no man steal"; and "Let the judge cause whoever is convicted of stealing to be hanged."

The communication of prohibitions to the citizenry is by implication only.[71] Citizens are in the position of bystanders or overhearers, not addressees, of statutes and regulations. Recalling the distinction made above in the discussion about jury instructions, the addressee is the one for whom the communication circuit is complete upon receipt, regardless of receipt by others. With statutes, the communication – the law – is effective and whole when it is in the hands of the judge, prosecutors, and law enforcements officers. It is not very relevant whether the defendant herself is in receipt of the communication, because ignorance of the law is no excuse.[72] On the other hand, the law does not affect the citizens unless and until it is used by the relevant state actors – judge, enforcement agent, etc. To return to my analogy of an electrical circuit, the lawmaker-judge circuit is complete without the defendant involved in the circuit, but the lawmaker-citizen circuit is not complete without the necessary state actors, who must be within the circuit itself.

The so-called "notice requirement" muddies this analysis somewhat. There is a general due process obligation for the state to publish the law in order to preserve its legitimacy – a sense of fairness and justice.[73] The notice requirement, however,

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Id. at Ch. 17 §2, n.7 § VI. Bentham appears to concede that written laws are really statements to officials about whom to punish, when, and how.

[71] Kelsen bluntly states that the influence on a citizen's behavior is indirect. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 61 (1945).

[72] Hans Kelsen claimed that the part of a law directed at the would-be offender is unnecessary and redundant:

> An example: "One shall not steal; if somebody steals, he shall be punished." If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm.

Id.

[73] Bentham was very concerned about this problem, and included "notoriety" (being easily knowable) as one of the seven "Properties or qualities which... a body of laws, designed for all purposes without exception, must be possessed of." *Letters from Jeremy Bentham to the Citizens of the Several American United States*, reprinted in JEREMY BENTHAM, 'LEGISLATOR OF THE WORLD': WRITINGS ON

mandates only constructive notice (a legal fiction) rather than actual notice, because ignorance of the law is no excuse. The notice requirement does not hold up well as a due process defense in court,[74] because even the scantiest evidence of publication or token of notice satisfies the requirement. This is true even where it would have been practically impossible for the defendant to access the information. Given its inapplicability to individual, subjective knowledge, the notice requirement seems to bolster the argument that the citizen is not the addressee. It implies instead that the citizenry as a whole is in

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CODIFICATION, LAW, AND EDUCATION 117-123 (Philip Schofield & Jonathan Harris eds., 1998). In Bentham's view, this meant phrasing the law in clear, easily intelligible language and organizing the sections in such a way as to facilitate memorization by the populace.

[74] For example, consider the seemingly contradictory positions on this point taken by Richard Posner in different contexts. In his treatise on law and economics, he argues that the notice requirement is indispensable. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW at 267 (6th ed. 2003):

> [L]aw must be public. If the content of a law became known only after the events to which it was applicable occurred, the existence of the law could have no effect on the conduct of the parties subject to it. The economic theory of law is a theory of law as deterrence, and a threat that is not communicated cannot deter.

But see Torres v. INS, 144 F.3d 472, 474 (7th Cir. 1998), involving a Guatemalan alien who had entered a sham marriage in order to prolong his legal stay in the United States. When the INS discovered his ruse, it denied his application for permanent residency and, after a series of unsuccessful applications for asylum, ordered him deported. *Id.* at 473. The final deportation order occurred on December 17, 1996; there had been a long-standing rule that deportees could appeal such orders into federal circuit court within ninety days, so Torres did so on March 14, 1997. Unbeknownst to Mr. Torres or his attorney, the time period had been changed pursuant to a rider on the "Nurse's Act," §309(c)(4)(C), that was passed on October 11, 1996. Pub. L. 104-32, 110 Stat. 3657 (amending 8 U.S.C. § 1105a(a)(1). The change made his petition overdue, although under the previous, published rule it would have been timely.

