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Introduction to “Pragmatics and the law: Speech act theory confronts the First Amendment”

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What happens when a linguist with keen powers of observation regarding language use encounters at first hand the workings of her nation’s legal system? In the case of Robin Lakoff, the result has been some insightful research that expands the discipline known as “applied sociolinguistics” and sheds light on the complexities involved in attempting to carry out justice via the courts. That language plays a key role in legal deliberation has always been recognized. Just how it works, however, and in particular, the extent to which it relies on pragmatic (as opposed to structural or formal) considerations, has only recently begun to be understood, thanks in part to Lakoff’s work.

I remember when Robin first began thinking seriously about language and the law. In the mid-1980s, when I was still a graduate student at the University of California, Berkeley, Robin somehow managed to get selected as a juror for a rape/murder trial. (This was no mean feat, given the anti-intellectual bias of court lawyers, then as now—usually just admitting that you had anything to do with a university was sufficient to get you dismissed from a jury.) She presented her observations about the linguistic and criminal aspects of the trial in chilling detail at an evening colloquium that I attended, and I remember thinking, here was the real thing: linguistic analysis that helped one to understand the compelling mysteries of life,

of crime and punishment. Her next court appearance was in the role of an expert witness, in a 1989 case involving allegations of “false advertising,” and I also went to hear her speak about that experience. It seems she had given the court an introductory lesson in presupposition and implicature, complete with illustrations on a chalkboard brought in specially for the purpose. I inwardly delighted at the thought of a linguist teaching judges and lawyers about pragmatics—maybe linguistics could contribute something practical to the real world after all! In this way, through public presentations (and, later, in published articles as well), Robin transformed her courtroom experiences into linguistic insights.

The paper reprinted here was first delivered in April 1991 as a plenary speech at the annual meeting of the Chicago Linguistic Society. In it, Lakoff draws on various legal interpretations of the First Amendment—the constitutionally guaranteed right to “freedom of speech”—in order to critique speech-act theory. Particularly targeted are two legacies of classical speech-act theorists: a tendency to focus mainly on the speaker’s intent, or *illocutionary force*, to the exclusion of an utterance’s *perlocutionary* effect, and a tendency to treat speech acts as either *performative* or not, and if performative, to treat them all as equally performative, that is, capable of acting on the world with equal force. As Lakoff points out in the article, these tendencies are problematic enough within linguistics itself. But they become even more problematic when confronted with the real-world complexities involved in legislating cases involving the First Amendment.

At the root of the problem is the fact that not all forms of speech are protected. The U.S. government has always reserved the right to limit individual expression when it goes against the common good, as, for example, anti-draft rhetoric during wartime, or when it inflicts harm on others, as in the case of defamation, or “fighting words” whose sole purpose is to provoke conflict. That is, the legal system recognizes that some language use is merely expression, while other language use constitutes action—and language as action is not protected by the First Amendment. The problem is and has always been: How can we tell the difference between the two?

As if this were not difficult enough, there is a second problem: what has harmful effects on others may not have been *intended* as action by the speaker, but rather as simple expression. (Such, for example, is often claimed to be the case in defenses of “racist” and “sexist” language use.) Whose perspective should prevail in determining whether the speaker is guilty of a “language crime,” or whether he was merely exercising his First Amendment right to free speech—that of the speaker or that of the offended party? Lakoff argues insightfully that these are false dichotomies,

both in legal theory and speech-act theory. Rather than classifying every speech act in terms of either action *or* expression, intent *or* effect, she bases her analysis on the notion that language use is gradient and complex. That is, words constitute action (they are performative) to varying degrees, and the effects (perlocutionary force) words have on the hearer are part of the socially situated meaning of an utterance, along with the intentions (illocutionary force) of the speaker.

Lakoff is not the first to critique speech-act theory on the grounds that it falls short of capturing the complexity of actual language use (see, e.g., Stubbs 1983). She is, however, the first to do so with evidence from court cases, and the first, to my knowledge, to address linguistic issues surrounding the First Amendment. In this, she has targeted a key issue of our times—the First Amendment is increasingly evoked in contemporary public discourse in defense of controversial behaviors ranging from flag burning to posting offensive speech on the Internet.

