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# A Modern View of Language

P. K. Saha

*Although the lawyer's basic tool is his use of language, the general concepts as well as the subtleties of language are only rarely analyzed by members of the legal profession. The author here introduces the reader to some basic generalizations about language and, at the same time, explores the principles of linguistics and the implications those principles bear for the legal profession. He first discusses the concept of language as being a sub-part of the overall concept of communication, distinguishing it also from other forms or means of communication. Finally, he discusses seven general characteristics which, he feels, have relevance to the field of legal writing.*

## I. INTRODUCTION

THE MOST BASIC CONCEPTS of language, as well as its most sophisticated nuances, bear much significance for English-speaking lawyers. Indeed, the lawyer's basic tool is his use of the language. It is the purpose of this article to sketch some basic generalizations about language and to demonstrate how these generalizations are meaningful for the legal profession.

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An inquiry into the concepts of language must include some mention of various theoretical approaches to the subject. In particular, the approach to language involving notions of deep and surface structure developed by Noam Chomsky<sup>1</sup> should be examined by those interested in language and linguistically influenced behavior. Chomsky is among the three or four most influential linguists of this century. Although some aspects of his theories are highly controversial, he has remained the dominant figure among linguists for over a dozen years.<sup>2</sup>

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<sup>1</sup> Noam Chomsky is a professor of linguistics at the Massachusetts Institute of Technology. His basic ideas are set forth in the following books: *LANGUAGE AND MIND* (1968); *ASPECTS OF THE THEORY OF SYNTAX* (1965); *CURRENT ISSUES IN LINGUISTIC THEORY* (1964); *SYNTACTIC STRUCTURES* (1957).

<sup>2</sup> See the *Times Literary Supplement* (London), July 23, 1970, at 787, col. 3. Most of the July 23 issue was devoted to articles on the study of linguistics written by eight prominent scholars. The contribution by Chomsky was introduced as follows:

But if Linguistics has a lay following in the Anglo-Saxon world, this has very largely been built up by the activities of Chomsky. Every one of the eight special contributors to this issue has invoked his name . . . .

He is . . . the most accomplished and provocative theorist of language . . . .

The insights of the school of structural linguistics, which dominated American linguistic thought prior to the 1950's, should also be seriously considered. As Chomsky himself said: "Structural linguistics has enormously broadened the scope of information available to us and has extended immeasurably the reliability of such data."<sup>3</sup> Roman Jakobson, the first person to use the term "structural linguistics," has been called by Chomsky "the elder statesman of linguistics."<sup>4</sup> His work provides a valuable resource for the inquiry into concepts of language and the law.

This essay will examine language and certain aspects of the language of the law in the light of ideas derived from: (a) the school of structural linguistics as exemplified by diverse writers like Bloomfield,<sup>5</sup> Sapir,<sup>6</sup> Trager and Smith,<sup>7</sup> Hockett,<sup>8</sup> and Francis;<sup>9</sup> (b) Chomsky's transformational-generative approach to language; (c) stylistic theory developed in the last decade by writers (including the present author<sup>10</sup>) who have analyzed verbal style from a linguistic point of view; and (d) writers like Philbrick<sup>11</sup> and Mellinkoff,<sup>12</sup> who have written specifically on language and the law.

## II. LANGUAGE DEFINED

Let us begin by trying to define linguistics and language. Linguistics is the objective study of the principles underlying language, and a linguist is thus someone who theorizes about language. Since linguistics is defined in terms of language, a definition of language becomes necessary.

Defining and exploring the nature of language is not an easy

[H]is prestige has been so crushing that his opponents have been unduly starved of attention.

<sup>3</sup>N. CHOMSKY, *LANGUAGE AND MIND* 19 (1968).

<sup>4</sup>The New Yorker, May 8, 1971, at 75.

<sup>5</sup>Leonard Bloomfield (1887-1949) has been regarded as the leading structural linguist in the United States. See L. BLOOMFIELD, *LANGUAGE* (1933).

<sup>6</sup>See E. SAPIR, *LANGUAGE* (1921).

<sup>7</sup>See G. TRAGER & H. SMITH, *AN OUTLINE OF ENGLISH STRUCTURE* (1951). These authors systematically used the insights of Jakobson, Bloomfield and Sapir to analyze Modern English.

<sup>8</sup>See C. HOCKETT, *A COURSE IN MODERN LINGUISTICS* (1958). Hockett is the most prominent among Bloomfield's living disciples and is one of Chomsky's strongest critics.

<sup>9</sup>See W. FRANCIS, *THE STRUCTURE OF AMERICAN ENGLISH* (1958).

<sup>10</sup>See Saha, *A Linguistic Approach to Style*, 2 *STYLE* 7 (1968).

<sup>11</sup>See F. PHILBRICK, *LANGUAGE AND THE LAW: THE SEMANTICS OF FORENSIC ENGLISH* (1949).

<sup>12</sup>See D. MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963).

task. As one linguist declared: "Language, like sleep, is not a substance but a process; in practice it is known to everyone, yet its theory all but defies formulation."<sup>13</sup> Even the most basic questions about language, which for centuries drew confident answers from many quarters, no longer elicit identical responses from linguists. There are superficial answers, of course, but the realities are incredibly complex and deep. In some cases, linguists do not attempt to answer the questions that are now known to be unanswerable. In yet other cases, depending on how the question is phrased, they might say the answer is both yes and no, just as in a somewhat analogous situation a lawyer who is asked whether judges legislate might conceivably give both yes and no answers.<sup>14</sup>

Nevertheless, the field of linguistics is dynamic, and considerable energy is currently being expended to question earlier assumptions and to explore previously uncharted areas. For example, the entire controversy over whether such things as "phonemes"<sup>15</sup> exist has recently been reopened.<sup>16</sup> This esoteric debate may not mean much to the legal profession or the world at large but it indicates the vigorous activity going on in the field of linguistics today. The exact nature of the phoneme will be thoroughly discussed later in this article. At this point it is sufficient to point out that the concept of phonemes is crucial to even the most basic inquiry into language. Without the concept, it is impossible to answer properly even the layman's question: "How many different sounds are there in a particular language?" However, let us lay aside these controversies for the time being and briefly consider the past as a foundation for our attempted modern definition of language.

One of the oldest extant works on language is Yāska's *Nirukta*. It deals with the etymology of Vedic Sanskrit words and was probably written in the 6th century B.C.<sup>17</sup> Pānini's *Astādhyayi*, one of the most remarkable linguistic works of all times, was composed

<sup>13</sup> N. BROOKS, LANGUAGE AND LANGUAGE LEARNING 1 (1960).

<sup>14</sup> P. MISHKIN & C. MORRIS, ON LAW IN COURTS 57 (1965).

<sup>15</sup> Webster defines a phoneme as "the smallest unit of speech that distinguishes one utterance from another in all the variations that it displays in the speech of a single person or particular dialect as the result of modifying influences." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Gove ed. 1961).

<sup>16</sup> See Schane, *The Phoneme Revisited*, 4 LANGUAGE 503 (1971).

<sup>17</sup> H. SHANE, LINGUISTICS AND THE CLASSROOM TEACHER 22 (1967). Shane claims that Yāska lived in the 8th century B.C., but it is more likely that he lived in the 6th century B.C.

some time in the 4th century B.C.<sup>18</sup> In the Western world both Plato and Aristotle<sup>19</sup> paid attention to language, while Dionysius Thrax, who lived around 100 B.C. developed classifications and definitions which remained standard until the 20th century. It was Thrax who defined a sentence as "a combination of words expressing a thought that is complete in itself . . . ."<sup>20</sup> He also developed the notion of eight parts of speech. Remarkably enough, it was not until our own times that Thrax's approach to linguistic analysis was substantially modified.

There is temptation to claim that if a concept has lasted 2000 years there must be some validity to it. Lawyers, by the very nature of their profession, are especially prone to be influenced by the past. Not only are they involved constantly with the doctrine of *stare decisis*, the principle of precedents, but most lawyers also resort frequently to archaisms like "aforesaid," "hereafter," and "give, devise, and bequeath" in their attempts to be "precise." But, as Mellinkoff has pointed out, the word "precise" can refer to "exact meaning or exactly-the-same-way. The first sense is the fixing of sharp definition; the second is repetition; and, though one sense does not exclude the other, the two are not the same."<sup>21</sup> Mellinkoff thus rejects the notion that repetition of past usage invariably breeds the type of exact meaning sought by lawyers.

Later in this essay the question of past usage will be explored more fully. But for the time being we should simply note that survival over a long period is not, by itself, sufficient justification for the continuing use of a concept or a specific phrase. The fallacy inherent in such self-comforting reliance on past usages can be found frequently in the history of man's intellect. For example, in the 4th century B.C. Aristotle claimed that an object thrown horizontally would move horizontally for a while and then begin to fall straight down. It is not until the 17th century, about 2000 years later, that Galileo proved projectiles move in a parabola.<sup>22</sup> Some of the most brilliant minds in European history came and went during these 2000 years, and yet no one before Galileo challenged Aristotle. In

<sup>18</sup> Bloomfield calls this grammar of Sanskrit "one of the greatest monuments of human intelligence." L. BLOOMFIELD, *supra* note 5, at 11.