Judge Posner opens his discussion in the case with the statement, "The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed." The deportee truly could not have known that the deadline for filing an immigration petition had suddenly changed, decreasing from ninety to thirty days; the new regulation was effective despite being unavailable in print form or on computer databases such as Westlaw or Lexis-Nexis. Even the appellant's attorney would have discovered only by a minor miracle, it seemed:

> West Publishing Company had not yet published the reform act in or as a supplement to the United State Code Annotated. And a search of the Immigration and Nationality Act oneither Westlaw or Lexis -Nexis (or both), the standard computerized databases for legal research, would not have disclosed that the 90-day provision had been repealed. A search of Westlaw's Public Laws database would have revealed both the Omnibus Consolidated Appropriations Act and the Extension of Stay in the United States for Nurses Act, but neither of these titles would have alerted the reader to the fact that the acts had changed the period within which to seek judicial review of orders under the immigration laws, although the full title of the Nurses Act does imply a connection to immigration.

Nevertheless, the Seventh Circuit ruled *against* the appellant, finding that there was enough token notice to justify application of the rule to an individual who was not aware it had been changed.

the position of a bystander, perhaps a "reviewer" (from the standpoint of public accountability for lawmakers) like the appellate judges are for jury instructions.[75]

V. The Problem with Transcripts

The American legal system, more so than its European or Latin American counterparts, is a mixture of written and oral statement. Especially in litigation, our legal system depends on a large amount of oral evidence (testimony and depositions), oral argumentation, and oral negotiation.

The intersection of these two sides of language in law is found in transcripts; court reporters reduce oral statements to writing.[76] Similarly, police interrogators reduce confessions and statements to writing in the form of signed statements, although these are more pervious to challenge than transcripts. "Reduce" is the operative word. Gibbons offers a description of how drastically the spoken words change when put into a written form that is readable and conventional. He offers the following example:[77]

Version 1: *Linguists' phonetic transcription*[78]

> ɘjʌs(1.5)ω(.3)dəmaˀ n(.3) wɘsdiswɘsdis(.5)hisɛd(.2)dʌənwaridʌ
> ənwaridʌənwari(.5)jənʌaə(.2)ɘisɛi (.2) kitstəumʌtʃʌ psɛt

[75] For more discussion of audience design and the true addressee for statutes, *see generally* Stevenson, *supra* note __, at 116-40; Drury Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. __ (2004) (forthcoming). The pioneering work in this area, applying audience design to legal writings, was done by Henry Smith, *supra* note 12, at 1133-48.

[76] Court reporting is an institution in itself, with its own national associations, codes of ethics, reference literature, and websites

[77] Gibbons, *supra* note 1, at 29-30. It is taken from an interview with an Australian man who migrated from Lebanon in adulthood.

[78] Also used in the *Oxford English Dictionary*.

Version 2: *Standard dictionary phonetic transcription*

> oi ära … ur ,, də man .. wos dis wos dis wos dis .. hi sed .. dōn wuri dōn wuri dōn wuri .. yə nō .. oi sā kits tōō much upset

Version 3: *Accurate wording and conventional spelling*

> I ask, er, the man, what's this, what's this, what's this. He said, don't worry, don't worry, don't worry, you know. I say kids too much upset.

Version 4: *More written*:

> I ask the man, "What's this?" He said, "Don't worry." I say, "Kids too much upset."

Version 5: *Standard written*:

> I asked the man, "What's this?" He said, "Don't worry." I said, "The kids will be very upset."

All of the above are transcriptions of the *same statement*. The first, of course, is the most accurate, but is unreadable to most of us. The progression illustrates that there is really a continuum of transcription approaches, with "accurate" on one end and "readable" on the other. Such a visible continuum also highlights the tension between accuracy and readability – the two are really in conflict, and any place on the continuum represents a trade-off between the two.[79] My concern is that in the legal community we regularly delude ourselves and view court and deposition transcripts as something more than they are. The critical role court reporters play in the legal system is seldom discussed by commentators; Gibbons' insights could ignite some genuine controversy, if widely read.

