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Talk about testimony: courtroom dialogue as racialized interactions

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Abstract: Within the criminal legal system, judges, jurors, prosecutors, defense attorneys, experts, and law enforcement officers all might employ language or language practices in the courtroom that can evoke racial bias against an accused person, including by using coded language, innuendos, or particular questioning techniques and clarification strategies. In light of recent legislation, including the passage of the Racial Justice Act in California, which prohibits the use of racially biased language against an accused person by courtroom actors, we are at a crucial moment where dialogue between linguists and lawyers is imperative to define racially biased language and how it emerges. In this article, we provide guidance to help identify and address the ways race can be invoked through discursive strategies in the courtroom that do not make explicit mentions of race, and end with recommendations for ameliorating the potential harms that racial bias expressed during such interactions can cause.

Keywords: language and law; sociolinguistics; Racial Justice Act; forensic linguistics; racial bias

1 Introduction

Linguists have appeared as expert witnesses in civil and criminal trials for decades, bringing their expertise(s) to explain ambiguous points in the law's language, to identify aspects of a person's voice, or to analyze and describe the techniques of judges, lawyers, and police interrogators that can lead to false or unreliable statements, and the accompanying witness responses (Baugh 2018; Shuy 2007).[1] Additionally, linguistics can offer a lens to better understand the dynamics of power and performance within the courtroom. Considering recent legislation such as the California Racial Justice Act, which prohibits the use of racially biased language against an accused person by courtroom actors, this moment requires dialogue between linguists and lawyers to define racially biased language and explain how it emerges. Because racial bias can enter the performative space of the courtroom not simply through *what* is said, but *how*, the protections for people accused of crimes must be broader than prohibiting overtly racist or racialized words or phrases from being spoken in the courtroom, or barring the use of racist analogies or stereotypes, though these protections are also necessary.

We aim to (a) illustrate the racist origins of the criminal legal system and its relation to current racialized courtroom dynamics; (b) explain how language use can maintain power differentials in the courtroom via linguistic anthropological theory on the listening subject; (c) identify where raciolinguistic ideologies can unfold in language about or directed toward racialized subjects; and finally (d) encourage more dialogue between linguists and lawyers in recognizing the possibilities and limitations of this new legislation, while also proposing how to address potential harms in the courtroom.

1 Examples of partnerships between lawyers and linguists can be seen in forensic linguistics programs such as the Institute for Forensic Linguistics, Threat Assessment, and Strategic Analysis at Hofstra University, which also includes a Forensic Linguistics Capital Case Innocence Project.

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2 The Racial Justice Act

In 2020 and 2022, the California legislature passed the Racial Justice Act and the Racial Justice Act For All (collectively referred to herein as the RJA), which prohibit the use of discriminatory language on the basis of "race, ethnicity, national origin … whether or not purposeful" by any actor in a trial, including law enforcement officers, judges, attorneys, expert witnesses, and jurors (Cal. Penal Code § 745(a)(2)). This legislation aims to lessen the impacts of racial bias in criminal trials by allowing claims to be proven and harms remedied under a lower burden of proof than federal law, which usually requires a showing of "purposeful discrimination" (Cal. A.B. 2542 § 2(c), (g), (i) (2020)). The California legislature sought to address both explicit and implicit biases by prohibiting "racially incendiary or racially coded language, images, and racial stereotypes," including using animal or insect imagery to refer to people accused of crimes, practices long held to have been legally permissible (Cal. A.B. 2542 § 2(e)).[2]

Linguists alongside lawyers can identify when and how racial bias influences the interpretation and assessment of racialized witnesses' testimony through an analysis of discursive strategies used by lawyers and judges. Where language otherwise appears neutral, linguists can situate linguistic interactions and accompanying power dynamics within the "white space" of the courtroom (Hoag-Fordjour 2023). Where language is coded or relies on implicit racial stereotypes, linguists can explain how these rhetorical devices may influence the fact finders' assessments of culpability or credibility.