Here I find myself once again inspired by Lakoff's work, this time not as a graduate student seeking reassurance that linguistic research can be socially meaningful, but as a professional linguist interested in how social inequality is perpetuated through language use on the Internet. In the course of my investigations into gender-based asymmetry on the Internet, I have observed a disturbing correlation between the use of misogynistic, harassing language by some individuals (all of whom appear to be male) and explicit appeals to the First Amendment. Lakoff's article provides a useful perspective from which to understand and critique this phenomenon.

I should state first off that defense of misogyny is but one manifestation of a more general civil libertarian-influenced ideology on the Internet in which the concept of "free speech" plays a crucial role. In this view, "free speech" is conceptualized in the strongest possible terms, as absolute and unrestricted. Such an extreme stance is justified, in part, in terms of the noncorporeal nature of computer-mediated interaction, which allegedly ensures that all that takes place is "just text," even when the words imitate actions. It cannot physically harm you (the argument goes), and if you don't like it, you aren't forced to read it—you can delete the messages on your computer screen, or avoid participating in electronic forums containing the kinds of messages you find offensive. Reasoning of this sort was evoked—successfully—in 1995 to defeat the first introduction of the Communications Decency Act in Congress which aimed to restrict the transmission of pornography via computer networks (Herring 1996). (The Act was later amended and passed in 1996.) According to this view, all communication on the Internet is, by technical definition, expression and not action, and therefore is protected by the First Amendment.

This view is at odds with three important points made in Lakoff's article: (1) that words can constitute actions; (2) that the effects of the words on others are relevant in assessing their harmfulness; and (3) that "free speech" is not protected when it harms others. Of course, Lakoff did not write her article with the Internet in mind—perhaps the electronically mediated nature of computer communication takes us beyond such considerations, rendering them obsolete. Some postmodern theorists of cybercommunication would no doubt wish to claim this. But does computer mediation really mean that people don't "do things with words" on the Internet, and that they aren't accountable for their words if others are adversely affected by them?

Revealing counterevidence appears as soon as we set theorizing aside and look at actual computer-mediated interaction. Consider, for example, a much-publicized event that took place on the Internet several years ago involving a "virtual rape" (Dibbell 1993). A male character in a recreational MOO (an abbreviation for "multi-user dungeon, object-oriented," a type of real-time electronic forum) publicly posted graphic descriptions of a violent rape having as its primary object a female character in the forum. The descriptions were clearly performative in structure, making use of immediate present tense verbs in sentences of the type "X does Y to Z." However, the man responsible for the actions of the male character claimed afterward that his words were not intended to be taken seriously; rather, he was experimenting with the freedom to construct different textual personas in the new medium. That is, he appealed to the prevailing libertarian view that "anything goes" on the Internet, because it is "just text." In contrast, other members of the group noted the psychological distress of the woman whose character was raped, and the disruptive effect the event had on the group as a whole, and maintained that the behavior constituted a harmful action. After much discussion, the group voted to deny the man future access to the MOO.

In this case, a community of users decided that computer-mediated words were more than "just text," that their meaning was determined in part from their effects on others, and that because the effects were harmful, the speech was sanctionable. In other words, the virtual community, like courts of law in the physical world, concluded that in order to preserve the common good, some restrictions on absolute free speech were necessary. This outcome is fully consistent with Lakoff's claims, but is inconsistent with the arguments of male cyberspace libertarians, which in light of this and similar incidents, seem not so much "postmodern" as self-serving and pragmatically naive.

Although the group legislative process that transpired in the MOO case was an isolated event, it opens the floodgates, it seems to me, to the same kinds of messy deliberations faced by courts of law in the “real world” regarding the First Amendment. That is, the Internet, too, will ultimately have to confront in a systematic way the fundamental problems identified in Lakoff’s article—expression or action? intent or effect?—and when it does, it would do well to avoid false dichotomies.

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