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BOOK REVIEW

THE FALL OF THE CONFESSION ERA

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LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* (CHICAGO: UNIVERSITY OF CHICAGO PRESS, 2005). PP. 289.

Today, we live in the “confession era” of criminal law: a defendant’s inculcation of himself is the golden ring for which prosecutors always reach. Police procedures are structured around it, as are vast swaths of criminal procedure doctrine, from *Escobedo* to *Miranda* to *Dickerson*. Knowing sophisticated and reliable techniques for *interpreting* these confessions is thus fundamentally useful to lawyers and judges. In *Speaking of Crime: The Language of Criminal Justice*, Lawrence M. Solan and Peter M. Tiersma provide a sweeping introduction to the state of the art in forensic linguistics, providing the reader with just such techniques. This makes their book indispensable to the modern practitioner.¹ At the same time I commend Solan and Tiersma in this review for making forensic linguistics accessible to the novice, I am also going to suggest that the confession era is coming to a close. As new technologies develop, such as DNA identification, fMRI “lie detector” tests, and “data fingerprinting” on the internet, I predict that courts will rely less and less on confessions and their artifacts altogether, ironically rendering our need for linguistic sophistication in this area of the criminal law less important.

Of course, we are not out of the confession era yet (if in fact we ever will be), and in Part I of this review, I will outline this book’s many contributions to understanding issues of language that are so central to the

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¹ LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* (2005).

criminal law today. I will also touch on the other areas of criminal law that Solan and Tiersma discuss, because their aims are quite broad. In Part II, I will make the case for my speculation that in the near future, emerging technologies will render confessions, and related phenomena such as consensual searches and requests for attorneys before interrogations, mostly obsolete. I will further argue that, consistent with past technological innovations in criminal evidence, the judicial system will continue to focus on traditional confessions well past the point where they contribute helpfully to the search for truth in trials, partly out of habit, and partly out of skittishness about the perceived (and I believe false) power of the new technologies to displace trials altogether.

I.

If you were to leave the rest of the book untouched, reading the first of the book's four sections (really, even just Chapter 2) would adequately acquaint you with the bulk of the linguistic tools Solan and Tiersma employ to resolve most of the criminal law problems they discuss. Though many lively debates continue in linguistics, they argue that much of importance is well-settled: "We now know a great deal about what makes language plain when it is plain, and what makes language vague or ambiguous when it is unclear. . . . We also know how the structure of a discourse affects the inferences that people are likely to draw from the language that they hear."²

The authors lucidly explain this body of knowledge to their readers—though I confess I would have liked more flesh in this overview chapter, even if it came at the expense of perfect clarity to the complete novice. Their discussion of "sound systems" (the way different languages voice—and sometimes confuse—different sounds at different parts of words and sentences),³ syntax,⁴ and the differences between the "definitional" (a list of necessary and sufficient conditions) versus "prototypical" (based on experience and understanding) approaches to word meaning⁵ are somewhat disappointingly brief, especially given that they don't return to these issues at any real length or technical detail later in other chapters. In contrast, their introduction to pragmatics⁶—that is, the understanding of language through both verbal and circumstantial context—is both clear and thorough; better yet, they return to it time and again throughout the book so that the reader gains real facility with the concepts.

² *Id.* at 15.

³ *Id.* at 16-18.

⁴ *Id.* at 18-20.

⁵ *Id.* at 20-23.

⁶ *Id.* at 23-26.

Indeed, this book is less about the science of linguistics generally, and more about the application of pragmatics to criminal law specifically. When divorced from context, language as spoken or written is hopelessly ambiguous. To illustrate this point, Solan and Tiersma offer the example of the simple statement, "It's two o'clock." Taken purely at face value, this is "nothing more than a statement about the time of day."⁷ Yet because we assume that the speaker is a conversational partner interested in cooperating with us in a shared endeavor to express meaning,⁸ we can infer from context what the speaker *intended* to say when she spoke her words:

[W]hen uttered by one concerned parent to another, it may be a way of saying, 'I'm worried about our teenager not being home yet,' even though worry is never mentioned. When uttered by a teacher at the end of a test, it may mean, 'Time is up.' When uttered by a sports fan, it may mean, 'The game is about to start.'⁹

It is of course this very ambiguity that causes repeated problems that courts must solve, and Solan and Tiersma's ambition is to raise the level of technical precision in legal discussions and resolutions of these problems.

After the first two introductory chapters, the authors organize the rest of the book into sections roughly organized around criminal procedure, the boundaries of expert linguistic testimony, and substantive criminal law. However, notwithstanding an interesting, but stand-alone, foray into the science of voice- and writing-identification in Chapters 7 and 8 and a final, exhortatory chapter that summarizes all of their policy recommendations, linguistic pragmatics is the unifying theme that runs throughout the entire book. The theme has two basic strands, which I expand on below. First, by offering repeated problems and solving them by using pragmatics, Solan and Tiersma provide the reader with a solid "how to" guide for solving other interpretation problems in the law. Second, the authors systematically uncover startling inconsistencies in courts' actual use of pragmatics to solve interpretation dilemmas.

