Book reviews

Anthony G. Amsterdam and Jerome Bruner (2000) *Minding the Law*, Cambridge, MA: Harvard University Press.
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This is an immensely stimulating book resulting from an extraordinary collaboration. Anthony Amsterdam is a renowned Supreme Court litigator and leader in the US campaign against the death penalty. Jerome Bruner is an eminent cognitive and cultural psychologist who has long campaigned for equal opportunities in education. Together they have run a post-graduate colloquium on 'Lawyering Theory' at New York University for the past 10 years. This book is both dedicated to the students and colleagues of the colloquium and is intended primarily for law students and law school teachers. However, the authors also have 'in mind' practising lawyers and those who are simply 'interested in the workings of the law' (p. 17). I shall assume that the average reader of this review will fall into the latter category and will have a keen interest in the *linguistic* workings of the law.

The aim of the book, stated clearly in the authors' 'Invitation to a journey', is 'to explore the ways in which human beings, including judges and lawyers, must inevitably rely upon culturally shaped processes of categorizing, storytelling and persuasion in going about their business' (p. 7). These processes are so familiar to us in our everyday linguistic functioning that they are, as Langacker puts it, cognitively 'off-stage'. While lawyers might be consciously busy with their 'on-stage' legal reasoning, they are equally reliant on, but mostly unaware of, these commonplace lay processes. The object then, in the Formalist Shlovsky's words, is to 'make the familiar strange again' and thus 'bring it back into mind' (p. 1). Indeed, we might see this as a novel reading of the *minding* in the title, along with the more standard and equally appropriate senses of being 'mindful of' and 'watching out for' the law.

As if to show that no lawyers, whatever their status, are immune to lay processes of reasoning, Amsterdam and Bruner choose to focus on a number of written opinions of Justices of the Supreme Court of the United States. Their choice of texts is confined to those representing opinions they consider unjust and they accept the social commitment which any reader aware of their previous work will have come to expect. At the same time, while not standing 'above the battle', they claim that they are not fighting the battle here. Metaphorically this is a little awkward. Clearly battles are raged in the Supreme Court. You can either claim to observe them 'from above' by, for example, comparing majority and dissenting opinions. Or, given the limitations of the metaphor, you must be joining in the battles on one side or the other. According to the authors, the Justices' opinions are not declared to be *unjustifiable* as such, simply *unjustified* within the texts themselves, but this is pure sophistry because the justificatory buck must stop somewhere, and that will always be the weakest point in any argument. I should hasten to add that I stand very firmly on the authors' side of the battle, but their awkwardness on this point is indicative of a general indecisiveness in the book as to whether it is meant as a student textbook or committed monograph.

Although Amsterdam and Bruner are careful to use collective *we* throughout, the book can be quite neatly divided into Brunerian chapters synthesizing cultural psychological theory (2, 4, 6, 8) and Amsterdamian ones analyzing Supreme Court discoursal practice (3, 5, 7, 9). The distinctive style and content of the two sets of chapters leaves one with the impression of embarking on not one but two parallel journeys. Each passes through the three cognitive-cultural stations of categorization (Chapters 2 and 3), narrative (4 and 5) and rhetoric (6 and 7). Yet, until they reach their common destination of reinterpreting the processes as cultural phenomena (8 and 9), they seem to be travelling to some extent on different lines and pulling up at different platforms. Consequently, I shall take each of these intermediate journeys separately and refer to the authorial teams responsible for the two lines as 'Bruner' and 'Amsterdam' respectively.

While the Brunerian line (2, 4, 6) takes us through landscapes which will not be new to seasoned travellers on the Jerome Express, the sights are as breathtaking as ever. Bruner manages like few others to combine breadth of scholarship and depth of understanding with clarity of vision and simple elegance of expression. He can take complex theories in cognitive science and make them seem blissfully straightforward and he manages to combine insights from a wide range of disciplines in the most coherent and convincing of arguments. Bruner enthusiasts will have noted for some time the applicability of his ideas to the legal setting, but this book is the first explicit attempt to do just that.

Our first stop is an essay on 'Categories' in Chapter 2. Categorization was the point of departure for the mid-20th century cognitive revolution

of which Bruner was a leading exponent. The main finding of that revolution was that categories are not found in the world but made in the mind, and the favourite example offered is the way we reduce the millions of colours we can differentiate to just a few dozen colour categories. Here 'Bruner' argues most effectively that categories are made in response to demands not only deriving from this capacity of ours to discriminate many more things than we are able to attend to, but also from constraints on communal living. Thus law defines categorically the boundaries between what is permissible and impermissible in society. The problem is that while law defines category membership in terms of necessary and sufficient conditions, most transgressions in life have fuzzy boundaries and we tend to categorize them not by means of checklists of conditions but by appeal to a prototype conception of, say, the typical murderer.