<sup>19</sup> For brief accounts of earlier approaches to language see J. HUGHES, *THE SCIENCE OF LANGUAGE* 37-40 (1963); J. WATERMAN, *PERSPECTIVES IN LINGUISTICS* 1-17 (1963).

<sup>20</sup> H. SHANE, *supra* note 17, at 23.

<sup>21</sup> D. MELLINKOFF, *supra* note 12, at 295.

<sup>22</sup> B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 207 (1945).

similar fashion Galileo also made it possible to disprove the centuries-old belief that bodies of different weights fall at different speeds.<sup>23</sup> Thus, survival over a long period alone should not (especially for a lawyer who likes to rely on proper proofs) constitute sufficient basis for the validity of a concept.

Some of the most significant advances in linguistics since the early works on language took place as recently as the 19th and 20th centuries.<sup>24</sup> The 19th century was especially fruitful for studies of historical developments of language, while the 20th century has made the most significant progress in describing language as it may be at a given time.<sup>25</sup> Our own times are particularly exciting in relation to linguistics. In the United States there has been a dramatic growth of interest in the subject since World War II.<sup>26</sup>

The modern linguist must begin his inquiry into the implications of language for any particular discipline by making a distinction between communication and language. Communication is a wider topic than language. Animals and insects communicate without the use of language; so can human beings. This point must be stressed because it is precisely this confusion over the terms "communication" and "language" that causes many people to entertain false notions about language. One obsolete notion, for example, is that certain animals have some kind of "primitive" language that uses a limited range of sounds or other signals. Bees, for example, have elaborate signaling devices to which the term "language" is sometimes applied in casual conversations. Dolphins have a set of sounds which are at times said to constitute some kind of rudimentary language. And we have all noticed animals like dogs communicate obviously basic feelings of hunger, pain, and fear. In ordinary conversations it may be appropriate to use the term "language" for such forms of communication, but in systematic discussions we must be precise and consistently distinguish "language" from "communication."

Linguistics is not the only field that demands such special rigor in terminology. For example, the way we use the word "work" in ordinary conversation is quite different from the way it is used in

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<sup>23</sup> *Id.* at 532.

<sup>24</sup> See J. WATERMAN, *supra* note 19, at 18-98, for a description of linguistic achievements from the beginning of the 19th century through the middle of the 20th.

<sup>25</sup> A centuries-old work, the PORT-ROYAL GRAMMAR of 1660, showed remarkable insight, considering that it was written so much earlier in the history of linguistics. See PORT-ROYAL GRAMMAR (Menston transl. 1967).

<sup>26</sup> It is interesting to note that immediately following World War II only four American universities offered the Ph.D. degree in Linguistics. Today there are approximately 36 universities with such advanced programs.

physics. The physicist may take up an entire day spending prodigious amounts of energy "working" at trying to push a heavy table. But until the table has moved he will say that no work has been done, because the rubric of his field defines work as the product of the mass of a given object and the distance over which it has been moved. Lawyers also have their own peculiar rubric, using common words like "specialty" and "demise" but giving them uncommon meanings.<sup>27</sup> Similarly, linguists use the term "language" more precisely than people need to in ordinary conversation.

The linguist defines a "natural," or human, language as a constantly evolving system for manipulating a finite set of arbitrary vocal sounds to produce the virtually infinite utterances that compose the primary everyday communication among a group of human beings.

Once language is defined in this way, it is possible to make a few preliminary generalizations. First, language is a system shared by a linguistic community. Second, although speech belongs to the individual and one person's speech is different from another's, our definition assumes that they can use the same language. Third, writing systems are *secondary* systems based with varying degrees of consistency on the *primary* spoken forms.<sup>28</sup>

<sup>27</sup> See D. MELLINKOFF, *supra* note 12, at 11-23.

<sup>28</sup> If anyone doubts this claim about the inconsistency of writing systems, particularly English, he should consider the following poem.

English

I take it you already know  
Of tough and bough and cough and dough?  
Others may stumble, but not you  
On hiccough, thorough, slough and through?  
Well done! And now you wish, perhaps  
To learn of less familiar traps?

Beware of heard, a dreadful word  
That looks like beard and sounds like bird.  
And dead; it's said like bed, not bead;  
For goodness sake, don't call it deed!  
Watch out for meat and great and threat,  
(They rhyme with suite and straight and debt).  
A moth is not a moth in mother.  
Nor both in bother, broth in brother.

And here is not a match for there,  
And dear and fear for bear and pear,  
And then there's dose and rose and lose —  
Just look them up — and goose and choose,  
And cork and work and card and ward,  
And font and front and word and sword.  
And do and go, then thwart and cart.  
Come, Come, I've hardly made a start.

If we accept the definition of human language proposed above, several factors will serve to distinguish human language from animal communication as well as from many other forms of communication. In the first place, for a human being to "know" a word means that what he actually knows is a set of relationships, rather than just the bare fact that a word stands for a particular object. Knowing the word "chair," for example, means recognizing as a chair something that may not at first even look like a chair. A child entering an unfamiliar house might look at a rounded object with very short, stubby legs and not know at first what to call it. But if he should happen to see someone come in and sit on it, he might exclaim, "Oh, it's a chair!" As far as we know, this capacity for perceiving relationships is totally beyond the competence of any animal. A parrot may repeat a word with astonishing accuracy or a dog may respond consistently and intelligently to human words, but they can never perceive relationships that are so crucial for the functioning of human language. Recent experiments at the University of California at Santa Barbara with a chimpanzee named Sarah have shown that chimpanzees can be trained to communicate with humans by using differently shaped plastic pieces. But even her trainer admits: "This does not mean she can produce all the functions of language."<sup>29</sup>

Secondly, human language generally employs a system of detachable parts. Suffixes and prefixes like "-ing" and "un-" can be detached uniformly from certain words and tagged on uniformly to other words of the same kind. On another level, full sentences have their detachable parts — words and phrases. No one has yet demonstrated how we can observe anything resembling such detachable parts in a cat's meow or a dog's bark. Animal sounds, as far as we know, simply do not have systems of detachable parts, and surely this is a factor that serves to distinguish human language.

Thirdly, as Joseph Greenberg has pointed out, human language

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*A dreadful language? Why, man alive,  
I'd learned to talk it when I was five,  
And yet to write it, the more I tried,  
I hadn't learned it at fifty-five.*

Anonymous, reprinted in H. SHANE,  
*supra* note 17, at 50.

It should be clear that when linguists say speech is "primary" and writing "secondary," they do not mean writing is necessarily secondary in importance. One can easily imagine many contexts in which writing may be more important than speech. The basic point to be noted here is that speech always historically precedes writing. No human society is without speech, but among the thousands of languages that exist in the world even today there are many that have not yet developed any writing system.

<sup>29</sup> For a brief account of these experiments see TIME, Sept. 21, 1970, at 51-52.



involves the use of individually meaningless sounds like /b/, /i/, and /t/<sup>30</sup> which can be combined to form meaningful words like *bit*. This two-level operation, in which items that are meaningless on one level become symbolic and meaningful on the second level, cannot be discerned in the vocal communication of the lesser animals. For example, each cry of an ape is a separate meaningful signal which does not combine with others.<sup>31</sup> The distinction between such signals and the symbolic quality of human language must be clearly understood: a sign and a symbol are not necessarily the same. For example, clouds are not "symbols" of rain. Rather, they are a "sign" of rain because there is an inherent and unvarying connection between the clouds and the rain. But there is no such inherent connection between words and what they symbolize: human beings use a finite number of sounds as symbols with infinite possibilities of combination.<sup>32</sup>

Karl von Frisch has demonstrated that bees have extraordinary signaling devices whereby they can dance and inform other bees about the location of faraway sources of honey.<sup>33</sup> This communication device, however, is not the same as human language because it lacks the different modes of language such as indicative, imperative, and so on. Besides, bee communication has only two meaningful units: the speed of the dance and the angle of the dance to the surface of the hive.<sup>34</sup> As a system, such communication can hardly be compared to the incredible complexity of human language. As the neurobiologist Eric Lenneberg points out, superficial similarities must not deceive us into making false comparisons.<sup>35</sup>

We must consider yet a fourth distinction between animal communication and human language. This concerns the factor of change. All living languages change with time. When they stop evolving they are dead languages, *i.e.* they are no longer used for ordinary everyday purposes, even though they may continue to play extremely important roles in scholarly or liturgical contexts. No one

<sup>30</sup> See, e.g., J. GREENBERG, *ANTHROPOLOGICAL LINGUISTICS: AN INTRODUCTION* (1968). It is customary among linguists to indicate individual phonemes or sounds of language by using virgules in this fashion.

<sup>31</sup> *Id.* at 10-11.

<sup>32</sup> This same factor of duality also serves to distinguish mathematics from language. In language the basic units of sound are individually meaningless, while in mathematics the basic units are numbers and are therefore, meaningful. *Id.* at 15.