A.

All of the following are established doctrines of criminal law and procedure: law enforcement personnel do not need to secure a warrant if a suspect consents to a search after a request—not a command—from a police officer.¹⁰ Police must immediately stop interrogating a suspect and

⁷ *Id.* at 23-24.

⁸ For this recurrent point, the authors cite to H.P. Grice's seminal work on the Cooperative Principle of conversation. *Id.* at 8 (citing H.P. GRICE, LOGIC AND CONVERSATION (1975)).

⁹ *Id.* at 24.

¹⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

allow him to consult a lawyer as soon as he explicitly asks for one.¹¹ Literal truth (even though deceptive) is a complete defense to a charge of perjury.¹² Mere predictions about future harms,¹³ or explicit, though menacing, political commentaries,¹⁴ do not count as convictable threats.

But what *is* the legal difference between a request ("May I have a look inside your car?") and a command ("Let me look inside your car")? How can we tell the difference between a genuine request ("Please let me talk to my lawyer") and a mere musing ("It would be nice if I could see my lawyer")? What makes a lie, a lie and not just a nonresponsive answer to a question? What makes a threat, a threat and not a warning or dramatic hyperbole? The distinctions, of course, are critical to the law, and courts are constantly called upon to make them.

Solan and Tiersma very convincingly make the case that all of these distinctions can *only* be drawn pragmatically. Take the example they offer, *Schneckloth v. Bustamonte*.¹⁵ During a traffic stop for burnt headlamp and license plate lights, a police officer asked the driver, "Does the trunk open?" The driver answered "yes," and opened the trunk. Inside, the police found three stolen checks.¹⁶ Did the police make a request to search the trunk? Obviously the officer was "not [making] an inquiry into the design of the automobile or the condition of the trunk,"¹⁷ and so the Court interpreted the question "Does the trunk open?" as a request to examine the contents of the trunk. It was context alone that suggested this reading. Had the questioner been a customer and the questionee a used car salesman, then the question might have more appropriately been taken literally. But here, the questioner was a police officer and the circumstance was a traffic stop. Had the citizen merely answered "yes" with no move to open the trunk, the police officer would have rightly regarded the response as obstreperous.

Solan and Tiersma point out that while courts instinctively use linguistic pragmatics to interpret the words of police officers in exchanges with citizens, their usually-subconscious and untutored applications can be wooden or one-sided. In *Bustamonte*, the Court took for granted that a question which on its face was about whether a trunk could open, was a request by the officer to open it. However, they did *not* consider another linguistically-plausible reading: given the context of a legitimate traffic stop

¹¹ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹² *Bronston v. United States*, 409 U.S. 352 (1973).

¹³ *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994).

¹⁴ *Watts v. United States*, 394 U.S. 705 (1969).

¹⁵ 412 U.S. 218 (1973).

¹⁶ *Id.* at 220.

¹⁷ SOLAN & TIERSMA, *supra* note 1, at 24.

and a police officer acting in his official capacity, most people would consider the words not as a request, but as a command. Solan and Tiersma argue that the Court's error was in considering only whether the officer *intended* to convey a request to open the trunk (the "illocutionary force"¹⁸ of his words), rather than on how the driver *heard* the words (the "perlocutionary effect"¹⁹). The error is made all the worse because *there was nothing in the actual language of the police officer* that would have clued the citizen in to the fact that the coercive phase of the interaction had ended (that is, being required to pull over and step out of the car), and the optional phase begun (the consensual search of the automobile).²⁰

This is but one instance where Solan and Tiersma walk the reader through an interpretive problem and solve it using pragmatics. Through extensive examples, the authors clarify many other language problems that come up again and again in criminal law. For instance, they demonstrate why courts should be especially careful about questions that begin "Do you mind" or "You don't mind," since these openers confuse the normal rule about the meaning of an affirmative response: a "yes" answer to "Do you mind if I search the trunk?" could mean either "Go ahead and search the trunk" or "I certainly *do* mind if you search the trunk!"²¹ In another extended example, they help us understand why suspects rarely forcefully assert their right to speak to a lawyer before being interrogated; namely, as is usual with people who carry less power in any interaction,²² the language suspects use to invoke their rights tends to be indirect.

They do similar work in the chapters on the substantive criminal law doctrines of solicitation/conspiracy, threats and perjury—that is, they walk the reader through several problems, with each one adding interpretive complexity. Given the recent I. Lewis "Scooter" Libby indictment, the chapter on perjury is particularly interesting: using pragmatics, the authors

¹⁸ *Id.* at 25.

¹⁹ *Id.* at 26.

²⁰ *Id.* at 40.

²¹ *Id.* at 42-43.