Our legal system has a strong preference for readability. Readability streamlines review, lowering information and transaction costs; it is more efficient. This preference,

[79] Gibbons, *supra* note 1, at 30-31.

however efficient, has the somewhat troubling effect of pushing transcripts in a direction away from accuracy, imposing standardization through editing by court reporters. This is not to accuse court reporters of dishonesty. They are service providers, and their clients – courts and lawyers – have a clear preference about the level of editing they prefer. Those who prepare training materials for court reporters are aware of the game: "To edit or not to edit is not the question; every reporter does is in greater or less degree."[80]

Some level of editing probably becomes unconscious for reporters over time, given the routine, mechanical nature of their task; many court reporters would probably deny that they are changing anything. Speech-to-text computer software performs a similar task; but the program is designed to match the spoken input to a menu of possible words or phrases with conventional spellings; even the software performs some automatic editing and translation, not pure transcription.

Spoken statements include hesitation, variations in volume to reflect emotion, regional accents (useful in identifying the speaker's background), and repetitions. Gibbons points out that repetitions are crucial for expressing emphasis in speech, but are disfavored in writing. Written repetitions are tedious to read, and few judges or lawyers would complain if a court reporter reduced repeated words or phrases into a single statement. Yet some of the original meaning, or m-intention, is lost in this process.

More troubling is the fact that transcribers do not stay at a fixed position on the accuracy-readability continuum, which further manipulates the impression of the statements. Gibbons observes:

> When judges or lawyers make "grammatical errors," recorders generally correct them, while for witnesses they may not do so. The federal guidelines for reporters notes that they are expected to correct the

[80] *Id.* at 31, citing GUIDELINES OF NATIONAL SHORTHAND REPORTERS ASSOCIATION 26 (1983).

> "ungrammatical and carelessly phrased remarks" of lawyers and judges, while the "testimony of ignorant or illiterate witnesses should be literally rendered."[81]

The result is that the transcripts portray the legal professional as generally eloquent and artful, and the laypersons as inarticulate, even stupid. The differences in linguistic decorum already present from the differences in training and expertise between lawyers and witnesses are exacerbated.

An Example: People v. Caruso

Apart from the power-play issues presented by such recording disparities, judges sometimes infer conclusions about the mental process or mental state of defendants based on the distorted impression created by court reporting. A particularly blatant illustration of this is the famous opinion of Justice Andrews in *People v. Caruso*,[82] a murder trial of an Francesco Caruso, Italian immigrant living in Brooklyn in the 1920's. The defendant's son was deathly ill; the family physician prescribed some medication, which apparently the pharmacist found questionable but dispensed nonetheless. The boy's condition deteriorated in the following hours; the doctor was delayed in arriving at the

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[81] *Id.* at 32. The original source is ENGLISH 26-27, (Professional Education Series, National Shorthand Reporters Association, 1983):

> It is well settled that the reporter should make every effort to eliminate obviously bad grammar from his transcript. The only questions are—whose utterances shall enjoy the privilege of being edited? And how bad must grammar be to warrant the reporter's departing from a strictly verbatim report? The general rule advanced by the advocates of liberal editing by the reporters is that the utterances of the lay witness should be recorded strictly verbatim but that those of judges, lawyers, and expert witnesses (usually professional men, entitled by presumption to a certain elegance of expression) should be polished by the skillful grammarian-reporter.

Professor Anne Walker commented on this section: "[t]he NSRA text on English . . . underwent review of the National Shorthand Reporters Association Books and Tapes Committee in the summer of 1989. The committee, of which I am a member, recommended that the text be neither reprinted nor endorsed in the future." Anne Graffam Walker, *Language at Work in the Law: The Customs, Conventions, and Appellate Consequences of Court Reporting*, in LANGUAGE IN THE JUDICIAL PROCESS (Judith Levi, ed., 1990).