3 Legal history and race

The criminal legal system in the United States is inextricably tied to the legacy of slavery and its enduring impact on race relations across all facets of society. For example, slave patrols, responsible for forcibly returning escaped enslaved people, were precursors to modern-day "policing" for Black communities who currently experience excessive force and hyper-surveillance (Alexander 2020; Harris 1993; Turner et al. 2006). Disparities in conviction and sentencing rates for people of color as compared to similarly situated white people point to the magnitude of the prejudice and accompanying injustice (Johnson 1985). Because of racial bias, Black people, who represent approximately 13.6 % of the adult population, are 37 % of incarcerated people in jails and prisons, and 30 % of people on probation or parole (American Bar Association 2023; Prison Policy Initiative 2023). On the other side of the criminal legal system, 5 % of lawyers identify as Black while 79 % identify as white and 76 % of federal judges identify as white (American Bar Association 2023). Such disparities can be explained by institutional racism (National Academies of Sciences, Engineering, and Medicine 2022), including the disproportionate penalization of Black people; their exclusion from jury service; charging decisions by prosecutors; sentencing decisions by judges; underfunding of indigent criminal defense attorneys; lack of access to the legal profession for people of color (Hoag-Fordjour 2023); and a lack of culturally competent and empathetic representation by defense attorneys (Eisenburg and Johnson 2004; Richardson and Goff 2013). The injection of bias into the criminal legal process is a product of historical patterns repeated in current systems, which can be seen, for example, in the parallels between Jim Crow–era extrajudicial lynching and modern-day capital punishment (Equal Justice Initiative 2020).

The broader legacy of bias in the criminal legal system reproduces itself differently but no less impactfully across states. In California, for example, through a series of laws passed between 1850 and 1851, non-white people were barred from fully participating in courtroom proceedings[3] and were not permitted to give testimony in

2 The law goes on to carve out exceptions "if the person speaking is relating language used by another that is relevant to the case or if the person is giving a racially neutral and unbiased physical description of the subject" (Cal. Penal Code § 745(a)(2)). As discussed further below, it is possible and likely that racial bias will be evoked in these instances as well (Bowman 2020).

3 The California Constitution of 1849 was committed to equality for "men" (Cal. Const. art. 1 § 1, § 18 (1849)). However, the legislature narrowed the potentially wide-reaching constitutional promises with a series of laws passed in 1850 and 1851, including laws banning the testimony of many minoritized people as defined under the statute, and upheld and clarified by the California Supreme Court in *People v. Hall*, 4 Cal. 399 (1854).

criminal and civil trials against white people. The effect not only erased the accounts of people of color from institutional memory, but also left them without recourse or protection in the legal system when their cases depended on their own stories or those of others who were also not white. While the law that barred the testimony of Black witnesses was repealed in 1863 (it took until 1924 for Indigenous people to be permitted to testify, and until 1947 for the bar to be fully lifted against Chinese people), the legacy of the courtroom as a white-speaking and white-listening space remains as inherent to the structure of the space (Carlin 2016; Hoag-Fordjour 2023; Rand 2000).

Such historical context is important to frame current disparities as the structure of the space from its inception and not as random by-products of inattention or unfortunate mistakes. Speaking and turn-taking practices that were established and enforced according to white hierarchical norms continue to inform the pedagogy of law and carry forth into its practical application (Montoya 2000). While the shape of discriminatory conduct and bias within the courtroom have shifted, state and federal laws tolerate the use of racist language during criminal trials by an array of actors – jurors, judges, lawyers, and experts – and courts rarely grant relief to defendants except in the most extreme circumstances (Bowman 2020).[4] Understanding the construction of racial bias in courtroom narratives is therefore essential in centering actual fairness, and not the promise of such, in criminal trials (Kang et al. 2012). Consider a departure from the popular conception that the courtroom's primary purpose is to find the truth. What if, instead, the courtroom's purpose is to construct narratives (Stern 2023)? What authority is afforded to those narratives told and heard as standardized "white" English versus those that are not, and how do these constructions in the courtroom serve the existing social and economic power structures in the United States? These questions frame the discussions that follow.

4 Studying black speech and the law

White jurors are more likely to believe that Black witnesses and Black defendants are lying based on their demeanor (Rand 2000). These misconceptions are further compounded by how Black witnesses are examined by attorneys and treated by other court actors, such as judges. Linguistic work examining the reproduction of power relations in Anita Hill's testimony during Clarence Thomas's hearing (Mendoza-Denton 1995) and analyses of the co-construction of nonstandardness in the case of Rachel Jeantel and courtroom actors in the Zimmerman case (Sullivan 2017; Walters 2018) highlight the need to examine the racialized others' speech practices, but also the construction of Black speech as unclear or inappropriate and Black speakers as uncooperative in legal interactions. Research on sociolinguistics and the law has focused on examining the speech of the racialized other and the sociopolitical consequences for being a speaker of a stigmatized variety including being misheard, misunderstood, and even discredited by jurors and the public (King and Rickford 2023); experiencing housing discrimination (Purnell et al. 1999; Wright 2023); and bidialectal speakers' being subject to racialized stereotypes (King et al. 2022). These studies examine the deployment of ethnolectal variables and their perception to understand how listeners racialize speakers. Yet, fewer sociolinguistic studies have examined the listening subject's speaking practices and the interplay between the racialized other and the listening subject to assess the intersubjectivity of these actors in high-stakes spaces like the courtroom.