<sup>33</sup> K. FRISCH, *BEE: THEIR VISION, CHEMICAL SENSES, AND LANGUAGE* (1950).

<sup>34</sup> J. GREENBERG, *supra* note 30, at 11-12.

<sup>35</sup> See generally Lenneberg, *On Explaining Language*, 164 *SCIENCE* 635 (1969).

knows the exact reasons for the constant change that takes place in living languages, but one can take some educated guesses.

First, as the circumstances of a linguistic community change with time, new words are coined (or existing words are modified) in order to express the new notions, while obsolete notions along with the words used to represent them may pass into oblivion. Second, the mixing of people from different linguistic groups may alter the languages of both groups. Finally, there is the less widely known factor of gradual and barely perceptible changes in languages brought about by each successive generation regardless of new notions or mixing of communities. For example, children never imitate their parents with 100% accuracy, and their slight alterations may not be noticeable in one or two generations, but over 10, 12 or 20 generations these differences become obvious.

To illustrate how far reaching these evolutionary changes can be, let us compare the early and recent forms of some passages from two languages. First, compare an excerpt from an Old Bengali poem composed approximately 1000 years ago with its Modern Bengali equivalent. Even though the meaning may be totally unclear to the English-speaking reader in either form, the radical differences in pronunciation should be easily noticeable. The Old Bengali original is:

bhana kaisey sahaj bolba jai  
kaobakchiya jasu na samai  
aley guru uesai seash . . . .<sup>36</sup>

The Modern Bengali equivalent is:

bawlo ki korey shahojiya bawla jai  
kaibakchitta jathey na probesh (kortehey parey)  
brithai guru upodesh daey shishyokey.

A more familiar excerpt from a well known Christian prayer will make the point more dramatically for English-speaking readers:

Fæder ure þu þe eart on heofonum, si þin nama gehalgod;

Father our thou who art in heaven, be thy name hallowed;

to-becume þin rice; gewurþe þin willa on eorðan swa swa on

come thy kingdom; be done thy will on earth as in

heofonum; urne gedæghwamlican hlaf syle us to dæg;

heaven; our daily bread give us today;

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<sup>36</sup> This excerpt is a sample of the Bengali language in its earliest form. The entire poem is quoted in Saha, *A Brief Introduction to Bengali Poetry*, 33 AMERICAN WEAVE 39, 43 (1971).

The literal translation into Modern English of the Old English prayer gives some indication of how drastically English has changed in only the thousand years intervening since King Alfred's time. To an untrained observer of our time, the earlier version may not even be recognizable as English.<sup>37</sup>

Lawyers have special reasons to be interested in such changes because their preoccupation with precedents and the history of law can often involve them in earlier forms of their language. In fact, the law was a key factor in initiating studies of Old English in modern times. As has been pointed out:

The study of Old English had its beginnings in the Reformation in an effort on the part of the reformers to prove the continuity and independence of the English church and its doctrines. This motive was accompanied by the desire to discredit the doctrine of the divine right of kings and to find the *source of English law and administrative practice*.<sup>38</sup>

The general principle of constant change, illustrated above by Bengali and English, is true of all living languages. Animal sounds, however, lack this universal quality of human language. One cannot, of course, prove the point conclusively, since there are no tapes of cats' meows from centuries ago, but in the absence of evidence to the contrary we can assume cats meowed about the same way and dogs barked in identical fashion a thousand years ago.

Similarly, other forms of communication, such as pictorial representation, can easily be shown to differ significantly from language, even though in some cases they may be based ultimately on natural languages. Gradations of light and shade, as Susanne Langer points out,<sup>39</sup> cannot be enumerated the way sounds of a language can: the visual elements captured by a camera are far more numerous. Consequently, correspondence between a word picture and a visible object can never be as close as that between the object and its photograph. That is why in ID cards and passports we attach more importance to photographs than verbal description. However, if we want to go behind the face and analyze character, the symbolism of words may be far more potent. A picture may be worth a thousand

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<sup>37</sup> The Old English period lasted from approximately the 5th century A.D. to the 11th century A.D.; the Middle English period lasted from the 11th century to approximately the 15th century; while the Modern English period began around 1500. It should be clear that the lines of demarcation are hazy and the periods overlap.

<sup>38</sup> A. BAUGH, *A HISTORY OF THE ENGLISH LANGUAGE* 344-55 n.1 (2d ed. 1957) (emphasis added).

<sup>39</sup> S. LANGER, *PHILOSOPHY IN A NEW KEY* 75-77 (1942).

words only in one out of every thousand instances of communication.

Having isolated natural languages from other forms of communication, let us briefly examine one element of communication which is distinct from, yet intimately associated with pure linguistic expression. This is the concept of "proxemics," or the manipulation of space during linguistic communication. The anthropologist Edward Hall has used the term "proxemics" for the study of the manner in which space communicates in conjunction with language as well as for man's use of space in general "as a specialized elaboration of culture."<sup>40</sup> In other words, proxemics is the study of the relevant proximity of one item to another during the use of speech. Like gestures, it is a non-linguistic means of communication that is used simultaneously with language, either unconsciously or subconsciously, to communicate the speaker's message. The inclusion of the concept under the rubric of communication serves to strengthen the basic contention that communication per se is a wider topic than is linguistics.

The concept may be illustrated by some specific examples cited by Hall.<sup>41</sup> In the United States, men at parties will, under normal conditions, stand about 21 inches from each other — that is the distance American men find suitable for normal conversation in such informal contexts. If one male were to come closer than 21 inches to another male, the latter would (unless there were abnormal overcrowding in the room) almost unconsciously move back until the normal distance of 21 inches were reestablished. Significantly, the proxemics changes dramatically as one moves from one culture to another. In Latin America, for example, men normally maintain a distance of 15 inches in similar circumstances. Like his North American counterpart, the Latin American is usually unaware that he is most comfortable conversing at a specific distance. Consequently, at gatherings including both North and Latin Americans it has happened that a North American diplomat has kept moving back throughout an entire evening with a vaguely uncomfortable feeling that his Latin American friend is perhaps a bit pushy. On the other hand, the Latin American may be bothered, equally consistently, by a dimly realized feeling that the North American is probably cold and aloof. There was actually a case in which a North American businessman in Latin America got so fed up with

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<sup>40</sup> E. HALL, *THE HIDDEN DIMENSION* 1 (1966).

<sup>41</sup> E. HALL, *THE SILENT LANGUAGE* 164 (1965).

what he thought were aggressive Latin Americans that he built a huge desk stretching from one wall to another so that his Latin American clients would have no way of getting close to him while he sat on one side.<sup>42</sup> And it also happened that at the crucial psychological moment, when signatures were being placed on the dotted line to clinch an important deal, the Latin American client felt so frustrated at a distance far greater than he was used to that he actually climbed over the desk in order to get close at the moment of signing the paper.

Even within the same society, various kinds of discourse may be associated with different kinds of proxemics. In western society, when one is talking about something that is really top secret he never talks from the other end of a room or some similar distance, even where there is no third person present. The proxemics for such secrets clearly involves ranges of less than twelve inches.

What is important about this as well as other such paralinguistic phenomena is the consistency with which people in a given community adhere to them. In many societies, for example, a higher position in space will, in certain contexts, always communicate the notion of higher status. Thus, a judge in the West sits in a higher position than the person on trial, while in some cultures the judge during a trial sits on the floor and the accused occupies a position on an elevated stand of some kind.

Along with consistency, an important feature of such paralinguistic factors is their inherent arbitrariness. There is no intrinsic reason why a certain spatial position should be equated with higher status. It just happens that this is the way the code has always been in a given culture. This factor of arbitrariness in matters linguistic or paralinguistic must be stressed because as we begin to examine language proper we find that the same arbitrariness is one of the principal features of language itself.

Before discussing these specific qualities of language we need to note just one more point made by Hall in regard to the uniqueness of man's use of language.<sup>43</sup> In man's earlier stages of evolution, language may have been one of the key factors that enabled him to forge ahead of other animals. Animals have no way of symbolically storing information for subsequent use. Thus, there is no way a mother rabbit can teach a young rabbit to be careful about leopards or other forms of danger until the young rabbit actually con-

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 53.

fronts the specific instrument or bearer of danger. Humans, on the other hand, can instruct their young about future dangers before the specific situation arises and, should the danger ever be encountered, the child can summon his knowledge from the past to guide his actions. Animals totally lack the capacity for such linguistically governed behavior patterns.

### III. SEVEN GENERAL FEATURES OF LANGUAGE

#### A. *Social Nature*

Turning now to language proper, let us examine some of its important features. First, it is necessary to realize that language, even though it has biological foundations, is social in nature and is not an instinctive function of mankind. Human babies do not have to be taught to breathe or digest or cry, for these are all instinctive functions for which all normal bodies are anatomically and physiologically equipped. Language, on the other hand, does not come instinctively. If a baby were to be deprived of the opportunity of hearing the speech of its elders it would not instinctively learn to speak. There are five well-authenticated cases in which we know of human babies growing up in non-human environments,<sup>44</sup> and none of these children ever really learned to speak after they were found by humans. These unique occurrences indicate that, if it is to be learned at all, one's first language must be learned in the earliest years of life and must be learned from other humans.