Categories, then, are not constructed brick by brick but are derived from some more encompassing edifice. While scientific categories find their source in the causal physical accounts of *theory*, 'Bruner' emphasizes that legal categories mostly owe their origins to accounts of purposeful human actions typical of *narrative*. As Chapter 4 on 'Narrative' argues, it is to these stories that we must turn to understand legal categories such as 'informed consent' and 'malice aforethought'. Although 'Bruner' is by no means the first to note that litigation in common-law courts is concerned with fitting competing stories ('facts') to categories ('points') of law, his account of the way categories and narrative interact is highly coherent and wholly convincing.

How lawyers manage to persuade judges and juries that their stories *do* fit the relevant legal categories is the theme of Chapter 6 on 'Rhetorics'. 'Bruner' uses the plural to cover both strategies of persuasion (classical Western rhetoric) and the construction of alternative meaning frames (postmodern rhetoric). However, one gets the feeling that 'he' is perhaps oversynthesizing a little here as we are taken on a whistle-stop tour of the key issues in pragmatics – speech acts, conversational maxims, presupposition, relevance – as well as genre, metaphor, prototype and narrative theory. The result is a somewhat motley assortment of theories and techniques which does not appear to cohere quite as well as the chapters on categories and narrative.

Given the range and depth of Bruner's scholarship, we might have hoped for a little more reference to our own burgeoning field of language and law. Chapter 4, for example, would do well to mention at least Jackson's important interdisciplinary work on legal narrative (1988, 1995). However, it is all too easy to be parochial in these matters and the real value to be gained from reading Bruner is precisely his ability to open up new vistas. A more serious problem is the lack of close cohesion between the 'Bruner' and 'Amsterdam' chapters. Stated simply, the 'Bruner' chapters contain more theory than is necessary for the analyses,

while the 'Amsterdam' chapters include far more detail than is needed to illustrate the theory. Taken as an independent line, though, the 'Bruner' essays are inspiring and make a streamlined and stimulating read.

The 'Amsterdam' line (Chapters 3, 5, 7) takes us into the busy centre of Supreme Court opinion making, where the scenery is certainly fascinating but the going a little harder for the lay traveller. These analytical chapters explore seven key and controversial opinions in the history of the supreme US tribunal. Six of the opinions concern racial equality and it is perhaps surprising that this has not been developed as the unitary theme. Nevertheless the cases are all vital and interesting, to a lay reader as much as a legal expert.

Chapter 3 explores categorising techniques in two opinions: one on segregation and the other concerning paternity. In *Missouri v. Jenkins* (1995) the Court argues that a lower federal court went too far in its efforts to desegregate state schools in Kansas City. 'Amsterdam' argues in a meticulous analysis that the case hinges on Chief Justice Rehnquist's *unjustified* categorization of the Kansas court's orders as an impermissible 'interdistrict remedy'. In *Michael H.*, on the other hand, Justice Scalia upholds Californian law in denying the right of a natural father to claim paternity of his child born to the wife of another man. 'Amsterdam' intriguingly compares Scalia's account of the case to portrayals of adultery in Arthurian legend, thereby showing the close interdependence of narrative and legal categorization.

The two cases in chapter 5 demonstrate quite neatly how narrative can be used rhetorically to support diametrically opposed viewpoints on racial discrimination. In *Prigg v. Pennsylvania* (1842), Justice Story denies a state's right to protect free 'Negroes' against kidnapping by slave snatchers. He does so by making use of an age-old stock narrative designed to show the need for a strong centralized power to offset the danger of impending chaos. One hundred and fifty years later, in *Freeman v. Pitts*, Justice Kennedy uses a narrative designed to show the dangers of *too much* centralized power to allow a Georgia county school board to cease carrying out desegregation measures.

Chapter 7 turns to a topic Amsterdam is deeply involved in politically – the death penalty – to explore the workings of rhetoric in *McCleskey v. Kemp* (1987). Here the social commitment comes across very effectively and the reader is left with two particularly disturbing features of this case: firstly the Court's willingness to ignore rigorous academic research demonstrating a pattern of racial bias in the capital sentences imposed by Georgia state courts; and secondly the fact that the judge who tipped the 5/4 judgment against McCleskey had serious doubts about his decision – but too late for the death row inmate, who had in the meantime been executed. This chapter shows, with mixed results, how a judge can get caught up in his own rhetoric and deceive not only others but himself.

The 'Amsterdam' chapters demonstrate an intimate knowledge of the Supreme Court opinions and are both socially committed and rhetorically powerful, as might be expected from a highly accomplished civil rights litigator. However, it must be pointed out that a number of features might mildly frustrate some of this journal's lay readers.