Inoue (2003, 2006) coined the 'listening subject' while interrogating the gender dynamics in the social construction of women's language emerging in nineteenth-century Japan. She focuses on the practices that men in power used to *other* women's speech, rather than on women's speech itself. In Flores and Rosa's (2015) invocation of the 'white listening subject,' they turn attention toward the racialized dynamics in bilingual speech communities, whereby accentedness and multilingualism are viewed as deficient. Examining white listening subjects in the courtroom subverts the attention from the minoritized other to the dominant listening subject,

4 For example, in *Buck v. Davis*, 580 U.S. 100 (2017), the Supreme Court found that the defense lawyer in a capital trial was ineffective and granted relief because the lawyer presented penalty-phase expert testimony that his client was more likely to act violently in the future because he was Black. In *Pena-Rodriguez v. Colorado*, 580 U.S. 2006 (2017), the Supreme Court overturned a conviction because one juror relied on stereotypes about the sexual aggressiveness of Mexican men in convicting the defendant, who was a Mexican man.

emphasizing how nonstandardness gets constructed. Acknowledging the courtroom as a historically white space and Black people's overrepresentation as criminal defendants, we must explore the role the listening subject plays in Black people's subjugation there. The white listening subject is not about solely locating race via the body, but views whiteness as a historical and contemporary subject position (Rosa and Flores 2017). Through scholarship on the interactional construction of nonstandardness, linguists can help to articulate the indirect and direct ways racial ideologies appear in language about or directed toward racialized subjects in criminal legal contexts. Lawyers can then use this research to inform their practice, including how they raise objections, brief issues, present expert testimony, and request jury instructions.

5 Lessons from our collaboration

Covert racism can occur via the use of discursive and linguistic practices in the courtroom that may appear benign on the surface but exploit racialized meanings of Black speech, including African American Vernacular English (AAVE), as inappropriate or unclear (King et al. 2022; Sullivan 2017).[5] We suggest how to analyze trial transcripts for instances of potential bias to remedy past and minimize future harms. The examples of interactions and exchanges that warrant scrutiny are based on observations made through our partnership on different cases, as well as from familiar public cases. It is our hope to encourage linguists: (1) to train lawyers and judges about linguistic bias in the legal system; (2) to serve as expert witnesses in criminal cases; (3) and to invite specialists from other subfields like computational linguistics and semantics to contribute to these discussions.

5.1 Exploring racialized courtroom interactions

Markus and Moya's (2010: 4) definition of *doing race* views race and ethnicity as "not things that people have or are. Rather, they are actions that people do. Race and ethnicity are social, historical, and philosophical processes that people have done for hundreds of years and are still doing." This definition recognizes the fluidity through which both race and racism materialize in the courtroom.

5.1.1 Body-centric language and stereotypes

To assess the interactional reproduction of racial hierarchies, we consider how courtroom actors can indirectly index (Ochs 1992) controlling images (Collins 2000) or well-established discourses around the racialized others with or without the use of overtly racist language. We emphasize the importance of courtroom actors exploiting racialized meanings via covert and understudied means:

– Race and racialized associations can be indirectly invoked through specific kinds of body-centric language that do not explicitly mention the racial category. For example, when an attorney uses the term *afro* or *waves* to describe a suspect's hairstyle, which are common names for hairstyles in African American communities, these terms invoke race, and therefore invite jurors to rely on stereotypes about the criminality of the person being discussed (Bowman 2020). Other descriptions of possible suspects associated with but not directly invoking race that are nonetheless associated with a person jurors believe is more likely to have committed a violent crime include being unattractive or tall, wearing dark clothes, and having dark skin tone or dark hair (Sorby and Kehn 2021).
– A person's size is another means of invoking the racial category without explicitly mentioning race. Historically, Black men have been portrayed in popular media as brutish to justify physical abuses or their deaths from Reconstruction-era lynchings to modern-day killings by law enforcement officers (Smiley and Fakunle 2016), including that of Michael Brown, the unarmed teenager shot by Darren Wilson in a suspected

5 We recognize that such racism and bias is not limited to AAVE or, more broadly, Black speech, and extends to other dialects and languages, including those spoken through different modalities, such as American Sign Language.