In its earliest stages, language development is related more closely to physical development than to chronological age.<sup>45</sup> The development of speech skills in the child closely approximates his general development of muscular control and motor coordination. Despite this apparent biological foundation, however, there is not a single part in the human body which was originally meant for speech.<sup>46</sup> The teeth, lips, tongue, palate, and other parts of the body used for speech all have basic and obvious physical functions totally unrelated to speech. Although their functions have become speech-oriented in relatively recent times, they were probably used

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<sup>44</sup> The most recent case is that of Ramu, the so-called wolf-boy, who was found in the fifties near Lucknow, India. He was observed while under the supervision of authorities at Lucknow Medical College. For the earlier examples see J. BURNETT, *OF THE ORIGIN AND PROGRESS OF LANGUAGE* (1773); E. ITARD, *THE SAVAGE OF AVEYRON* (1802); H. WILSON, *2 WONDERFUL CHARACTERS* (1821); J. SINGH & R. ZINGG, *WOLF CHILDREN AND FERAL MAN* (1942).

<sup>45</sup> Lenneberg, *supra* note 35, at 636.

<sup>46</sup> W. FRANCIS, *supra* note 9, at 3-4.

exclusively for their primary function of ingestion for millions of years before being used for speech. Early man, in the company of others of his species apparently had to learn how to adapt his ingestive organs so as to communicate with others, just as the child must learn how to communicate with the surrounding society.

Another bit of evidence that seems to confirm the social nature of speech is that there is no speech center in the brain at the time of birth. As the body develops, the speech center begins to develop in the left portion of the cerebral cortex.<sup>47</sup> Although there is obviously present in the brain the ability to develop this speech center, the fact that it is not identifiable at birth, together with the fact that it develops in response to external social stimuli, supports the hypothesis that speech is not innate but is socially learned.

### B. *Arbitrary Nature*

After the social nature of language, the second major quality of language that we must note is the arbitrariness referred to earlier. This arbitrariness of language was not properly recognized in ancient views of language. Plato, in his dialogue *Cratylus*,<sup>48</sup> made some absurd mistakes in trying to demonstrate rational relationships between words and objects or notions signified by the words. In our own time people tend to assume that there is something absolute about words like "chair" or "blue" or "freedom." One must recognize, however, that these and other words in the English language which seem to express perfectly natural ideas to speakers of English may appear wholly puzzling when one tries to use the same concepts in the contexts of other languages.

H. A. Gleason illustrates the above notion well by pointing out that a speaker of American English recognizes six colors in the spectrum or rainbow (purple, blue, green, yellow, orange, red), while a speaker of Shona, a language spoken in Rhodesia, sees only three colors in the same spectrum, and a speaker of Bassa, which is spoken in Liberia, perceives only two colors ("hui" and "ziza") in the same band of colors.<sup>49</sup> At another extreme, some other language, which we may call Language X, might have seven or more colors. The question naturally arises as to who is right, the speaker of English,

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<sup>47</sup> Actually, at the beginning of the development of one's ability to speak, the right and left sides are both operational, with the left side specializing later. Lenneberg, *supra* note 35, at 639.

<sup>48</sup> See Waterman, *supra* note 19, at 5-6.

<sup>49</sup> H. GLEASON, AN INTRODUCTION TO DESCRIPTIVE LINGUISTICS 4-6 (1961).

Shona, Bassa, or Language X. It might be tempting, at first, to suggest that English is more advanced than Shona or Bassa because it makes more distinctions than the other two, but then speakers of Language X see seven colors in the same spectrum, and surely no one would want to say that Language X is more advanced than English.

Actually all of these languages are equally correct within their own frameworks. There is no reality we can discuss independently of a given language. Each language arbitrarily slices up the continuum of reality, and whatever categories are recognized in that language *are* reality as far as that language is concerned. One can talk in any language about the categories of another language, but it is useless to talk about any reality existing independently of language because as long as one is *talking* one is using a specific language and is inextricably involved in the categories of reality as imposed by that language.

Thus, even though we know that the spectrum is a continuous scale of light waves whose length ranges from 40 to 72 hundred-thousandths of a millimeter, we have no valid reasons for saying that a six-fold or seven-fold division of this scale as found in English or Language X is in any way a more accurate representation of objective reality than the two-fold division of Bassa. As a matter of fact, if we turn to the botanist, who does try to deal with colors objectively in relation to plants, we see that he finds himself unable to use the "purple, blue, green, yellow," etc. terminology of ordinary English. Basing his conclusion on the chemical reality that underlies color phenomena, he uses one term for the series constituted by yellows, oranges, and reds and another term for the series constituted by blues and purples. Thus, the English-speaking botanist has to coin the terms "xanthic" and "cyanic" for the range of colors indicated by the spectrum. A Bassa-speaking botanist would have no such problem. His ready-made terms "hui" and "ziza" correspond neatly to the objective two-fold division set up by the botanists.<sup>50</sup> By an odd coincidence the language which might seem to English-speaking people as backward ends up appearing to match objective reality better than English. Actually, the truth is that both languages are equally accurate. If English has six terms then there really are six colors for speakers of English and if Bassa has two terms then those two colors are equally and supremely real for Bassa speakers.

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<sup>50</sup> H. GLEASON, *supra* note 49, at 5.



In philosophy as well as law, the implications of the linguistic fact illustrated by the above discussion of color terms are quite significant. We often tend to think of reality as something absolute. We must recognize, however, that reality, as long as we are talking, is dependent on language which is constantly changing. Language does not merely express reality; it simultaneously creates reality. The universe can seem very relative and shifty from this linguistic vantage point. There is no guarantee that any of the so-called permanent truths are any less ephemeral than language itself.

Two specific examples will assist in attaining a full understanding of how this view of language can affect traditional modes of discussion or writing in philosophy and law. First let us consider the philosophical example. Many speculations on the creation of the universe involve notions about the existence of some kind of reality before the creation of the universe and time. Notice that language with all its arbitrariness is consistently linear in terms of its progression in time. All language depends on a systematic succession of certain sounds or words. If instead of saying, "the artist created a beautiful painting," one were to say "painting beautiful a created artist the," there would be a complete breakdown of the linguistic system of English. One cannot utter a single word without being involved in this linear sequence of time. Consequently, even though it might be relevant from a mystical point of view to meditate transcendently on what existed before time was created, from a linguistic point of view it is difficult to express the notion of creation of time or the universe. The moment we say "time was created," the simple use of the word "was" implies there was a time of some kind before the creation of time, which, of course, makes nonsense of consistent discourse. If someone objects that the universe surely must have been created at some point in time, all that can be said in response is that language is a time bound system and simply cannot be used to talk about "the beginning of time," at least not in a rational manner. We can only talk about events that are clearly within the framework of time. Attempting to go outside this frame involves discarding language and entering the realm of mysticism or something similar which calls for silence.

Once again, as with colors, we must accept whatever seeming limitations are imposed upon us by the inherent limitations of language itself. We must not only accept these limitations but even respect them and bear in mind that everyone who complains about the limitations of language almost always uses language to do the

complaining. All this does not mean that reality cannot exist apart from language; it simply means that there is no way of discussing any reality without accepting first the intrinsic limitations of language itself. As the narrator in Flaubert's *Madame Bovary* remarked:

No one can ever express the exact measure of his needs, or conceptions, or sorrows. The human language is like a cracked kettle on which we beat out a tune for a dancing bear, when we hope with our music to move the stars.<sup>51</sup>

Both the linguist and the non-linguist must bear in mind, of course, that man uses language not only to conduct the prosaic daily affairs of society but also to fumblingly express his awareness of his binding involvement in an immense and incomprehensible pattern of time and space. Both uses are vital, and the absence of a clear-cut line of demarcation calls for added caution to avoid confusion.

Having seen how arbitrariness in relation to language can affect a philosophical viewpoint, let us now consider the implications of this arbitrariness for the language of the law. Lawyers engaged in drafting legal documents realize that the representatives of any opposing vested interests are always likely to search for flaws in their statements. These opposing parties are motivated not by the quest for linguistic perfection but by the possibility of profiting from destruction of the validity of a given document. Thus, a lawyer has a built-in motivation for resorting to semi-petrified forms which have been known to be successful in the past, regardless of how arbitrary some of these formulaic items may be in terms of contemporary language. For example, here are three excerpts taken from the writer's will as drawn up by a well-known firm of lawyers in Cleveland, Ohio:

1. I . . . do hereby make, publish and declare this to be my *last Will, hereby* revoking any and all wills and codicils *heretofore* made by me.
2. I *bequeath* to . . . my brother . . . if he survives me, the sum of . . . .
3. I *devise* to . . . my wife, if she survives me, all my right, title and interest in and to any and all real property, wherever located, including both the land and all improvements thereon, which upon my death is occupied or maintained for occupancy by my wife and me as a place of residence . . . (Italics added).

Later in this article the emphasis will be on syntax, but here the analysis will be limited to words, specifically the italicized items.