Firstly, there are a number of factors affecting readability. For those of us unversed in the *opinion* genre, and for discourse analysts in general, it is essential to have copies of the texts to hand. The authors note that they are available electronically, but rather undemocratically point to the fee-paying sites of Westlaw and Lexis (320 n.45): this is unproblematic for lawyers but not for impoverished arts academics. It would be helpful to point out to lay readers that all the texts are available *without subscription* from FindLaw.[1] Having the texts in front of you does not always guarantee that it will be easy to follow the analysis. On taking the authors' 'Cook's Tour' (61) of Rehnquist's categorizing moves in *Missouri v. Jenkins*, I was disappointed to find that the 13 'Scenes' progressed neither linearly nor smoothly around the opinion. Instead, I was shunted from one part of the text to another in no apparent order, which was liable to confuse rather than clarify. Rather than the promised tourist sights, I seemed to be faced with a set of holiday snaps that had fallen out of order. The quantity of endnotes itself is similarly daunting for the non-legal reader. The analysis of *Michael H.* in the main text (77–109), though admirably clear and readable, is accompanied by 30 pages of small-print endnotes, and one must question whether this degree of noting is appropriate in a book aimed at a fairly broad readership. Finally on readability I must note the lack of a bibliography – a mysterious practice apparently common to legal publishing but immensely frustrating when trying to locate a reference.

A second *mild* source of frustration for linguistically minded readers is the lack of what many of us would call systematic linguistic analyses. Most of the analysis falls very much within the literary-critical rather than linguistic tradition and focuses primarily on content rather than expression. This is particularly true of the analyses comparing arguments in the opinions with timeless narratives, as when Kennedy's *Pitts* opinion is likened to the classic story of the Conquering Hero (*Brown v. Board of Education*) Turned Tyrant (*Pitts*). I stress that the frustration is mild here because, just as much literary criticism can be enlightening, so the comparisons made here *are* often illuminating. Moreover, in most cases the analyses do not claim to be linguistic.

The frustration becomes a little stronger, though, when the analyses *do* appear to be making such claims. We are told at one point that the interpretation of *Michael H.* as combat myth is borne out by 'the linguistic microstructure of Justice Scalia's entire opinion' (p. 91). It turns out that the 'analysis' of that *linguistic microstructure* merely consists of listing all the active verbs that have one of the protagonists as their subject. Finite

forms are converted into the simple present and no distinction is made between finite and non-finite forms. Given that the 37 verbs predicating action by Michael alone supposedly show that his 'entire activity consists of *distraining, disputing, and despoiling*' (p. 93) (but what of *lives*?, *stays*?, *visit?*, *act?* and *begets*?), we are meant to conclude that 'This is the recognizable figure of the traditional Satan as a "being without a center, … [one who] has no essence", one who is simply the Adversary, the Opponent, the *diablos*…'. Here, as elsewhere, it is not that the general line of interpretation, in the broadest of terms, is wrong. Indeed, my own quick comparative analysis of verbs in Justice Brennan's dissenting opinion shows that there Michael is portrayed as a rather passive figure being *denied* and *deprived* by Californian law, an apt alter-ego to the *disputing* and *despoiling* figure of the majority opinion. Rather it is that such a grand conclusion is drawn from such thin linguistic evidence. Here the supreme litigator overwhelms the cautious academic, the rhetorician who quotes Delbanco upstages the analyst who adduces more data.

The Brunerian and Amsterdamian lines finally draw together again in the chapters on *culture*. The categories that can be formed, the stories that can be told and the means of persuasion that are likely to work all depend ultimately on the culture in which they are embedded. Chapter 8 describes *Culture* in terms of a *Dialectic* between the canonical versions of how things are and should be, as set down by society's institutions, and 'countervailing visions about what is alternatively possible' (pp. 231–2). This idea of culture is then applied directly in Chapter 9 to the history of American attitudes to segregation over the past 100 years. The dialectic in this particular cultural frame is characterized as one between an American Creed – 'hopeful, open-handed, companionable and idealistic' – and an American Caution – 'suspicious, grasping, clannish and ruthless' (p. 261). In terms of the Supreme Court's opinions, the American Creed reached its apex with the historic *Brown v. Board of Education*, which abolished the doctrine of 'separate but equal' in education. That doctrine was set up by *Plessy v. Ferguson* at the end of the 19th century and Amsterdam and Bruner make a convincing case that decisions made at the end of the 20th century show a return to that American Caution. These two chapters work well together, providing a clear sense of how Supreme Court opinions, like most other things in life, are so dependent on the surrounding culture.

Despite the few frustrations noted above, I do not hesitate to recommend this book. Overall it has three great virtues for those of us interested in language and law. First, it presents Bruner's seminal work in a legal framework. Second, it illuminates the process of Supreme Court opinion making and suggests this as a ripe field for linguistic analysis. Finally, and perhaps most interestingly, in throwing light on the tormented history of racial relations in the United States, it demonstrates how law making at the highest levels is inseparable from the culture in which it is

embedded. Ultimately *Minding the Law* adds an authoritative voice to those of us intent on proving that 'life does not stop at the courthouse steps' (p. 18).