robbery. Terms like *giant* or the repetition of Brown's height and weight were used to justify Wilson's fear and, ultimately, Brown's murder (Smiley and Fakunle 2016). Such patterns persist in trials where male defendants are narrativized as thugs or criminals via the repetition of terms like *macho*, *muscular build*, or *body builder*. Another insidious means of portraying defendants as racialized occurs in examples where prosecutors refer to the small stature, including the height and weight, of purported victims. While such descriptions appear benign on the surface, they provide a scalar contrast that juxtaposes the presumed perpetrators as having superhuman strength in comparison to the victims, and place primacy on the defendants' bodies rather than their conduct.

– Once the legal fact of what a witness perceived is established, repetition of descriptors that indirectly invoke race and, therefore, stereotypes and controlling images, may impermissibly influence the jurors' assessments of the evidence. Therefore, attorneys and linguists should catalog the repetition of redundant physical descriptors of a defendant across a trial and especially when a single witness is asked to provide similar physical descriptors multiple times throughout their testimony, as such questioning may be objectionable.

5.1.2 Equating black communities with violence

Alongside body-centric language, attorneys draw on stereotypes associating Black communities with violence and delinquency through references to racialized spaces, such as communities where residents live in government-subsidized housing:

– The relationship between race and place ideologically links racialized groups to particular spaces and the negative traits associated with such groups are seen as belonging to the spaces they occupy (Bowman 2020; Lipsitz 2011). High concentrations of African Americans in impoverished communities are often viewed as resulting from moral failings or economic irresponsibility of the residents, thus, associating people with those spaces builds negative, racialized narratives based on geography.
– Invitations for bias can arise when the name of a neighborhood stereotypically associated with violence or poverty is repeated multiple times once the fact of that place has been established, and its repetition no longer conveys new substantive information, but rather draws attention to the place and its negative associations. Such tactics during criminal trials can be seen in the repetition of the names of public housing developments such as Imperial Courts in Los Angeles, or regions, such as the South Side of Chicago, both of which are populated predominantly by minoritized residents and depicted as dangerous and/or impoverished in media representations.

5.1.3 Undermining black witnesses' credibility through questioning practices and transcription errors

Moments of interruption, repetition, revoicing, or repair can draw on raciolinguistic ideologies, constructing Black speech as wrong, incomprehensible, or inappropriate. Such clarification strategies can shape how witnesses are heard, how their testimonies are evaluated, and, ultimately, the cases' outcomes:

– Sullivan (2017) argues that interruptions by the court transcriber during Rachel Jeantel's testimony marked her speech, affecting how other court representatives interpreted her. Such interruptions appear to be about clarity, but may also signal the lack of acceptability of Jeantel's response and an indirect evaluation of her lack of respect for the judicial process (Rand 2000; Stern 2023). Johnstone (1994: 8) discusses the power of repetition, arguing that repeated utterances "call attention to the prior" and "brings it forward again for further treatment." Thus, when a juror or the court transcriber interrupts, repeats aloud that they cannot understand Jeantel, or revoices the utterances in a different dialect, it *others* Jeantel's speech, co-constructing it as nonstandard.
– Bias can emerge through questioning strategies disproportionally used with Black witnesses and defendants. Like the disparate questioning observed of prospective Black female jurors (Effenberger et al. 2023), we have found that Black female witnesses were asked more yes/no-questions than other witnesses during trial testimony. Conley et al. (1978) found that if members of the jury hear a narrative style (more wh-questions)

rather than a fragmented style (more yes/no-questions) from the witness, they perceive the lawyer as believing in the witness's competence. Additional research is needed to understand how Black witnesses are questioned differently at trial and how it affects their perceived credibility.

– Finally, we turn to mistranscriptions as familiar sites where bias emerges based on a lack of knowledge of the variety being transcribed (Jones et al. 2019). Rickford and King's (2016) review of intelligibility errors in the context of witnesses using creoles or AAVE demonstrates this most clearly, especially in instances like the one found in Brown-Blake and Chambers (2007), where a gun was attributed to a Jamaican Creole speaker in a transcript of his police interview, though he never admitted to such.

Discursive practices can become signs for reading race (Alim and Reyes 2011), indirectly indexing stereotypes or well-established discourses around racialized others. Our examples focus on African Americans, but such bias is not limited to only Black speakers or only spoken languages. More research is needed to understand how clarification strategies like repetition, revoicing, and repair become sites where bias emerges and minoritized speech is misrepresented.