²² Solan and Tiersma cite to JOHN CONLEY & WILLIAM O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 65-66 (1998), SOLAN & TIERSMA, *supra* note 1, at 60, but they might also have cited to interesting work in social psychology by Susan Fiske and others, showing that the more-powerful interaction partner (here, the police) is less likely to perceive the needs or requests of the less-powerful partner (here, the suspect), and are more likely to base their impressions on stereotypic information rather than on actual attributes possessed by the less powerful target. See, e.g., Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621 (1993); Stephanie A. Goodwin, Alexandra Gubin, Susan T. Fiske & Vincent Y. Yzerbyt, *Power Can Bias Impression Processes: Stereotyping Subordinates by Default and by Design*, 3 GROUP PROCESSES & INTERGROUP REL. 227 (2000).

convincingly demonstrate why the bright-line "literal truth" defense to perjury is far dimmer than it first appears.

Solan and Tiersma's extensive instruction in linguistic pragmatics should not feel foreign to their target audience: in many ways, they are just providing further lessons in "thinking like a lawyer." That is, Solan and Tiersma emphasize careful, close textual analysis coupled with sensitivity to alternative meanings based on circumstances. The advantage of this approach is its familiarity. The disadvantage is that it weakens the claim that their pragmatic approach answers legal problems in a unique and definitive way—something the authors implicitly acknowledge when they note, "Roughly speaking, pragmatic information can include just about anything beyond the actual language of an utterance."²³ Lawyers can virtually always make plausible counterarguments for considering a large set of possible interpretations or for construing a situation in different ways.

For instance, Solan and Tiersma ask, "Why . . . would *any* rational person *ever* agree to let the police search his possessions," especially when they know they are concealing contraband?²⁴ They use the context of the citizen's guilty knowledge as dispositive evidence for their pragmatic interpretation that a citizen who "allowed" such a search must necessarily have perceived the officer's "request" as a command.²⁵ Yet a skilled lawyer (or even just a good amateur psychologist) could argue something like the following: given the ambiguities of suspicion, coupled with the intuition that police officers, like everyone else, can be lazy, a citizen carrying contraband might hope that the officer's request is, essentially, a bluff: if she says "yes" to the request, the officer might decide to not bother with the search. After all, as Solan and Tiersma point out, why bother looking when no one with contraband is likely to invite the search?

Further, a citizen might worry that answering "no" will convert the officer's mild interest into full-blown suspicion (what does she have to hide?). Though legally, of course, answering "no" to the request could not itself constitute probable cause to search, lest the request be a meaningless game—but it would be surprising if the refusal had no effect at all on an officer's assessment of the situation. And it would be equally surprising if rational citizens did not intuit this and act accordingly.²⁶ These two

²³ SOLAN & TIERSMA, *supra* note 1, at 44.

²⁴ *Id.* at 27.

²⁵ *See, e.g., id.* at 45-46, 48.

²⁶ Consider a real example offered by the hip hop artist Jay-Z (born Shawn Carter). In a song, he describes a traffic stop he experienced in 1994, which he believes was racially motivated. The officer asked to search the car, and Jay-Z, knowing his rights, refused. The officer retorted, "We'll see how smart you are when the K-9's come." JAY-Z, *99 Problems*,

interpretations do not exhaust the possibilities, either. In her own writings on the subject, Janice Nadler has listed several other reasons rational, guilty people might consent to a search, other than because they believe it to be a command.²⁷ *Bustamonte* itself seems like a good example—though the driver lost his gamble, odds were high from the outset that a police officer performing a cursory search in the middle of the night would not find three wadded-up stolen checks inside a probably junk-laden (if my own is representative) car trunk.

In the end, why citizens acquiesce at such high rates to officers' requests to search is a tricky empirical question that at least one scholar has tried to answer, as I will discuss later. But my larger point here is not to criticize Solan and Tiersma's approach to these problems. It is in fact the opposite. Solan and Tiersma enrich our interpretive vocabulary, and provide new tools for increasing the precision of the arguments lawyers and judges already intuitively know how to make. This book helps the reader improve the kind of analysis that recurs throughout the law—and not just in the criminal arena—by more rigorously flexing mental muscles that our own discipline has already toned.

B.

If the authors' first goal is to teach the reader how to employ linguistic pragmatics in a principled, rigorous way, their second is to reveal how unrigorously, and inconsistently, the courts currently use it. Consider, for example, "performative speech acts," such as verbal requests for a lawyer.²⁸ Speech acts are legal magic words: they *do* something. In the case of a request for a lawyer, the police must cease interrogation completely until the suspect has had access to her attorney.²⁹ There are other performative speech acts in the criminal law, such as the substantive crimes of threat, solicitation and perjury. (Noncriminal analogues are things like contracts, or slander.) If each type of statement were constructed "I hereby such-and-such" (such as "I hereby request a lawyer," or "I hereby inform you that if you testify against me in court, I will kill you,") they would be

on THE BLACK ALBUM (Def Jam 2003). In the end, the canine unit was unavailable, and the officer let Jay-Z drive away—but there is no doubt in the description that Jay-Z felt he was between a rock and hard place in replying to the officer's request. Shaheem Reid, *Jay-Z: What More Can I Say*, MTV.COM, http://www.mtv.com/bands/j/jay_z/news_feature_112103/ (last visited Jan. 4, 2006).