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<sup>51</sup> G. FLAUBERT, *MADAME BOVARY* 188 (M. Marmur transl. 1964).

The use of "last," the arbitrary capitalization of "W" (note the equally arbitrary decision not to capitalize "wills" six words later), the archaisms "hereby" and "heretofore," the arbitrary distinction between "bequeath" (give personalty) and "devise" (give realty) can all be shown to be imprecise and confusing both from a layman's as well as a lawyer's point of view. The following observations support such a conclusion:

[W]hich *last will* is the *last will*? . . . When a testator has been made will-conscious, and likes the habit, *last will* adds spice to a will contest. For example: Will No. 1 revoked by will No. 2; a later ". . . codicil to my last will" held to refer to No. 1, reviving it and revoking No. 2. The testator was talking about his first, not his second, when he said his *last will*.<sup>52</sup>

As for "hereby," it is difficult to know:

[W]hether *hereby* means only by-means-of-this-writing, or right-now-by-means-of-this-writing. And whichever choice is made, the answer still leaves in doubt whether this-writing refers to the entire document or to only a part of it.<sup>53</sup>

In similar fashion:

[H]eretofore has been held to include the date of the document containing it, and to exclude that date.<sup>54</sup>

As for "bequeath" and "devise":

Not until the 19th century did it become a lawyerly custom to *devise realty* and *bequeath personalty*, a subtlety contrary to the linguistic and legal history of the words and never uniform in practice.<sup>55</sup>

In addition to using such formulaic items, lawyers are also involved with linguistic arbitrariness vis-a-vis ordinary words in relation to:

[T]he *ejusdem generis* principle, by which general words which follow specific words are taken to apply only to persons or things of the same class as already mentioned, so that in "house, office, room, or other place" the final item is not allowed to refer to an uncovered enclosure, even though this may be a "place."<sup>56</sup>

It would not be entirely fair for non-lawyers to attack such linguistic practices of lawyers indiscriminately. The layman must realize that such formulaic linguistic habits are "designed not so much

<sup>52</sup> D. MELLINKOFF, *supra* note 12, at 332-33 (footnotes omitted).

<sup>53</sup> *Id.* at 314 (footnotes omitted).

<sup>54</sup> *Id.* at 317 (footnotes omitted).

<sup>55</sup> *Id.* at 354.

<sup>56</sup> D. CRYSTAL & D. DAVY, *INVESTIGATING ENGLISH STYLE* 214 (1969).

to enlighten language-users at large as to allow one expert to register information for scrutiny by another."<sup>57</sup> If "collections of such formulae . . . are known to do the job adequately, having been subjected to long and thorough testing before the courts . . ." <sup>58</sup> then why should lawyers not continue to use them? In attempting to deviate from or to change the established forms, an individual lawyer would be risking his own as well as his client's interests. The basic linguistic principle involved in this analysis does, however, need to be recognized by lawyers. If lawyers were the ones who in the first place standardized such arbitrary linguistic forms within their own circle of experts, then they are the ones who with equal arbitrariness (taking advantage this time, though, of 20th century advances in linguistic knowledge) can change the patterns and make their language approximate ordinary prose in a desirable fashion.

The issue of arbitrariness raised here is not the same as that raised by the general semanticists in the thirties, forties, and fifties when they tried to draw attention to the way people often arbitrarily and unfairly generalize the implications of certain words. As one scholar observed during that period:

Words like communist, Red, Jew, Negro, convict, parolee, poor white, Southerner, gambler, etc. are likely to cause us to use a stereotype picture of an individual who is made to represent all members of a class. The fact is that they are only individuals, all different. Gambler<sub>1</sub> is not gambler<sub>2</sub> who is not gambler<sub>3</sub>. The index to indicate individuals is a device invented by Korzybski to keep us aware of the uniqueness of individuals and that in the non-verbal world there are only individuals.<sup>59</sup>

Even though there are fundamental flaws in the approaches used by many of those commentators,<sup>60</sup> they are obviously right insofar as they argue against use of verbal items as projections of conscious or unconscious prejudice.

On the other hand, the other type of arbitrariness which is under discussion here, *i.e.* universal linguistic arbitrariness, is basically neutral. Because it is free of the emotive connotations inherent in the "stereotype," lawyers (like any other specialized group) may manipulate it according to their collective desire. Despite the innate conservatism mentioned earlier,

<sup>57</sup> *Id.* at 193-94.

<sup>58</sup> *Id.* at 194.

<sup>59</sup> Duffy, *Practicing Law and General Semantics*, 9 W. RES. L. REV. 119, 123 (1958).

<sup>60</sup> See Youngern, *General Semantics and the Science of Meaning*, 29 COLLEGE ENGLISH 253 (1968).

[L]egal language has changed, even if slowly. . . . Nowadays points may be found in legal documents at which the language is considerably simpler than was once the case, perhaps allowing a single term to stand in place of a whole string of synonyms, or a simple phrase to indicate a series of legal operations that once needed several lines to set out in full.<sup>61</sup>

Even apart from the formulaic use of words, historical arbitrariness is a factor that influences our approach to legal concepts involving not just archaisms but terms that are part of the everyday vocabulary of English-speaking people. Linguists refer to "folk-etymology" as the "misunderstanding of a more or less esoteric word which renders it into something more familiar and hence seems to furnish it with a new etymology, false as it may be . . . ." <sup>62</sup> Thus "hangnail" originally had nothing to do with hanging. In Old English the word was "angnail" from Old English "ange," meaning painful.<sup>63</sup> "Helpmate" originally was "help" plus "meet," meaning proper or fitting. "Meet" was confused with "mate," leading to the creation of a new verbal item.<sup>64</sup>

Similarly "law" in "mother-in-law" comes not from the earlier word for law (Old Norse "lag") but rather from the Old English word "licgan"<sup>65</sup> meaning to lie down (in the specialized sense of referring to both bed and marriage). Even the erudite Mellinkoff seems to overlook this bit of folk-etymology when he cites "mother-in-law" in the context of discussing the origin of the word "law."<sup>66</sup> What complicates the whole situation is the intriguing fact that before the Old Norse influence became operative on English (due to the Viking raids on England), the earlier Old English word for law was "ae,"<sup>67</sup> which in Old English not only meant law but also marriage.<sup>68</sup> This historical muddle is not the important point here. What is important is the linguistic arbitrariness evidenced by the overriding consistency with which all speakers of English today will interpret "law" in "mother-in-law" to mean law and not marriage. The meaning of this compound word would essentially remain the same if we did say "mother-in-marriage," and one could also point

<sup>61</sup> D. CRYSTAL & D. DAVY, *supra* note 56, 213-14.

<sup>62</sup> T. PYLES, *THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE* 289 (1964).

<sup>63</sup> *Id.* at 291.

<sup>64</sup> *Id.*

<sup>65</sup> J. SHIPLEY, *DICTIONARY OF WORD ORIGINS* 210 (1967).

<sup>66</sup> D. MELLINKOFF, *supra* note 12, at 52-53.

<sup>67</sup> *THE OXFORD ENGLISH DICTIONARY* 143 (1933).

<sup>68</sup> D. MELLINKOFF, *supra* note 12, at 52.

out that the Old Norse "lag" and its plural form "lagu" involved a related concept in the sense that "law" means "something laid down or settled."<sup>69</sup> But all this does not alter the arbitrary twist given by history to the word for marriage in "mother-in-law." Such folk-etymology, arbitrary though it may be, reigns supreme once the misinterpreted term is widely accepted.

### C. *Unknown Origin*

The third important generalization about language which is significant for the legal profession, concerns speculations about the origin of language. Although it is probably man's most impressive invention, we have no way of knowing for sure how the amazing phenomenon of language originated in the human species. Recent research has taught us a great deal about its development in individual children, but when we try to discuss its origin in the species we must remember that the earliest records of any language are four to five thousand year old inscriptions. These languages of four or five thousand years ago are just as complex as languages of today and there is no way of knowing exactly when, how, or where they began.

In the absence of tangible records it is impossible to reach any scientific conclusions about the origin of language. Indeed, it is often assumed today that anyone who seriously tries to explain the origin of language must be a quack, or if you will, a linguack.<sup>70</sup> But in the past this sober fact has not deterred fanciful people from making the attempt. Some of their theories have been given interesting names by linguists of today: names which clearly indicate how seriously the theories ought to be taken. For example, there is the "yo-he-ho" theory.<sup>71</sup> According to this theory, primitive man uttered grunts and groans while doing heavy work and language developed from these primitive grunts. The trouble with the theory is that while a very tiny percentage of words does resemble grunts or groans, there is no way of relating most words or expressions to grunts. Then there is the "ding-dong" theory,<sup>72</sup> according to which some kind of a bell rang in primitive man's mind when he saw

<sup>69</sup> See WEBSTER'S NEW WORLD DICTIONARY 828 (College ed. 1956).

<sup>70</sup> See E. STURTEVANT, AN INTRODUCTION TO LINGUISTIC SCIENCE 40 (1947). Sturtevant points out that according to a by-law of the Linguistic Society of Paris, anyone wishing to read before it a paper concerning the origin of language is automatically out of order.