NOTE

1 Transcripts of these opinions are available free of charge at: http://www.findlaw.com/casecode/supreme.html

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Richard A. Lee and George C. Thomas III (eds) (1998) *The Miranda Debate: Law, Justice and Policing*, Boston: Northeastern University Press. xix + 339 pp. ISBN 1555533388 (cloth) $55 (US), £52.50 (UK); ISBN 1555534228 (paper) $24.95 (US), £21.50 (UK)

The book under review is a collection of articles or, more accurately, extracts from articles that have been published revolving around the landmark decision of the US Supreme Court in 1966 in the case of *Miranda v. State of Arizona*. Several of the articles were originally published before the decision, while most of them are post 1966, relating to the *Miranda* decision itself and its aftermath. These articles present research and opinion on the decision, its effects on the legal system, etc., written by academic lawyers, for an audience of lawyers and other workers within the criminal system (for example, the police). The question that we have to ask here is: what is there of interest to linguists? I will not go through all the 24 articles in the four parts of the book, and the separate introductions to each of the parts; some of them are not concerned with linguistic questions. I will relate especially to those that concern the right of silence (see Part I of the References, below, for the necessary information concerning the chapters discussed in this review). Nevertheless, it is interesting and educational once in a while to look at something from a broader perspective, to give a general background to the small area of interest to us.

For example, how many readers know what the case against Miranda was, and what means were taken before 1966 to prevent third-degree treatment of suspects and forced confessions? Here we are not discussing the various possible interpretations of silence, whether it means admission, for example. But from this book we do get a general picture of the Miranda warning, its background, objections to it, and its problematics. In fact, the right of silence is a fairly modern judicial concept. The American legal system originally used English legal concepts, including not simply the right to silence, but the absence of the right of the accused to defend him/herself in court. The defendant was not called upon to give evidence on oath. This was the case in England to the end of the 19th century, and until 1864 in the United States, when the State of Maine was the first of the states to allow sworn testimony from the defendant. What there was in the United States to protect the suspect, and then the defendant in court, was the Bill of Rights, the first set of Amendments to the Constitution passed in 1791 (discussed by Alschuler). Today we are forever talking of the Fifth Amendment, which was passed to prevent suspects from incriminating themselves, but in the past, focus was on the Fourth Amendment, which forbids evidence that was seized illegally to be introduced, and on the Fourteenth Amendment, which deals with confessions. The Fifth Amendment was used only in the *Miranda* decision to protect suspects from police abuse.

Another aspect of the entire issue is the distinction between the right of silence in the courtroom and in the police precinct. No one denies the right of the defendant at trial not to give evidence if s/he so wishes. S/he uses this right in public in front of the court and in front of the press. Why, the pro-*Miranda* argument continues, can this right not be extended backwards to the interrogation room in the police station?

Who and what was Miranda? One of the editors, George Thomas, describes the background of the case. Ernest Miranda was accused of raping one Mary Adams one night in March 1963. In his interrogation, during which he fairly quickly confessed, he was given a preprinted warning of rights, which was in the following form:

> I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement may be used against me.

This sounds familiar, and it has to be remembered that this was written before the *Miranda* warning. His confession – and whether it was a freely given confession – became the centre of the controversy. It may be asked whether the officer read these rights out before Miranda confessed or after. Furthermore, one right already protected by law is the right to counsel. Miranda was not told this. As is well known, the case reached the Earl Warren Supreme Court in 1966, which declared that suspects have to be told of their rights – to silence and to counsel – prior to the interrogation, and if a suspect does start talking, but at any point invokes his or her rights, this has to be respected, and the interrogation must end. What happened to Miranda after the Supreme Court decision? The case was sent for retrial at which he was again convicted, not, of course, on the basis of his inadmissible confession, but on the basis of a confession he made to his girlfriend. So, 'Ernest Miranda served a prison term for the very rape that led to the most controversial ruling in favor of a criminal defendant in the history of the Supreme Court'(Leo and Thomas, Introduction to Part II, p. 87).

Several of the authors in this collection suggest that the law had protected the suspect's rights before the 1966 ruling. After all, the Fourteenth Amendment, enacted in 1868, provides that no state may 'deny any person life, liberty, or property without due process of law'. A state could not refuse a defendant counsel, for example, since this would be a violation of this amendment. In the 1930s there were infamous cases of African Americans tried and convicted of crimes they may not have committed. In *Brown v. Mississippi*, for example, from 1936, the Supreme Court stated that 'prolonged brutal beatings … and the threat of more from beatings if they did not confess, violated the due process right not to be coerced into confessing' (Thomas, p. 12).