²⁷ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 165-66 n.27.

²⁸ *Id.*

²⁹ *Edwards v. Arizona*, 451 U.S. 477 (1981).

unambiguous speech acts.³⁰ Even without the “I hereby” prefix, with a plain performative statement (“I request a lawyer,” “If you testify, I will kill you,”) there would be no need to use pragmatics to identify them.

But of course people rarely talk that way. For reasons of politeness,³¹ or euphonics,³² or powerlessness,³³ we tend to speak indirectly and imprecisely. In personal interactions, we unconsciously employ pragmatic analysis to discern meaning on the fly. But the formal legal system has the option of insisting on literal readings of speech acts. Solan and Tiersma point out that the law treats different categories of speech acts differently in whether they are willing to use pragmatics, or instead require literal interpretations to identify them. For perjury, the law explicitly refuses to engage in pragmatic interpretation.³⁴ Thus, if on cross examination a lawyer asks a witness, “Do you have a Chevy?” and receives the answer, “I have a Ford,” the witness has not committed perjury even if he has a Chevy, as well.³⁵ In contrast, the law is expansive in reading even quite obscure intimidations as threats.³⁶ Thus, “It sure would be a shame if someone messed up that pretty face” would certainly be a criminal act if uttered by a stranger to a lone woman in a dark alley.

Inconsistency like this, across different speech acts, is relatively unproblematic. We can—and Solan and Tiersma do—articulate good reasons for having different rules about literalism in these two areas. When it comes to perjury, cross examining lawyers already have the upper hand by getting to frame and order the questions, thus they have a great deal of power to manipulate the meaning of witnesses’ answers. “It would skew the power relationship between lawyer and witness even more if witnesses could be prosecuted for creating a misleading impression in a dialogue in which the questioner is doing exactly the same thing.”³⁷ No such worries arise in the case of threats, however. Indeed, allowing criminals to escape prosecution through a little creative wordplay would effectively evaporate laws against mugging, extortion, bribery, solicitation, etc.

³⁰ SOLAN & TIERSMA, *supra* note 1, at 25.

³¹ *Id.* at 38-42.

³² *Id.* at 19.

³³ *Id.* at 59-61.

³⁴ *Id.* at 215. As noted above, Solan and Tiersma point out that it is impossible for courts to truly demand literalism in perjury, but relative to other performative criminal speech acts, it is definitely at the extreme of the spectrum in its refusal to engage in pragmatic interpretation.

³⁵ *Id.* at 214. Solan and Tiersma show that this example is parallel to the exchange in *Bronston*.

³⁶ *Id.* at 204-07.

³⁷ *Id.* at 216.

Other inconsistencies, however, are more troubling. One of the most important contributions of *Speaking of Crime* is its unveiling of the indefensibly lopsided approach courts have taken with linguistic analysis in certain areas. I have already related their description of how courts implicitly use pragmatics to decide whether a statement by the police such as “Does the trunk open?” or “Do you mind if I take a look around?” is in fact a request to search, while refusing to engage in the same sort of pragmatic openness in considering whether the exact same questions are, in fact, *commands* to search.³⁸ But Solan and Tiersma offer countless other examples, such as that courts have frequently refused to rule that indirect requests by a suspect to speak to a lawyer trigger the requirement that the police stop an interrogation and fulfill the request. They have instead demanded from untrained citizens the very kind of literalism they have found unreasonable to expect of a trained police officer. Thus, a suspect who said that he “felt like he might want” to talk to a lawyer, and even those who said, “I think I would like to talk to a lawyer,” “I think I might need a lawyer,” and “Maybe I need a lawyer,” were all held not to have requested a lawyer.³⁹ The contrast with courts’ pragmatic approach to interpreting police requests to search without a warrant is striking, and Solan and Tiersma make a compelling case that the courts should not be allowed to have it both ways.

II.

Occasionally, Solan and Tiersma’s concerns seem dwarfed by considerations that even the most sophisticated linguistic analysis can’t address. Solan and Tiersma know this, yet even while acknowledging it, they sometimes seem to underappreciate the point. Take as an example their discussion of jailhouse snitching, in which they emphasize the unreliability of confessions that are necessarily based only on the “gist” of what a suspect said to a cellmate. In analyzing the problem, they write, “The problem is not just that cellmates have a stake in lying. It is exacerbated by the fact that witnesses can do a fairly good job insulating themselves from strong cross-examination by never having to give much detail about what the defendant actually said.”⁴⁰ True enough; the fact that we have no way to use the fine grained tools of linguistics to analyze a defendant’s “confession” does indeed add to the problem of letting snitches testify. Yet the motive cellmates have to lie is so overwhelming, it simply dominates the scene. Focusing on the linguistic qualities of such a

³⁸ *Id.* at 45.

³⁹ *Id.* at 57-58.

⁴⁰ *Id.* at 112.

confession feels like worrying that we can't band-aid the toe of a man who may be missing his whole leg.