<sup>71</sup> L. MYERS, THE ROOTS OF MODERN ENGLISH 3 (1966).

<sup>72</sup> *Id.*

an object, say a cat, and he decided to call it a cat, and so on. Once again, so many different bells must have rung in so many different minds for primitive speakers of different languages that it is hard to do any serious thinking with all these bells ringing. There is also the "bow wow" theory,<sup>73</sup> according to which words arose from the imitation of natural sounds. This onomatopoeic theory could indeed explain words like "splash" and "screech," but it fails to account for the vast majority of words, many of which involve abstract concepts like "sorrow" or "justice." Besides, even the so-called onomatopoeic words lack universality and consequently are not suitable as the basis for any general theory of the origin of language. For example, to speakers of English it might seem that "bow wow" does indeed represent the sound made by a dog. But then in South Asia the same animal, the dog, is heard not to "bow wow" but to "gheu gheu." However, if one goes to the Far East, people there may claim this is all nonsense. Dogs neither "bow wow" nor "gheu gheu." They "wung wung." As they hear it, the sound of a dog is indeed "wung wung!" So much for the onomatopoeic theory. It should be clear that these theories, or a combination of them, may be partially right, but there is no way of *proving* any one of them. All one can do is speculate, and the trouble with speculation unsupported by factual evidence is that it can lead to any belief.<sup>74</sup>

Fanciful speculations about the origin of language deserve some ridicule, but to restore the balance it should be remembered that there can be more respectable ways of speculating about the beginnings of language. Greenberg, for example, speculates that tool making may have been related to the development of language in the species.<sup>75</sup> Archaeological findings show that toolmaking techniques must have persisted from generation to generation, and it is assumed by some anthropologists that such transmission of toolmaking tradition could not have taken place without the use of language. If this inference is valid, then language is at least several million years old. We must remember, however, that the oldest linguistic records are only four or five thousand years old. On the basis of something that is only four or five thousand years old, how can we talk with certainty about stages occurring millions of years ago?

Susanne Langer advances a different kind of speculation which

<sup>73</sup> *Id.*

<sup>74</sup> For example, the philologist Andreas Kemke seriously believed that in the Garden of Eden Adam spoke Danish, the serpent spoke French, and God spoke Swedish. Kemke himself was Swedish. See M. PEI, *THE STORY OF LANGUAGE* 24 (1965).

<sup>75</sup> J. GREENBERG, *supra* note 30, at 5.

is equally, if not more, convincing.<sup>76</sup> Professor and Mrs. W. N. Kellogg, many years ago, brought up a little chimpanzee exactly as if they were bringing up their own child. They noticed that the baby chimpanzee made no attempt to babble regularly the way their infant daughter babbled when she was contented. The comparison may indicate a human need, lacking in the lesser animals, for pure self-expression. It may be that the utilitarian theory of Greenberg which relates the origin of language to the practical need of tool-making is of secondary importance in comparison to this primary aesthetic need humans may have for pure self-expression. Two examples seem to confirm this primacy of the aesthetic over the utilitarian urge to communicate.

At the beginning of the nineteenth century, Dr. Itard took on the job of trying to educate Victor, the so-called "savage of Aveyron," captured in that district of Southern France.<sup>77</sup> Dr. Itard tried the behavioral approach of giving rewards for a job done properly. He found, however, that even by withholding food or drink to the point of starvation he could not induce Victor to repeat the words for water or milk: *eau* and *lait*. Finally, he gave up all hope and, feeling sorry for the boy, actually poured the milk out for him. It was then, not as the sign of a need, but rather as an exclamation of joy that Victor repeated the word for milk, *lait*. Though he never learned to speak in any significant sense, he did also repeat the syllable *Li*, which Dr. Itard identified as the shortened form of the name of a young girl, Julie, who stayed in the same house with Victor for several weeks.<sup>78</sup>

Another example of the aesthetic motivation for communication is the well-known case of Helen Keller. Many attempts by her teacher, Anne Sullivan, failed to induce Helen Keller to make the essential connection between a symbol and the object symbolized. She apparently lacked capacity for perceiving relationships, which is the very basis of linguistic communication. That famous day when Helen Keller thrilled at the coolness of the water gushing over her hand, it was aesthetic delight and not utilitarian need that enabled her for the first time to make the connection between water and the symbol for water. Later Helen Keller was to write: "I felt joyous, strong, equal to my limitations. Delicious sensations rippled through

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<sup>76</sup> S. LANGER, *supra* note 39, at 85.

<sup>77</sup> E. ITARD, *supra* note 44.

<sup>78</sup> Victor obviously was quite fond of Julie. He was observed to continually repeat the syllable *Li*, even in his sleep.



me, and sweet strange things that were locked up in my heart began to sing."<sup>79</sup> Clearly her motivation, like Victor's, was aesthetic joy rather than utilitarian need.

Wolfgang Köhler, in his famous studies of chimpanzees,<sup>80</sup> observed that his apes developed a game of spinning in circles in a manner strikingly suggestive of rhythmic movement of the kind we see in the dances of many so-called "primitive" tribes. In speculating about the origin of language, one could perhaps theorize that millions of years ago some vocalizing human, or near-human creature, uttered shouts of joy or shouts that marked rhythmic motion as a group swirled around in ecstatic circles. In this vein, Langer observed: "It is not at all impossible that *ritual*, solemn and significant, antedates the evolution of language."<sup>81</sup> Similarly, the Scandinavian authority on language, Jespersen, specifically suggested that speech and song may have sprung from the same source. He speculated: "There was once a time when all speech was song, or when these two actions were not yet differentiated."<sup>82</sup>

It is necessary to remember, however, that all of the above is mere speculation. We really do not know what happened in the early days of language development, and unfortunately empirical research is impossible since there is no extant society in which language is just beginning to evolve. Even the most backward savages in the remotest jungles have languages as developed as any language found in advanced technological societies.

If the ancestors of the languages we know about today evolved millions of years ago, how can we ever hope to speak about their origin with any scientific certainty or advance any proof that would be acceptable to a lawyer? Clearly there is something unique about man's brain which at some point in time did develop language. If one wants to *speculate*, he could hypothesize that several million years ago some dying star exploded and released a special kind of radiation which reached our earth and brought about a mutation in the genes of some human or semi-human creature, resulting in a new species which was able to use language. The point is quite simply that no one could prove anything definitely about this or any other speculation.

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<sup>79</sup> V. BROOKS, HELEN KELLER: SKETCH FOR A PORTRAIT 14 (1956).

<sup>80</sup> W. KÖHLER, THE MENTALITY OF APES 326-27 (1925).

<sup>81</sup> S. LANGER, *supra* note 39, at 104.

<sup>82</sup> O. JESPERSEN, LANGUAGE: ITS NATURE, DEVELOPMENT AND ORIGIN 420 (1922).

#### D. *No Hierarchy of Languages*

The fourth significant generalization to be made about language is that there is no such thing as an "advanced" or "primitive" language. Many people have long believed that some languages, especially those of advanced industrial countries, must somehow be superior to those of less "advanced" cultures. No professional linguist can be heard any longer to support such a view. It was pointed out earlier, while discussing the simple example involving colors, that the terminology of the less "advanced" cultures is not at all linguistically inferior. One must recognize that often when he thinks he is talking about language what he really has in mind is culture. For example, Eskimo culture involves considerable preoccupation with snow, and consequently Eskimos have over a dozen words referring to different kinds of snow: one word for fine powdery snow, another for wet snow, another for dry snow, and so on. English does not have anywhere near as many words for snow simply because English speaking people do not have to contend with snow to the same extent. This does not mean the Eskimo language is in any way superior to English; it simply means that Eskimo culture is more conscious of snow. On the other hand, when it comes to cars, an American may rattle off a whole list of terms related to the automobile, such as hard top, convertible, coupe, sedan, two-door, four-door, and so forth. An Eskimo lacks these terms not because his language is inferior, but because his culture is less concerned with cars.

In a somewhat different context, but for similar reasons, the Garadjari Tribe of Western Australia has different terms for one's father's sister's daughter, as distinguished from one's mother's brother's daughter.<sup>83</sup> In English both are considered cousins because there are no social rules that compel one to make any distinctions. Among the Garadjari, however, a man is permitted to marry his mother's brother's daughter but not his father's sister's daughter. Consequently there are two different terms standing in place of the single English word. Once again the explanation of the disparity is found in cultural factors rather than any relative inferiority of the language.

A final example, this time involving an abstract concept, is the educated speaker of Bengali who can, without much effort, list over

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<sup>83</sup> A. CAPELL, *STUDIES IN SOCIO-LINGUISTICS* 28-29, 83-84 (1966).

a dozen Bengali words which signify various shades of desire.<sup>84</sup> One word may signify desire for money, another for love, another for power, and so on. And if one can think of that many synonyms so easily, there must be many others in the language. But this does not mean that Bengali is linguistically superior to other languages with fewer words for desire. It only indicates that the traditional culture of Bengal or India may have been obsessed by the desire to get rid of desire.