[82] 246 N.Y. 437, 159 N.E. 390 (N.Y. 1927).

house, and the boy's life ebbed away. The physician arrived hours after the boy had died, and was informed by the distraught family that the child had already expired, at which he expressed some sort of shock or disbelief (the defendant indicated he laughed or smirked in disbelief). The father flew at the physician, choking and then stabbing him; at trial he was convicted of premeditated murder.[83] The question on appeal was not the defendant's responsibility for killing the doctor, but whether the attack was premeditated. Andrews, a master draftsman of legal prose, opted in this case to insert a large block of Mr. Caruso's court testimony transcript:

> "About four o'clock in the morning," he testified, "my child was standing up to the bed, and asked me to, he says, 'Papa' he said 'I am dying.' I say that time, I said, 'You don't die.' I said 'I will help you every time.' The same time that child he will be crazy -- look like crazy, that time -- don't want to stay any more inside. All I can do, I keep my child in my arms, and I held him in my arms from four o'clock until eight o'clock in the morning. After eight o'clock in the morning the poor child getting worse -- the poor child in the morning he was" -- (Slight interruption in the testimony while the defendant apparently stops to overcome his emotion.) "The poor child that time, and he was asking me, 'Papa,' he said, 'I want to go and sleep.'
>
> "So I said, 'All right, Giovie, I will put you in the sleep.' I take my Giovie and I put him in the bed, and he started to sleep, to wait until the doctor came, and the doctor he never came. I waited from ten o'clock, the doctor he never came." Then after trying in vain to get in touch with the doctor he sent for an ambulance from a drug store. "When I go home I seen my child is got up to the bed that time, and he says to me, 'Papa, I want to come with you.' I take my child again up in my arms and I make him look to the back yard to the window. He looked around the yard about a couple of minutes and after, when he looked around, he says to me, 'Papa, I want to go to sleep again.'
>
> "I said, 'All right, Giovie, I will put you in the sleep.' I put my child on the bed. About a few seconds my child is on the bed, my child says to me, he says, 'Papa, I want to go to the toilet.'
>
> "I said, 'All right, Giovie, I will take you to the toilet.' So I was trying to pick up the child and make him go to the toilet, when I held that child I felt that leg -- that child started to shake up in my arms. My wife know about better than me -- I cannot see good myself in the face, so she tell what kind of shakes he do, and she has told me, she says, 'Listen, Frank, why, the child has died already.'
>
> "I said, 'All right, you don't cry. No harm, because you make the child scared.' That time I go right away and put the child on the bed. When I put the child, before I put my hand to the pillow, my child said to me, 'Good-bye, Papa, I am going already.'
>
> "So that time I put my hands to my head -- I said, 'That child is dead. I don't know what I

[83] *Id.* at 443.

> am going to do myself now.' That time I never said nothing, because I said, 'Jesus, my child is dead now. Nobody will get their hands on my child." -D'[84]

The sentences capture, or re create, the immigrant's broken English. Notice the reporting of Mr. Caruso's stereotypical, ungrammatical use of the present tense throughout. The sentences are short and chronologically disjointed. The staccato effect, combined with the misused verb tenses, create the impression that Mr. Caruso thinks in a series of flashed scenes. Now I am at my son's bedside. Now I am walking to the bathroom with my child. Now I am standing at the windowsill. Now I am putting the child back in bed. Now I am walking him across the room again.

Of course, this is not necessarily the way Mr. Caruso's mind worked – it is just the way he *talked*. English was not his native language. Exclusive use of the present tense, and short sentence fragments are characteristics of those straining to speak in a second language learned in adulthood (as in the transcription-style examples above). It is quite possible that Mr. Caruso would have expressed himself in longer sentences, with appropriate verb tenses and nuanced increments, had he testified in Italian.

The issue on appeal, however, was whether his attack on the doctor was premeditated: "The real issue was as to state of mind of the defendant . . . whether the killing was the result of premeditation and deliberation. What Caruso in fact believed and thought, what he had in mind at the time of the homicide, is the issue . . ."[85] Justice Andrews was a masterful writer; he could certainly have penned a succinct fact summary without resorting to the inclusion of a transcript excerpt filled with clumsy phrasing. Yet

[84] *Id.* at 441-442.
[85] *Id.* at 443.