For another example, consider something I have already discussed: courts' reliable inconsistency in applying literalism versus pragmatics to interpretations of officers' requests to search, or suspects' requests for attorneys. The inconsistency itself is not really the problem, it is the underlying reasons for the inconsistency. First, judges assume that most criminal defendants are guilty. Second, they assume that police officers rarely manipulate suspects or lie under oath. The first assumption is almost certainly true, but sadly, the second assumption is far more questionable. Christopher Slobogin wrote a devastating article about the phenomenon of "testilying," which is slang for police lying under oath (usually when they are convinced the defendant is guilty) and prosecutors turning a blind eye. Slobogin cited various sources that claimed the phenomenon is "commonplace," and may occur in as many as half of all criminal evidence suppression hearings.⁴¹ Here again, tightly examining the "actual words" used by police and defendants in the context of confessions, searches and interrogations seems beside the point, when the words reported may have been stitched from whole cloth.

Following Solan and Tiersma's sensible recommendation to simply record all police-suspect interactions could not cure the problem entirely. For one thing, and as the authors fully admit, the power differentials between police and citizens are so great that citizens are likely to feel coerced no matter *how* officers frames their requests.⁴² This has been empirically demonstrated in a study of "consensual" searches following traffic stops. Out of a random sample of fifty-four requests to search made by officers of the Ohio Highway Patrol, a full forty-nine citizens conceded that they gave permission—and all but two of them reported doing so because they were worried about what would happen to them or their automobiles if they said "no."⁴³ Moreover, requiring recordings in suppression hearings would not stop corrupt police from starting the tape rolling *after* coercing suspects into saying what they wanted them to say, or from simply strategically editing the tapes. And of course jailhouse confessions couldn't be recorded even in theory.

⁴¹ Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COL. L. REV. 1037, 1041-42 (1996).

⁴² SOLAN & TIERSMA, *supra* note 1, at 48.

⁴³ Ilya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter* 163-64 (unpublished doctoral dissertation, Rutgers University), *cited in* Nadler, *supra* note 27, at 202.

Still, recording police-citizen interactions would certainly *reduce* problems, presumably both by keeping rogue or careless officers relatively in check, and by allowing courts to more systematically evaluate the nature of the interactions. And as I've already discussed, we could read Solan and Tiersma less as advocating consistency *per se*, and more as just urging judicial transparency: rather than allowing judges to be wordlessly selective in applying linguistic pragmatics, we ought to demand that they articulate why they choose to be expansive in some cases and literal in others. Giving police officers the benefit of any doubts is not *necessarily* the wrong policy, but we should be very clear that we are trading off equality (for it is the least powerful populations who are disproportionately harmed by these judicial inconsistencies) and perceived legitimacy for increased social order. By uncovering the inconsistencies we are implicitly demanding that judges articulate their reasons for it, which enables *us* to ultimately decide if the exchange is worth it.

But if this reading of the importance of linguistic analysis saves Solan and Tiersma from occasionally seeming a bit beside the point, I am going to argue now that an even more fundamental threat looms on the horizon. Namely, advances in technology are rendering the "confession era" itself obsolete.

By the confession era, I mean the justice system's reliance on face-to-face confessions and other low-level interactions between suspects and investigators. If law enforcement could get all it needed by DNA evidence (of the suspect at the crime scene, or pieces of the crime scene on the suspect), coupled with high-tech "lie detector" tests that actually worked, we would not need Columbo-style police detectives who specialize in extracting confessions from recalcitrant suspects, using their powerful understanding of criminal psychology. At best such confessions would be redundant, and at worst they could be inaccurate. With more powerful tools for securing demonstrative evidence, we would also not care as much about requests for attorneys before interrogation, because we wouldn't be relying on interrogations so heavily. Also, in a world where fraud conspiracies and drug trafficking depended on the use of computer-based banking, communication and distribution channels, we also wouldn't care as much about randomly stumbling onto evidence during a traffic stop—we would use computer technologies to both identify and intercede in criminal wrongdoing at a level several times removed from the street. In sum, improved technologies would render oral confessions and other artifacts of the confession era relatively obsolete. And if this happened, then our need for linguistic sophistication in managing and interpreting these phenomena would all but disappear.

We aren't in that world yet. As it stands today, confessions *are* perceived as central to policing. The Supreme Court itself stated the conventional wisdom in *Arizona v. Fulminante*: "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct."⁴⁴ Researchers have empirically assessed the proportion of successful prosecutions for which a defendant's confession was deemed necessary to conviction. Though these are necessarily complicated and somewhat subjective determinations, one scholar, Paul Cassell, examined several such studies and conservatively estimated that historically, around a quarter of convictions have depended on the confession of the defendant.⁴⁵ In addition to being seen as necessary to a sizeable proportion of convictions, confessions are valued for their efficiency. An early confession can save a police department a lot of time and money, because rather than engaging in an expensive and protracted investigation, they can stop—or at least wind down—their efforts once a perpetrator admits to the crime.