As for the grammatical system underlying a language, linguistic research reveals that contrary to what one might expect, the languages of so-called "primitive" cultures are grammatically just as complex as the languages of "advanced" cultures. To cite just one example, the culture of the people who spoke Old English would seem backward to English-speaking people of today. Yet the grammar of Old English is patently more complex in some areas than the grammar of Modern English. Where Modern English has only one word "the," Old English had over a dozen.<sup>85</sup> Which one of these different words was used depended on whether it referred to a masculine, feminine, or neuter noun. Similar mechanics governed the form of the adjective, verb, and so on. Similarly, languages of other so-called "backward" cultures show astonishingly complex grammatical systems. How jungle societies that have yet to invent the wheel are able to develop so complex a thing as language is indeed one of the basic mysteries of mankind.

Therefore, although the concept of primitivism may be applied to law, it may not be similarly applied to language. One may think of primitive law as a system which relies not on general principles, but on a loose conglomeration of traditional sayings, commandments, and proverbs. Presumably the hallmark of a modern legal system is that it attempts to formulate law in terms of:

[The] smallest number of general principles from which all possible cases can be reached, just as we try to reduce our knowledge of nature to a deductive mathematical system. . . .

Just as the generalized arithmetic which we call advanced mathematics has increased manifold our power of solving physical problems, so a generalized jurisprudence enlarges the law's control over the diversity of legal situations.<sup>86</sup>

But the languages of so-called primitive societies have underlying

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<sup>84</sup> That list includes: bashona, kamona, lalsha, abhipsa, abhilash, eepsha, laullo, akankha, chaoa, ichcha, lolupota, ishti, lobh, gridhnuta, and others.

<sup>85</sup> These include: se, pone, paes, paem, py, seo, pa, paere and others.

<sup>86</sup> Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622-25 (1916).

principles which are qualitatively the same as those of languages used by cultures which have modern legal systems.

### E. *Constant Change*

The fifth significant generalization about language is that all living languages change constantly. Although this point has previously been discussed, it should be additionally noted that such change is generally not haphazard, but quite systematic and understandable, assuming that one studying the changes has adequate historical data and proper analytical methods with which to work.

Another point to remember is that linguistic change is not the same as decay of a language. Language may *reflect* cultural decay, but language itself never decays. When we refer to a "dead" language, we might have in mind one of two things. First, we might mean that a language has changed so much over a long period that its various branches of development have become known by different names. In this sense, Latin is not really dead; rather, it has mutated into what we today call French, Italian, Spanish, Portuguese, etc. Similarly, Sanskrit is not really dead; it changed into Hindi, Bengali, Marathi, and so on. The second sense in which we may refer to a language as dead involves the true extinction of a language which occurs as a particular linguistic group loses its identity, and no derived form of the language continues in use for everyday purposes. Thus Gothic, which is a cousin language of West and North Germanic, is truly dead because no derived form exists.

### F. *Linguistic Correctness*

This notion of linguistic change is closely related to the sixth important generalization about language. The English-speaking world has, since the seventeenth century, developed a popular notion of linguistic "correctness" that is often concerned more with social acceptability than with real linguistic factors. Linguistic change was not properly understood until the nineteenth and twentieth centuries. During the seventeenth and eighteenth centuries most Europeans, especially the English, were extremely worried that if something was not done to purify the language and establish it permanently in that supposedly pure and codified form, all communication would be subject to doom and decay. Consequently, in the eighteenth century many influential people began to formulate strict rules of usage. Such a concern for rigidity is not surprising in light of the era in which it occurred. It was the time of the Industrial Rev-

olution, and the fantastic scientific discoveries of the time dealt severe blows to many traditional beliefs. Political conditions were also in a state of turmoil. It is not surprising that the European mind should have groped almost desperately for order in any possible area. This was the age of great change, instigated by great law givers, mathematicians, and scientists. The common man welcomed practically anything that could create or suggest areas of orderliness in such a rapidly changing world.

The public at large wrongly began to think of grammar as some kind of linguistic etiquette which tells us when to use "shall" or "will," when to use "like" or "as," and so on. And, of course, there are certain things like "ain't" or double negatives that grammar presumably tells us never to use. The linguist of today, however, avoids making such absolute value judgments and simply points out that this kind of correctness is solely a matter of effective communication and social acceptability. For example, the putative distinction between "shall" and "will" is not followed by the overwhelming majority of the people in all levels of society, even though the fallacious distinction was widely accepted after it was made by John Wallis in the seventeenth century.<sup>87</sup> The only real distinction between "shall" and "will," which one rarely sees described in grammar books, involves questions in which "shall" indicates intention and "will" probability. For example, "Shall we investigate this situation?" involves the *intention* of investigating as distinguished from a question like "Will we investigate this situation?" which involves the *probability* of investigating.

In regard to the double negative, the modern linguist will point out that on certain levels of modern society double negatives are quite acceptable and that their meaning is quite clear. He would further note that for the first thirteen or fourteen hundred years of the English language its speakers never condemned double negatives, or triple or quadruple negatives for that matter. Chaucer once used four negatives in a row: "[T]o tellen nas nat his entente to nevere no man . . ." <sup>88</sup> That is, "to tell not was not his intent to never no man." In those days multiple negatives served to emphasize the negative nature of the remark. It was only in the eighteenth century that Robert Lowth decided to apply mathematical notions to language and declared that two negatives made a positive even

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<sup>87</sup> R. HALL, JR., *LINGUISTICS AND YOUR LANGUAGE* 24 (1960).

<sup>88</sup> F. ROBINSON, *THE WORKS OF GEOFFREY CHAUCER* 397 (2d ed. 1961).

in language.<sup>89</sup> Unlike the equally artificial distinction between "shall" and "will," this particular dictum *was* widely accepted by speakers of standard English. Because of this early acceptance, today the double negative is indeed to be avoided by anyone who wishes his speech to be acceptable among educated, cultivated people. But the important point is that the reason for avoiding the double negative is not linguistic but social in nature. Among non-standard speakers, as well as among standard speakers before the eighteenth century, the double negative has never been a problem.

Much grammatical rigidity is the result of purist approaches taken since the eighteenth century by men who generally have been unaware of the facts of linguistic change and have therefore attempted to spread the notion that there is something inherently wrong about certain kinds of speech. These approaches thus confuse morality with grammar. Morality involves a notion of right or wrong, but grammar should be only a matter of appropriateness or inappropriateness. There is no reason why a child who has grown up in the slums, hearing non-standard speech, should be made to feel inferior or inadequate. There is nothing *wrong* with his speech, and indeed within the slums his speech is far more effective than standard speech. But, unfortunately, the purist approach states dogmatically that there is only one correct way of speaking. As a result a great many people, the ghetto resident especially, who speak quite adequately and communicate quite clearly have been made to feel unnecessarily insecure about the propriety of their speech patterns. The speaker of non-standard English needs to be concerned about his speech only when he wishes to enter the business or social world of those who speak standard English.

One additional point to be made about the traditional approach is that it did not recognize what is known today as divided usage. For example, if one were to ask a group of educated people whether "two and two *is* four" or "two and two *are* four," there would be no unanimous answer as to which form is habitually used.<sup>90</sup> When we have a situation like this, in which even highly educated and cultivated speakers use variant forms, linguists claim that both forms are appropriate, and we have a case of divided usage. The same principle can be extended to dialects of the same language. If two socially acceptable dialects of the same language have variant forms for the same expression, both are appropriate within their respective

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<sup>89</sup> A. BAUGH, *supra* note 38, at 336.

<sup>90</sup> M. BRYANT, *CURRENT AMERICAN USAGE* xxii (1962).

domains. Thus a speaker of the Northern dialect of American English, in New England, may be sick *to* his stomach while a speaker of the North Midland dialect of American English, in Eastern Pennsylvania may be sick *on* his stomach with equal propriety without making any knowledgeable linguist sick *at* his stomach.

These various rules of usage bear significant implications for the lawyer. As was discussed earlier, lawyers have special reasons for holding on to archaisms and traditional formulaic patterns of writing. The pressure of these special reasons can be mitigated considerably if lawyers collectively act on the realization that in all other domains of linguistic behavior the doctrine of current usage is supreme. If they decide collectively to allow current standard usage, which they themselves follow in their non-legal activities, to prevail in their legal writing, then an individual lawyer need not "stick his (or his client's) neck out" in this matter.

#### G. *Morphology, Phonology, and Syntax*

We come now to the last generalization about language to be discussed. Serious study of any language involves analysis of its phonology, morphology, and syntax. Phonology involves study of the sounds of a language. Morphology deals with the way these sounds are combined to form meaningful units like words and prefixes or suffixes, and syntax concerns the arrangements of words in phrases and sentences. Semantics, the study of meaning, pervades all three items and is the topic most vigorously debated among linguists today. In an earlier part of this discussion the concepts of morphology and semantics were, at least by implication, considered in relation to specific words used by lawyers:<sup>91</sup> no additional treatment is needed here. Moreover, Mellinkoff has adequately discussed the morphological aspects of legal writing.<sup>92</sup>

Phonology need not be a vital concern for lawyers because they can take the sounds of a language for granted. However, the basic concept of the phoneme, which was mentioned at the beginning of this article,<sup>93</sup> ought to be made familiar to all because it reminds us again how the principle of arbitrariness affects the very basis of language — its individual sounds.