Andrews wanted to acquit;[86] he was irritated with the prosecution for introducing irrelevant, inflammatory evidence about the defendant's immigration status and the victim's young widow and children, and suspected that this had unfairly swayed the jury.[87] At least two hours had elapsed between the time the child died and the arrival of the physician, giving Caruso ample time to deliberate and premeditate.[88] Premeditation is a subjective mental activity that the jury must infer from the circumstances, and time to deliberate before a killing is often the basis for this inference. Andrews concedes that "where sufficient time exists very often the circumstances surrounding the homicide justify -- indeed require -- the necessary inference."[89] He justified the reversal, however, on the rule that "[d]eliberation and premeditation imply the capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of these powers, to refrain from doing a wrongful act"[90] – which he did not believe could have been present with Mr. Caruso. He mentions his skepticism about the defendant's mental prowess as a basis for giving credence to his statement at the time of arrest, "before it is likely that a man of Caruso's mentality would be preparing a false defense."[91]

It seems clear, therefore, that Andrews included the transcript excerpt to reinforce the notion that the defendant was too much of a simpleton to be capable of premeditation and deliberation, even if he had the time and the motive. The transcript could not have been better in this regard; the short disjointed sentences create the impression of a person whose mind works minute-to-minute, reacting to the immediate environment, incapable

[86] *Id.* at 440 ("This judgment must be reversed.").
[87] *Id.* at 444.
[88] *Id.* at 445. ("[The jury] considered their verdict for six hours -- twice returning for definitions of homicide and of deliberation and premeditation. Time to deliberate and premeditate there clearly was. Caruso might have done so. In fact, however, did he?").
[89] *Id.*
[90] *Id.* at 446.
[91] *Id.* at 442.

of scheming or complicated planning. The irregular use of present-tense verbs casts doubt on his ability to think in temporal terms, whether past (in recounting the story) or future (the essence of premeditation).

The problem is that this is manipulative, even deceptive, on Justice Andrews' part. We speak differently than we write; some linguists consider written English a different language than spoken English. Most of us would seem less articulate, and therefore less crafty or intelligent, the more accurately a transcript recorded sounds we uttered. In the case of an immigrant, this effect is even more pronounced. Caruso's level of English acquisition was comparable to that of a pre-school child learning his native tongue; recording his speech irregularities creates the (probably) false impression that he had the mind of a child as well. The transcript tells us nothing about the way he thought, or the way he would have explained himself in his own language. Yet the transcript was cited in an opinion where the only issue to resolve was the defendant's mental state, his ability to premeditate a murder over the course of two hours. It is presented to create an impression – falsely – about the defendant's mind. Perhaps Caruso indeed deserved to be acquitted or to be charged with a lesser offense;[92] the point is that the transcripts were misused to achieve this goal, regardless of the merits of the result.

The irony is that transcripts seem so rigorous and empirical, like raw data that is free from interpretation and bias, unlike anything else in the litigation context. Transcripts have an air of neutrality, which makes their misuse even more devious. We have our guard up when a lawyer presents his argument – it is the attorney's job to advocate zealously for his client, and everyone assumes attorneys will spin facts, slant

[92] The case was, in fact, remanded for a new trial to determine if Caruso was guilty of voluntary manslaughter (i.e., a crime of passion) or second-degree murder without premeditation. *Id.* at 446.

evidence, and present everything in as biased a manner as possible. I fear that the parties in the courtroom do not have their guard up in a similar way when reviewing transcript evidence, even though any attempt to reduce speech to text requires interpretation, editing, and the imposition of conventions. Examples abound; I have presented one case where the latent danger of transcripts is particularly easy to see.

VI. Conclusion

The study of law and linguistics is more than dissecting words or parsing verbs. It includes important issues of how language is being used and abused in our legal system. Examining genres of legal writing or noting the specific register of oration used in courtrooms has some value, but there remain larger unsettled issues – such as the true audience for jury instructions and the proper role of transcripts – to which linguistics can contribute. Each of these areas is fertile ground for additional, badly-needed research.

Gibbons starts us on this road. The book would be a superb addition to any serious library, and a useful tool for getting acquainted with an area many find unfamiliar or intimidating. It covers a wider range of topics than the previous books in the field, offering the reader exposure to many areas for further inquiry. *Forensic Linguistics* should prove illuminating for judges and litigators, and helpful for academicians wanting to enrich their approach to research and theory.