Still, everything I wrote in the last paragraph was truer in the recent past than it is today. And in the not-too-distant future, I predict that all of it will be almost completely false. Let us begin with the Court's statement that a defendant himself is undoubtedly "the most knowledgeable and unimpeachable source of information" about his own role in a crime.⁴⁶ It seems like every week we read about yet another convicted felon, sometimes waiting on death row for his execution, who both confessed to a heinous crime and was later exonerated by post-conviction DNA evidence.⁴⁷ There are many reasons a suspect may falsely confess—among them, the power/coercion problems I have already discussed, mental illness, confusion, or a misplaced guilty conscience—but it's safe to say that the words of the defendant are not the *very best* evidence of his guilt. As we are painfully learning, we'd much rather have something more objective to rely upon.

⁴⁴ 499 U.S. 279, 296 (1991) (internal quotations omitted).

⁴⁵ Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 422-37 (1996).

⁴⁶ *Fulminante*, 499 U.S. at 295.

⁴⁷ As of December 15, 2005, the Innocence Project at Cardozo Law School claims that 172 convicted felons have been proven innocent via the use of post-conviction DNA testing. See The Innocence Project, www.innocenceproject.org (last visited Dec. 15, 2005).

Consider next the statistic that approximately 25% of convictions have historically depended on confessions. I cannot find any data on the *current* proportion of convictions that rely on confessions—but I have reason to suspect that it has decreased. The first conviction in the world using DNA evidence happened only as recently as 1987, in the U.K. rape prosecution of Robert Melias.⁴⁸ The science of DNA testing did not hit the mainstream of criminal investigations until the 1990's in this country,⁴⁹ and as this evidence has come to play an increasingly integral part in prosecutions, undoubtedly the number of cases that *depend* on the “old school” method of oral confessions would have gone down. Only two of the studies in Cassell's review took place after 1987: one was a study of three counties in California in 1993, and another (his own) was a study of Salt Lake City cases in 1994.⁵⁰ Both found a similar proportion of cases that relied on confession (about a quarter)—but these two studies were too early in the history of DNA evidence to reveal much. It would be surprising if the now-ubiquitous use of DNA evidence to solve questions didn't cut into that proportion significantly—and the ratio should shrink even further as the techniques improve.

Finally, compared to modern DNA evidence, oral confessions don't even seem particularly cost effective. A laboratory test comparing a suspect's DNA to that found at a crime scene is fairly cheap, and becoming more so as courts take judicial notice of the reliability of the techniques rather than requiring extensive foundational expert testimony, and as the techniques themselves have become less costly. Indeed, as long ago as the late 1990's in the U.K., officials believed that the use of DNA evidence had reduced the overall cost of law enforcement, given police no longer had to rely as much on more traditional gum-shoe investigating.⁵¹ Now, scientists are on the brink of bringing a cheap, portable “chip based” DNA test to market that would allow investigators to immediately analyze DNA at the scene of the crime.⁵² Even laboratory errors should decline as DNA

⁴⁸ See NAT'L INST. OF JUSTICE, *THE DNA WARS ARE OVER* (1996), available at <http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/wars.html>.

⁴⁹ The history of the admissibility of DNA evidence in criminal cases is detailed in the NAT'L RESEARCH COUNCIL REPORT, *THE EVALUATION OF FORENSIC DNA EVIDENCE* (1996), available at <http://www.nap.edu/books/0309053951/html>.

⁵⁰ Cassell, *supra* note 45, at 432.

⁵¹ VICTOR WALTER WEEDN & JOHN W. HICKS, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *THE UNREALIZED POTENTIAL OF DNA TESTING 6* (1998), available at <http://www.ncjrs.org/pdffiles/170596.pdf>.

⁵² Mark Hollmer, *Network Biosystems Puts Its Chips in DNA Analysis*, BOSTON BUS. J., Jan. 2, 2004, at 9, available at <http://www.bizjournals.com/boston/stories/2004/01/05/story8.html>.

expertise becomes more widespread and protocols for handling and processing the evidence become more systematic and widely accepted.⁵³ (Not to mention that tests conducted immediately on-site would be subject to fewer problems of cross-contamination or breaks in the chain of custody—or of deliberate planting of inculpatory evidence.)

DNA evidence (for now) is used for violent crimes such as homicide and rape, which make up a relatively small proportion of the crimes committed each year. Won't oral confessions still be critical to far-more-prevalent burglaries, bank robberies, drug crimes and the like? There is reason to believe not. For one thing, as the amount of biological material required for DNA testing goes down, its promise in crimes such as burglaries goes up.⁵⁴ More importantly, advances in DNA testing are not the only emerging technologies to increase the sophistication of forensic science. Researchers have already developed functional Magnetic Resonance Imaging (fMRI) techniques that could measure whether a suspect has previously seen an image (of, say a crime scene) displayed in a photograph. These techniques would have equal promise for both violent and nonviolent crimes. The techniques are currently in their infancy and would not likely be considered reliable enough for admission in a court of law; however, they improve daily.⁵⁵