If the Bill of Rights and the Fourteenth Amendment did protect the suspect from making an 'involuntary confession', there did not seem to be a reason for the Warren court to deliver their opinion in 1966. But, Thomas argues, the decision has to be seen against the background of the struggle between the states and the federal centre. In the 1950s and 1960s 'the autonomy and sovereignty of states were eroded' (p.15). In 1966, the Court finally took the stand that in all federal and state criminal proceedings, a uniform rule has to be applied. But still the question remains why the Fifth Amendment – against self-incrimination – was invoked when people interpreted the Fourteenth as maintaining that voluntariness was part of due process, and the Sixth Amendment was used to give suspects the right of counsel.

The answer came in Yale Kamisar's essay, published in 1965, of which an extract appears in the book under review. Given that the various constitutional amendments apply to what happens in the courtroom (the 'mansions of American criminal procedure' in his title), there is no reason why the same amendments should not apply in police interrogation ('the gatehouses'). Kamisar saw the use of the privilege against self-incrimination as a new line of thought. This was adopted by the Warren Court in *Miranda* and the other three cases the Court dealt with. The Fifth Amendment was given pride of place.

In Chapter 3, the editors give the text of Chief Justice Warren's *Miranda v. Arizona* opinion, and some extracts from the dissenting opinions. This is followed by an article by David Simon, who takes a 'colloquial' look at the effect of *Miranda.* He 'translates' each of the sentences in the *Miranda* warning into language which a fairly typical suspect would understand. For example, the right to silence – the famous sentence 'You have the absolute right to remain silent' – is explained by Simon in the following way:

> Of course you do. You're a criminal. Criminals always have the right to remain silent. At least once in your miserable life, you spent an hour in front of a television set, listening to this book-'em-Danno routine. You think Joe Friday was lying to you? You think Kojak was making this horseshit up? No way, bunk, we're talking sacred freedoms here, notably your Fifth Fucking Amendment protection against self-incrimination, and hey, it was good enough for Ollie North,[1] so who are you to go incriminating yourself at the first opportunity? Get it straight: A police detective, a man who gets paid government money to put you in prison, is explaining your absolute right to shut up before you say something stupid. (p. 49)

And the other sentences of the warning are given similar translations. Simon sees in the police interrogation nothing that can be said to be truly

voluntary. By 'any standards of human discourse', he maintains, 'a criminal confession can never truly be called voluntary' (p. 56). Detectives are trained to use deceit to extract a confession from the suspect. They, therefore, cannot be seen as cooperative, even though they present themselves to the suspect in such a way. Suspects must suspend Gricean maxims when in the interrogation room. The maxim of quality is violated in the following example, cited by Simon and by other authors in the book under review. Several Detroit detectives deceitfully used a photocopying machine as a polygraphic device. They prepared three sheets of paper; the first and second had the word 'Truth' written on them, while the third had 'Lie' on it. The suspect was led into the room and told to put his hands on the machine, without realizing that it was not a lie detector but a simple photocopier. On asking the man's name and given the answer, the police would press the copy button and the suspect's answer was given as truth. The same with residence. But then came the third question:

> And did you or did you not kill Tater, shooting him down like a dog in the 1200 block of North Durham Street? (p.61)

The suspect answers in the negative, but the machine says 'Lie'. He confesses.

Unlike the assumed status of participants in an everyday conversation, the suspect and detective are not equals. In fact, the former is powerless, in much the same way as Robin Lakoff describes the powerless strategies of women in their language (1975). This is also discussed in Janet Ainsworth's article in the book under review. As well as women's speech, Ainsworth also mentions the powerlessness of African-American spoken language. Instead of demanding to see a lawyer, a suspect (male or female) would probably say something like: 'Maybe I should get a lawyer.' The detective would then respond, 'Maybe you should. But why would you need a lawyer if you don't have anything to do with this [crime]?' (p.59). It can be said in court that the suspect did not ask to see a lawyer, only brought up the possibility. We know from the considerable amount of work on natural conversation, and even from Grice's Cooperative Principle, that what the suspect was doing was asking for a lawyer.

Patrick Malone argues that instead of the initial fear that the *Miranda* warning would reduce considerably the number of confessions, the ruling 'turns out to be the police officer's friend … sanctifying the very practices it was meant to end' (p.76). On the basis of previous research, continues Malone, next 'to the warning label on cigarette packs, Miranda is the most widely ignored piece of official advice in our society'. Research has shown, and this is presented in other chapters in the book, that a mere 0.07 percent of confessions have been thrown out of court because of *Miranda*.[2] Malone is one of the few authors in this book that speaks – unknowingly

of course – of pragmatic matters. One of the failures of *Miranda* – that suspects waive their rights and blurt out utterances that incriminate them – derives from the social pressure not to remain silent. He writes, 'a universal rule of polite social discourse is to speak when spoken to. Silence conveys arrogance, hostility, rudeness, and most of all, guilt' (p.79).