6 Recommendations for ameliorating potential harms

The courtroom is inherently an inequitable turn-taking space so it is important to recognize how inequity surfaces for Black speakers and to recognize the co-construction of otherness and criminality in legal interactions (Eades 2010). While the RJA is helpful because it prohibits the use of overtly biased language, we also need to ensure that seemingly neutral linguistic practices used disproportionately with Black witnesses and defendants can be addressed under such legislation. The RJA and other laws like it are watersheds, but alone the RJA is insufficient to rid the legal system of harms produced in racialized interactions where biased language is used against the defendant and the witnesses upon whose credibility a conviction will rest. We enumerate a few other ways to reduce such bias:

(1) To collaborate with more lawyers, linguists must make their work accessible beyond the academy. Lawyers and practitioners find our work through published editorials in newspapers or papers in open-access journals, podcasts with a wide reach, TED Talks, and documentaries. Linguists can also reach out to law schools or firms and speak with them about how our research might be useful. For example, the first author has guest-lectured and trained members of law firms and court reporters on approaching language and race in the courtroom and the second author has trained attorneys at national and regional conferences on integrating sociolinguistic theory and partnering with linguists as experts in criminal trials.

(2) We recommend more researchers examine legal performances to develop and support theories about how racial bias emerges in the courtroom. Studying racial bias is not merely a checklist of terms or lists of features, so we hope to see broader training regarding sociohistorical narratives used to *other* racialized communities. We also advocate for more research investigating established trial tactics, including direct and cross-examination and the way racial bias may figure into differences in witness-questioning based on race and gender. Work is emerging that employs artificial intelligence to help identify disparate questioning of potential jurors during jury selection in capital trials based on race and gender (Effenberger et al. 2023), and altering the procedures of cross-examination is a remedy that has been employed in the U.S. under Title IX (Dowling 2021). Trial lawyers can use such research to support objections to language practices that may invoke racial and gender bias and request specific jury instructions to address subtler forms of linguistic bias.

(3) Jury instructions can include explanations of minoritized dialects and describe speakers of such varieties as equally credible. Further, jury instructions might directly address the potential impact of language and other biases during the proceedings by including one of linguistics' central tenets: no language or dialect is inherently better or more correct, and thus language or dialect should not be used as a measure of credibility.

(4) We hope to see more education for actors in the criminal legal system,[6] such as judges, attorneys, and court transcribers, about dialectal differences and power dynamics in the space of the courtroom, so that objections to questioning that evokes bias can be appropriately considered by the court and accurately captured by court reporters.
(5) All criminal trials should be audio or video recorded, which preserves the actual exchanges with a higher degree of accuracy than the use of court reporters alone and allows researchers to revisit and analyze discursive strategies, linguistic features, and body language. Currently, 14 U.S. states regularly employ digital audio and/or video recording of trial proceedings (Jaafari and Lewis 2019). Courts should also have set transcription standards for out-of-court transcripts to be received as evidence. Oftentimes, out-of-court statement transcription is outsourced to legal service suppliers who employ transcribers with insufficient knowledge of linguistic variation, are paid hourly, and given varying degrees of feedback on work quality. In cases where dialectal differences matter, it may be worth having a linguist review such transcriptions.
(6) We recommend that legislatures and judges engage with new and emerging research as they pass legislation and interpret it. A judge may find that the RJA already prohibits the types of racial bias in trial testimony described in Section 5 above, but it is equally plausible that a judge may find that the law does not. Should judges continue to interpret racial bias narrowly while imposing insurmountable burdens on the proof of its existence (Bowman 2020; Hoag-Fordjour 2023), then it is incumbent upon legislatures to make laws that are responsive to the complex reality of how bias emerges during criminal trials.

As authors of this paper from different disciplines, we hope to see more partnerships between lawyers and linguists that expose how accepted courtroom techniques, such as recounting physical descriptions and requests for clarification, operate to undermine the credibility of witnesses disproportionately and improperly because of racial bias. Exchanges that do not use racialized language but rely on subtle or facially neutral language are no less insidious. Upon development of a greater understanding of how racial bias operates in the courtroom, legal actors can test and implement procedural and systemic safeguards that will help to dismantle the "white space" of the courtroom and move toward a more equitable turn-taking space, where Black clients and Black witnesses properly have a voice in the room, and where *we* talk about testimony.

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6 An example of such training done for judges and court staff in partnership with the Judicial Branch of California Courts can be seen at http://www2.courtinfo.ca.gov/cjer/4780.htm (accessed 15 August 2024).

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