⁵³ This is not to say that laboratory error—or, of course, deliberate mishandling—can ever be completely eliminated. However, though gross violations of laboratory standards do crop up, see *Houston Chronicle*, Hot Topic: HPD Crime Lab (last visited Dec. 30, 2005), available at <http://www.chron.com/content/chronicle/special/03/crimelab/index.html>, standards continue to improve, see COMM. ON DNA FORENSIC SCI., NAT'L RESEARCH COUNCIL, THE EVALUATION OF DNA EVIDENCE 75-88 (1996), available at <http://www.nap.edu/books/0309053951/html/75.html>. Moreover, researchers have found that jurors do discount the probity of DNA evidence due to laboratory error rates—if anything, more than they should. See Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. LEGAL STUD. 395 (2005).

⁵⁴ Richard C. Li & Howard A. Harris, *Using Hydrophilic Adhesive Tape for Collection of Evidence for Forensic DNA Analysis*, 48 J. FORENSIC SCI. 1318 (2003), available at http://journalsip.astm.org/journals/download/JFS2003121_486.8481-1.pdf; Jeff Wise & Richard C. Li, *The Future of DNA Evidence*, 19 CRIME & JUST. INT'L 31 (2003).

⁵⁵ See Paul Root Wolpe et al., *Emerging Technologies for Lie-Detection: Promises and Perils*, 5 AM. J. BIOETHICS 39 (2005). Interestingly, at least one court has considered a proffer of just such fMRI “brain fingerprinting” evidence in a post-conviction relief action. In an unpublished ruling, the judge determined the technique to be sufficiently reliable to be admitted into evidence as a general matter, but found that in the case at hand it was not strong enough, given other evidence in the case, to justify a new trial. On appeal, the Iowa Supreme Court overturned the lower court and ordered a new trial on other grounds, and so did not reconsider the trial judge’s “brain fingerprinting” ruling. *Harrington v. Iowa*, 659 N.W.2d 509 (Iowa 2003).

Improvements in technology leading to a completely different style of law enforcement are not limited to crimes with identifiable victims. The war on drugs (and on fraud, and even organized crime and terrorism) has similarly undergone a profound sea change in recent years. Though there will always be a certain amount of effort aimed at low-level interception of contraband in homes and cars, the future of law enforcement in these areas appears to be computerized communication networks. The DEA is increasingly using computer technologies to catch drug traffickers via their inevitable use of the internet. They have launched a large “cyber initiative,” which recognizes “that criminals in the drug trade are embracing the use of 21st century technology to peddle their poisons into U.S. communities.”⁵⁶ They are thus more and more likely to go after the money laundering—and necessarily, the computer-dependant banking fraud that accompanies it—to break up drug rings than to focus on the low-level dealing for which consents to search during traffic stops would be helpful.⁵⁷ It’s hard to imagine this trend reversing.

I am suggesting what may sound like an implausibly futuristic *Jetsons*-like world. The idea that confessions would become irrelevant is unsettling, if for no other reason than the ethical case for them. (Simply put, “People ought to accept responsibility for wrongful acts that they commit,” as Solan and Tiersma write.⁵⁸) But I believe that our reluctance to dispense with the need for confessions is less about a philosophy of moral responsibility, and instead a product of a more general and recurrent skepticism in the law of evidence to innovations that replace tried-and-true ways of discerning truth. Innovations appear to challenge the hegemony of the trial itself as the preferred method of discerning truth, and this is why they engender initial resistance.

In a seminal article on the history of forensic photography, Jennifer Mnookin outlined this very phenomenon.⁵⁹ The photograph was almost immediately recognized by the public as a powerful evidentiary tool for the

⁵⁶ Press Release, DEA, DEA Disables Major Pharmaceutical Internet Scheme: New “Virtual Enforcement Initiative” Announced (Sept. 21, 2005), available at <http://www.dea.gov/pubs/pressrel/pr092105.html>.

⁵⁷ As DEA Administrator Karen P. Tandy phrased it, “Drug traffickers are using their profits to burrow into our neighborhoods and corrupt legitimate banking systems. In major drug trafficking operations, money is the thread that unravels the drugs and devastation otherwise hidden by dealers. DEA knows where money leads, and we will be relentless in going after it.” Press Release, DEA, DEA Disables Large International Drug and Money Laundering Organization (Dec. 8, 2005), available at <http://www.dea.gov/pubs/pressrel/pr120805.html>.

⁵⁸ SOLAN & TIERSMA, *supra* note 1, at 53.