We do not need Brown and Levinson (1987) to tell us that it is polite to speak when spoken to; in fact, they do not relate to that at all. What we may be sure about is the interpretation given to silence in normal discourse (Kurzon 1998). A theme that appears in several of the articles is the early modern legal system, still found to a great extent in countries with the continental system of law, with the magistrate who takes over the interrogation. The Warren Court, argues Malone, could have ruled that interrogation violates the Fifth Amendment as a principle, so interrogation would have to take place with the suspect's lawyer present and/or in the presence of a neutral magistrate. The Court, says Malone (p. 84) 'assumed that a recital of warnings could adequately educate a suspect to decide intelligently whether to undergo questioning unaided by counsel.' We have seen in David Simon's article that the typical suspect is uneducable in this respect. By the way, Malone also mentions the new American English verb – *to Mirandize*.

Malone's contention concerning the difficulties people may have remaining silent is supported by Stephen Schulhofer's paper, written a year later (1987). He also speaks of the natural assumption that if asked a question, a person 'is obliged to answer' (p. 114), especially when the questioner is someone in authority. Moreover, the pressure of an interrogation can floor even 'the sophisticated law professor or professional investigator' (p. 115). Hence, the conclusion may be reached that any interrogation, even for a few seconds, 'is inherently compelling' (ibid.). So, the logic would run, why not ban interrogation in private altogether?

Gerald Caplan also reconsiders *Miranda* in his article from 1985, by questioning what the right to silence really is. It is not, he argues, the right to withhold evidence, but the right to withhold self-incriminating evidence. There is a substantial difference. A suspect who remains silent after being asked a question about the murder of his wife is 'not heroic; he is merely covering up' (p. 125). There is a conflict between two approaches: the protection of the weak, the frightened, etc. when in interrogation, and the need to convict 'those hardier, more knowledgeable persons – the hired killer, the calculating embezzler, the experienced burglar' (p. 126). The Warren Court chose the former, ensuring that everyone is given an equal chance. But, says Caplan, one should not confuse equality with justice.

Inspired by Jonathan Swift's ironic suggestion to solve the Irish problem in the 18th century, Irene and Yale Rosenberg make their own 'modest proposal', first published in 1989. This follows on from the question I ask in my discussion of Malone's article above. In order to uphold the Fifth

Amendment, and in light of the inherent compulsion of the interrogation room, one may abolish 'out-of-court statements made by the defendants while in custody' (p. 143). It seems almost superhuman to assure that confessions are given totally voluntarily; 'the exercise of free will is at best problematic' (p. 146). The Rosenbergs argue that if the *Miranda* warning does not solve the problem of self-incrimination, the next logical step would be 'a total bar against statements made in all circumstances viewed as compulsive' (p. 148). In other words, confessions are bad evidence. It is banned in the Talmud,[3]; it has been given totally negative press in the middle ages especially in connection with the inquisition. It has been given bad press even in the 20th century in the United States in many cases. Soviet and Soviet-inspired purge trials of the 1930s and 1950s were based on confessions which were extracted from high-ranking party officials by methods which even the police in the southern states of the USA did not think of (see, for example, the description in Arthur Koestler's *Darkness at Noon*). The message of the Rosenbergs is that the police and the prosecution have to make sure there is sufficient external evidence to convict the suspect. If there is not, s/he should be released. There was some logic in the system of early modern times in which the defendant could not appear as a witness for (or against) himself on oath (this is discussed in Alschuler's article, mentioned above).

Not only does my own tentative proposal concerning the exclusion of confessions (Kurzon 2000) find support in these articles, but further interesting information comes to light in two of the later articles. One way of protecting the suspect's rights, even if interrogation in private continues to be an important source of obtaining evidence, is by recording – audio or video or both – the police interrogation. Phillip Johnson proposes this in a statute which, in his opinion, should replace the Supreme Court *Miranda* decision. In Section 8 of the proposed act, it is laid down:

> that, to the greatest extent feasible, interrogations of suspects in custody shall be recorded so as to provide a complete and accurate record of the content of any statements and the circumstances under which the statements were obtained. (p. 301)

In the following article, by William Geller, this is elaborated upon. One sixth of all police departments in the United States in 1990 do videotape at least some interrogations and confessions. But it seems to be left to the local police department. Some detectives, says Geller, 'don't like taping an entire interview because they don't know what the suspect will say or where the interview is going' (p. 307). A police official is quoted as giving the following reason for this apprehension: 'You won't get the truth the first time around, and the defense attorneys will make use of the exculpatory statements' (ibid.).