What usually appears to an untrained observer to be an individual sound in a language, say the sound represented by the letter

<sup>91</sup> See text accompanying notes 52-58, *supra*.

<sup>92</sup> See D. MELLINKOFF, *supra* note 12.

<sup>93</sup> See notes 15-16 *supra* & accompanying text.

<l> (angle brackets will be used here, as used by linguists, to refer to written forms in standard orthography), are in reality not single sounds but classes of sounds which comprise a *phoneme* in a given language. Each truly individual sound is called an allophone of a phoneme. Allophones are presented within square brackets and phonemes are enclosed within virgules. Thus, the letter <l> occurs in <lap> and in <pal>, but the sounds represented by <l> in the two words are not the same. Let us say that the allophone [l] is the sound at the beginning of <lap> and [ɫ] is the sound at the end of <pal>. If we were to try to pronounce <lap> by starting with the sound that ends <pal> we would immediately notice that [l] is different from [ɫ]. In fact, [ɫ] used at the beginning of <lap> would sound extremely unnatural because in English this sound does not occur at the beginning of a word. However, even if we did use [ɫ] at the beginning of <lap> it would not change the meaning of the word; only the pronunciation would sound unnatural. So we say [l] and [ɫ] are allophones of the /l/ phoneme. But substitution of [l] by [k] would change the meaning to that of <cap>; thus /k/ and /l/ are different phonemes in English.

Each language may have countless allophones but the phonemes are easy to count. English, for example, has 45 phonemes, while Maori has only 15. Some other languages like Abkhas and Kabardian have over 50 phonemes for the consonants alone.<sup>94</sup> Without utilizing the concept of the phoneme it is virtually impossible to say how many sounds a language uses.<sup>95</sup>

One point remains for analysis in this discussion. Chomsky's ideas concerning syntax bear much relevance for legal writing. Before Chomsky, grammarians considered each sentence separately. Their analysis of the surface structures of sentences failed to show deep, systematic relationships between different kinds of sentences. For example, consider the following sentences:

- (1) He ran up a big bill.
- (2) He ran up a big hill.
- (3) They were shot by the police station.
- (4) They were shot by the policeman.

Traditional analysis would label (1) and (2), and (3) and (4) as two pairs of sentences with similar structures. Thus, both (3) and

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<sup>94</sup> A. CAPPELL, *supra* note 83, at 32.

<sup>95</sup> For perceptive comments on Noam Chomsky's controversial views regarding the phoneme, see Schane, *supra* note 16 at 503.



(4) would be said to consist of the subject *they* and the similar predicates *were . . . police station* and *were . . . policeman*. Both predicates would be said to contain similar prepositional phrases introduced by *by*. This kind of syntactic analysis does not explain why every native speaker knows almost intuitively, that (3) and (4) are substantially different structures despite their surface similarity.

Chomsky's methodology postulates underlying deep structures for all utterances in order to provide more adequate theoretical models for explaining such syntactic patterns. This methodology involves what Chomsky calls the transformational-generative approach to linguistic analysis. Underlying deep structures are *generated* in these theoretical models in accordance with explicit phrase-structure rules and *transformed* in accordance with equally explicit transformational rules.

The underlying deep structure (3A) for sentence (3) may be roughly indicated as follows:

Noun phrase	+	transitive verb	+	noun phrase	+	locative
Someone		shot		them		by the police station

To this underlying deep structure (3A) we first apply the transformational rule that converts an "active" structure to its "passive" form. After making this passive transformation, we apply the deletion transformation which deletes a so-called "understood" or recoverable item. The passivization of (3A) yields (3B):

They were shot by the police station by someone.

Next, deletion of the understood *by someone* produces (3):

They were shot by the police station.

The derivational pattern of sentence (4) is quite different, because the deep structure of the sentence does not contain a locative element in the underlying string of phrase-structure. Thus, the deep structure (4A) would be diagrammed as:

Noun phrase	+	transitive verb	+	noun phrase
The policeman		shot		them

To (4A) we apply only the passive transformation to get (4):

They were shot by the policeman.

Transformational analysis accurately reveals relationships between sentences like (3) and (3A), and between (4) and (4A). Earlier methods of analysis not only had to discuss (3) separately

from (3A), and (4) separately from (4A), but also failed to demonstrate, in terms of formal rules, the differences in deep structure between (3) and (4). Such relationships are vital for creating the total stylistic effect of a passage.

Before these principles can be applied to legal writing, three other terms must be explained: right-branching, left-branching, and nesting. In regard to branching:

Legal English contains only complete major sentences. Both the incomplete sentences which help to characterize conversation and also the minor sentences which are so notable a feature of commentary and by no means rare even in some written varieties are entirely lacking. . . . Reduced to a minimal formula, the great majority of legal sentences have an underlying logical structure which says something like "if X, then Z shall be Y" or, alternatively "if X, then Z shall do Y." There are of course many possible variations on this basic theme, but in nearly all of them the "if X" component is . . . essential.<sup>96</sup>

This "if X" element is clearly an adverbial structure which in transformational-generative analysis would be regarded as a dependent construction joined to an independent construction by special transformational rules. Thus if we have a dependent adverbial clause such as:

When (or if) the trial court does not comply with the habitual criminal statute . . .

it may be joined in various ways to an independent clause like:

A judgment imposing a sentence of life imprisonment is void.

We could have a *right-branching construction* in which the main clause precedes the dependent clause:

A judgment imposing a sentence of life imprisonment is void when the trial court does not comply with the criminal statute.

Or we could have *left-branching*:

When the trial court does not comply with the habitual criminal statute, a judgment imposing a sentence of life imprisonment is void.

Or we could have *nesting* in which the dependent clause falls totally within the independent clause:

*A judgment imposing a sentence of life imprisonment when the trial court does not comply with the habitual criminal statute is void.*

Extensive branching does not necessarily create any adverse sty-

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<sup>96</sup> D. CRYSTAL & D. DAVY, *supra* note 56, at 203.

listic effects, but the human mind can take only a limited amount of syntactic nesting because nesting forces the brain to keep track of the initial part of the construction until the nested item has been absorbed and the balance of the construction is revealed.

Let us now look at the full sentence of legal writing from which the above example was taken:

*When, without any showing to the contrary, it affirmatively appears, from the record in the trial of a criminal case on an indictment for a felony punishable by confinement in the penitentiary for a period of less than life imprisonment, that the trial court did not comply with the habitual criminal statute then in effect which expressly required that before a sentence of life imprisonment may be lawfully imposed it must be admitted, or by the jury found, that the person convicted on the indictment had previously been twice sentenced in the United States to the penitentiary, a judgment imposing a sentence of life imprisonment upon the convict, based upon statute, is void, to the extent that it exceeds the maximum sentence for the particular offense charged in the indictment, for lack of jurisdiction of the trial court to render it, and the effect of that part of the sentence of life imprisonment, in excess of the maximum sentence for such particular offense, will be avoided and its enforcement prevented in a habeas corpus proceeding.*<sup>97</sup>

Although this formidable sentence does not represent the language of the law in its entirety, it does illustrate the syntactic factors that often cause difficulties, especially for non-lawyers reading legal documents. Not only is there extensive branching, but also repeated nesting within both the dependent and independent clauses. Elaborate nesting of this sort inevitably causes stylistic strain. Rewriting such a sentence would require not only examination of the surface structure, but also a thorough analysis of the underlying deep structure. Only a lawyer could rewrite the sentence with total effectiveness, for a non-lawyer would not know the relative importance of the various legal ideas embodied in each nested or branched element.

To undertake such stylistic overhauling, one need not necessarily be familiar with Chomsky's notion of deep and surface structure, or with his terms like nesting, left-branching, and right-branching. There can be no denying, however, that such awareness provides us with sharper analytical tools than those provided by earlier methods of linguistic analysis.

Transformational analysis would appear to call for brevity in the field of legal writing, but, as Mellinkoff declared: "The pressure for

<sup>97</sup> State *ex rel.* Browning v. Tucker, 142 W. Va. 830, 838, 98 S.E.2d 740, 745 (1957) (emphasis added).

brevity comes in better grace from the bar itself . . . [from] looking to the best rather than the worst of the law's literary tradition."<sup>98</sup> He cites the following as a sample of the best:

The Court below erred in giving the third, fourth and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it. *The judgment is reversed and the cause remanded.*<sup>99</sup>

The above sample of nineteenth-century legal writing may not touch on the most profound aspect of law, but the linguistic principle involved is crucial. The same kind of clear prose should also be used for the most profound statements on law in our age of great transitions when more and more members of the public must understand the law if they are to cooperate in bringing about these transitions properly. Insight into the underlying principles of language discussed here is an essential prerequisite for the kind of communication that must take place in our complex society not only among lawyers but also between lawyers and non-lawyers.

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<sup>98</sup> D. MELLINKOFF, *supra* note 12, at 413-14.

<sup>99</sup> *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 461, 462 (1855).