⁵⁹ Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998).

courtroom. At the same time, it also produced profound skepticism: commentators often wrote of its unreliability and manipulability (arguing, for instance, not only that photographs could be staged, but also that changing the focal length of the lens or altering the light could distort the image).⁶⁰ Courts split the baby and admitted photographs, but not as direct evidence. Rather, they could only be admitted as mere aids to a witness's own oral testimony. Doctrinally, photographs couldn't even act as corroboration of testimony. They were analogized to maps or diagrams: they were simply visual representations of a testifying witness's oral descriptions.⁶¹

In practice, as the public (and the courts) became used to the specter of photographs in trials, the doctrine evolved, and the doctrine that photographs were never evidence themselves, but mere illustrative aids to spoken testimony, quickly became a legal fiction.⁶² But why was the fiction ever necessary? Why *were* courts reluctant to explicitly regard photographs as direct evidence? Mnookin argues forcefully that judges saw photographs as dangerously "certain," in a way that threatened the authority of courts themselves. Photographs challenged the hegemony of words in the courtroom, and thus were perceived as challenging the need for trials altogether. Why have a trial at all, with evidence so strong?⁶³

Thus mistrust combined with simple habit resulted in a somewhat curious phenomenon: testifying witnesses describing what was obvious from a photographic representation. For example, if a photograph of a crime scene were admitted, a witness would have to describe what the picture showed.⁶⁴ That same sort of redundancy occurs in criminal trials today, when presentations of both definitive DNA identification evidence (often pinpointing a perpetrator with odds of one in quadrillions) are coupled with evidence of spoken confessions.⁶⁵ For now, perhaps the overkill makes sense: the memory of the O.J. Simpson jury's rejection of DNA evidence is still recent enough to give prosecutors pause. And like with the analogy of the early preference for oral testimony over photographs, the confession still has an aura of legitimacy and indispensability that DNA evidence doesn't presently match. But just as

⁶⁰ *Id.* at 20-27.

⁶¹ *Id.* at 43-45.

⁶² *Id.* at 50.

⁶³ *Id.* at 55-59.

⁶⁴ *Id.* at 43-50.

⁶⁵ See, e.g., *People v. Sterling*, 828 N.E.2d 1264 (Ill. App. Ct. 2005); *State v. Allen*, 913 So.2d 788 (La. 2005); *Minjarez v. State*, No. AP-74592, 2005 WL 3061981 (Tex. Crim. App. Nov. 16, 2005) (unpublished opinion).

with photographs, DNA (and other technologically sophisticated demonstrative evidence) is eventually bound to crowd out confessions. And when it does, it will render our current preoccupation with getting both the doctrine and the science of the confession era “right”—a preoccupation front and center of Solan and Tiersma’s masterful book—a relic of the past.

CONCLUSION

Speaking of Crime is an eminently readable overview of what the science of linguistics has to offer the criminal law. The authors’ ambition to clarify complicated linguistics principles, and to underscore instances where judges apply them inconsistently or badly, is fully realized in the text. At the same time, the book illustrates the “state of the art” for a domain that I believe is sliding into the past. Law enforcement practices, and then by necessity the judges and juries, will rely less and less on confessions by suspects as innovations in technologies (such as DNA profiling, fMRI “lie detection,” and computer fraud detection and intervention) make confessions redundant, and even quaint. Because of this, portions of the book felt to me a bit like the old joke about the scholar who finished his definitive, multi-volume treatise on federal common law the year *Erie* was decided: Solan and Tiersma update techniques for solving some problems that I believe are disappearing from the scene altogether.

Perhaps this review is too speculative, or even absurdly futuristic: this is always the risk when one argues as a hedgehog rather than as a fox.⁶⁶ Then again, it may seem so simply because of our recurrent fear that drastic improvements in the accuracy of probabilistic evidence will make trials themselves redundant, or at least change their character so dramatically that their very legitimacy, which depends on beginning with an assumption of innocence and ending with a democratic judgment by a jury of the defendant’s peers, will be lost.⁶⁷ I seriously doubt this will happen. Among other things, not every case will yield enough forensic data for the new techniques to process—there will always be some role for confessions, however small. Furthermore, not every trial is about the identity of the perpetrator—juries must still find, for example, *mens rea*, or even whether there a crime was committed at all.⁶⁸

⁶⁶ PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005).

⁶⁷ Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

⁶⁸ The improving technologies promise to bring not only the end of the confession era, but also the end of statutes of limitation. A primary justification for statutes of limitation is that evidence degrades rapidly; not so for DNA evidence. This fact has led over half of the

Despite the thesis of second half of this review, on no account do I mean to suggest that one should skip *Speaking of Crime*. For one thing, we are still in the confession era, and its doctrines and techniques are very much present—the confession era's encroaching senescence is not yet fully upon us (nor, perhaps may it ever be). More importantly, although Solan and Tiersma styled their book as illuminating the criminal law, all of the techniques of pragmatic linguistics they teach will continue to thrive in the civil or constitutional domain. Indeed, their choice to restrict themselves to criminal examples was probably somewhat arbitrary. Law is, after all, fundamentally about words, and interpretation (of statutes, or contracts, or whatever) will always play a central role. Any reader interested in the psychology of language—and all lawyers should fall into that class—would be well-served to read this book.

states to abolish their statutes of limitation for rape. Julia Preston, *Power of DNA Spurs Call to Abolish State's Time Limit on Rape Cases*, N.Y. TIMES, Jan. 2, 2006, at B1.