This may come as a surprise to British readers, for example. After the infamous Birmingham and the Guilford cases, among others, recording the interview is normal procedure. According to the Police and Criminal Evidence Act of 1984 (PACE), all police interviews have to be audio-recorded. There are some places in England and Wales where video equipment is being used. Just as viewers of American TV police dramas can quote the *Miranda* warning, viewers of British TV dramas have invariably seen the tape-recorder being turned on and off during police interrogations. There is a move now of using portable tape recorders to record interviews with suspects not yet arrested, and of witnesses at the scene of the crime or anywhere else but the police station, or to ban such interviews altogether.[4]

On the whole, much of the book does not seem directly relevant to the interests of linguists. However, those articles that do address linguistic problems, and those that give background information, should be of help to those who are concerned with problems such as the comprehension of the suspect's rights. It should also be remembered that the book relates to the American situation only, with its reliance on the Constitution and the Supreme Court's interpretation of the document. General discussions of the interpretation of silence, and the value of confessions as freely given utterances of a suspect are relevant to other jurisdictions, but the American Constitution and some of its amendments are forever lurking in the background.[5]

NOTES

1 For those of the younger generation, 'book-'em-Danno' is classical *Hawaii-Five-O*, Kojak is the bald-headed lollipop-sucking detective, and Lt. Col. Oliver North was involved in the Iran-Contras arms deal in the Reagan administration in the early 1980s.

2 In articles concerning the reduction in the number of confessions due to *Miranda*, Paul Cassell calculates it to be 3.8 percent, while Schulhofer gives the figure of 0.78 percent. Even this seemingly low percentage represents 4,700 'lost' violent crime convictions per year.

3 Sanhedrin 9b: 'A man is most closely related to himself, and no one can accuse himself of being evil'.

4 My thanks to Mark Adler and David Wolchover for this description of the UK situation, personal communication (see also Wolchover and Heaton-Armstrong 1996: Chapter 3).

5 This may be seen, too, in another field which I am looking at – the language of libel. Instead of linguistic matters, 'the main focus of modern defamation litigation is the resolution of constitutional issues' (Thomas 1999: 380).

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Holly Mikkelson (2000) *Introduction to Court Interpreting*, Manchester, UK and Northampton, MA: St. Jerome Publishing.
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At the beginning of the 21st century, it would appear reasonable to the enlightened individual to assume that the provision of interlingual interpreting in legal contexts is as old as the practice of administering justice in settings where one or more of the participants does not speak or understand the language of the proceedings. Oddly, however, it turns out that this is not necessarily a reasonable assumption. In England, until the middle of World War I the presence of a defence lawyer was considered to obviate the necessity to provide interpretation for language-handicapped defendants at trial (the legal position prior to the 1916 case of *Lee Kun*), while in the United States, as recently as 1970 a judge could be moved to comment in a criminal appeal case:

> Not only for the sake of effective cross-examination ... but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.
>
> (*Negron v. the State of New York* at 390)

In the last 20 or 30 years, the judicial environment worldwide has largely moved on and a defendant's entitlement to the free services of an interpreter has more or less become a given in *criminal* proceedings, as required by the provisions of the relevant international covenants and conventions. In the *civil* domain, practice is far more patchy, although what is at stake can be extremely important to those involved in such proceedings. The Achilles heel in this apparently satisfactory contemporary picture is constituted by the issue of quality, however; the competence and professional level of the person who provides interpretation services is a topic which many jurisdictions prefer to ignore. Even within the same country, attitudes and practice often vary widely, by both geographical area and administrative units (for example State and Federal courts in the United States), as well as different language combinations. The upshot is drastically uneven levels of quality in interpreting services.

As judicial practice in this area of court interpretation has made progress, there has been a concomitant expansion of academic interest in the field. The 1970s studies of legal language and power issues by such scholars as Jean and William O'Barr, John Conley, and Robin Lakoff were

built on by Susan Berk-Seligson's path-breaking studies of the bilingual (Spanish-English) courtroom in the United States. Although most writing on court interpreting to date appears as articles in journals, there are by now a number of books which might usefully be in the library of all researchers of the field. These include the early verbatim proceedings of a 'mini-symposium' on court interpreting held in 1980 at the University of Ottawa (Roberts 1981), de Jongh's *An Introduction to Court Interpreting: Theory and Practice* (1992), Laster and Taylor's *Interpreters and the Legal System* (1994), Edwards' *The Practice of Court Interpreting* (1995), and Moeketsi's *Discourse in a Multilingual and Multicultural Courtroom: A Court Interpreter's Guide* (1999). Other books include the massively comprehensive *Fundamentals of Court Interpretation* (1991), by González, Vásquez and Mikkelson, and the reviewer's co-authored *Interpreters and the Legal Process* (Colin and Morris 1996). Between them, these publications show both the diversity and the similarity of issues confronting interpreters in legal settings, whether they work in the United States, Australia, England and Wales, or South Africa. On the whole, the emphasis is on spoken-language interpretation, although the world of sign-language interpreting also receives a certain amount of attention.

Holly Mikkelson, one of the co-authors of *Fundamentals,* is not only a practitioner, but also a teacher and researcher into court interpreting. Her other publications include a series of widely used training manuals (*The Interpreter's Edge*, 1993) and a set of extremely useful Spanish/English glossaries (*The Interpreter's Companion*, 2000) to assist both the aspiring/apprentice and the practising court interpreter. Her latest work, *Introduction to Court Interpreting* (2000*),* appears as part of the enterprising St. Jerome Publishing's series of coursebooks entitled *Translation Practices Explained*. As the series editor Anthony Pym writes, the intention is to offer a body of practical information that can orient and complement the learning process. In a number of countries, including the USA, Britain and Sweden, courses for court interpreters are proliferating hand in hand with the growth in the need for qualified personnel.

Although the author is from the United States and her experience is largely drawn from the American courtroom, the 'Introduction' is not specific to any particular national legal setting. To introduce the reader to the profession of court interpreting, Mikkelson provides a broad-ranging overview of this highly complex field and alerts teachers and students to 'avenues for further inquiry'. She points out that court interpreters (also known variously by such names as legal interpreters, judiciary interpreters, and forensic interpreters) can and do work in a variety of settings other than courts of law, including law offices, law enforcement agencies, prisons, and other public agencies associated with the judiciary. Clearly, the book does not discuss in detail the workings of all such institutions and settings, let alone in different countries, but it does give a 'taste' of the

variety of legal systems, outlooks, and settings worldwide which inevitably impact on the performance of the court interpreter's task.

In the book's introductory chapter, Mikkelson touches upon a number of controversial issues that are often addressed in comment about court interpreting. For example, when it comes to standards governing what must be interpreted, the expectation in the United States is to:

> interpret simultaneously every word that is uttered in the courtroom, no matter who the speaker is, when a non-English-speaking defendant's case is being heard (this would include jokes and asides, comments about other cases, and the like).
>
> (Mikkelson 2000: 3)

What the interpreter is emphatically barred from doing in this comprehensive approach is to explain, elaborate, or clarify. In contrast to this classically American 'hard-line' attitude, Mikkelson later (in Chapter 5 on 'The Code of Ethics') discusses a totally different approach, as described in positive terms by Rosemary Moeketsi in connection with the South African courtroom. Moeketsi cites the case of an interpreter who renders the magistrate's simple question, 'Do you have a lawyer' as 'Do you have a legal representative? This court allows you to seek your own lawyer. If you do not have money, you can use the lawyers paid for by the state'. Mikkelson quotes Moeketsi's discussion of the issues at stake, and in particular that the magistrate's neglect to communicate information about State Legal Aid is an irregularity that could lead to miscarriage of justice: should the interpreter expect to behave like a so-called conduit (the hard-line approach), or should the interpreter rectify the situation and supply the crucial information in order to 'save the magistrate from dereliction of duty, protect the accused from an unfair trial and ensure that criminal proceedings are conducted accordingly?' (Moeketsi 1999b: 14). Mikkelson then comments: 'This chapter thus ends with a question, a reflection of the uncertainties that still prevail in the theory and practice of court interpreting' (p. 64).

To some extent, the entire book is replete with examples of both the inflexible and open-minded approaches. It is perhaps less a question of 'uncertainties' than of the many issues of communication and relativity which underlie the dilemmas of practising interpreters. For example, the mere existence of codes of ethics may not protect interpreters from judges and lawyers who ask interpreters to do something which is in violation of such a Code. Indeed, a Code may well contain a number of provisions which it may be impossible to satisfy concurrently. An example can be found in Australia's AUSIT code, cited by Mikkelson (p. 54), which requires that 'interpreters be polite and courteous at all times' as well as

'unobtrusive, but firm and dignified'. As an Australian sign-language interpreter once demonstrated (with major implications for the practice of court interpreting in that country), adhering firmly to the tenets of professional conduct may, with the wrong judge, be highly detrimental to an interpreter's unobtrusiveness (*Gradidge v. Grace Bros. Pty. Ltd.*, 1988).

Intended both for 'self-learners' and teachers of translation, each chapter in the book includes proposals for further reading, and there are also some suggestions for further study. Some of its most useful exercises are best carried out with fellow students. Particularly striking is the set of role-playing scenarios with which the chapter on codes of ethics concludes, based on common dilemmas which interpreters face on a day-to-day basis. The book should make interpreters reflect on the variety of legal traditions and settings which affect them and their 'clients', whether directly or indirectly, and the cultural issues which are superimposed on so many of the linguistic challenges typical of court interpreting. Mikkelson's discussion of interpreting techniques is informative, and the suggested monolingual exercises (to help improve mental agility, work on enunciation and intonation, and so on) most helpful. The concluding chapter, dealing with specialized topics, resources and references can be a lifesaver in pointing the student or practising interpreter towards modern, particularly electronic, sources of background information and research material which can be accessed in order to prepare for assignments. The very up-to-date bibliography provides an excellent starting point for those interested in researching various aspects of the field. Overall, the book is recommended for all those interested in a non-country-specific introduction to the challenging profession of court interpreting in today's diverse world.

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