

WHY LINGUISTICS?

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I read the materials from the symposium with eagerness; like many others, I tend to be excited by the opportunity to view legal questions through the eyes of those with different training than mine. Both the humanities and the social sciences have proven to offer a great deal to those who wish to enrich their understanding of law as a discipline of ideas. With this favorable disposition I embarked on the task of reading what the linguists had to say about interpretation. Soon and persistently, however, a question interrupted the flow of my reading, a question whose tenacity and salience I had not anticipated; it is this question that I would like to address in these brief remarks.

The question I pose for those who have devoted considerable effort to the project is why linguistics should have anything to offer those who would interpret legal texts. An answer to the question requires both an understanding of what linguistics is and a theory for why it might illuminate areas of interest for us. Through the materials of the symposium I believe I have acquired a reasonably accurate, if limited, understanding of the linguist's enterprise, but nowhere in the materials have I found help with the theoretical problem.

I gather that what linguistics (at least the branch of the discipline that is represented in this collection) primarily offers is an empirically supportable and refined way to assess how "ordinary people" (I admit that I have some difficulty in discerning which segment of the American populace is covered by this term) understand certain uses of language. They can help us consider, for example, how an ordinary person would understand a sign banning vehicles from the park. Through introspection, examining actual uses of language or polling members of the community, linguists can offer an informed judgment as to possible interpretations that most people would ascribe to a given expression. They can identify whether most people would understand an utterance in the same manner, whether people would differ in their understanding (i.e., whether the expression is ambiguous), or

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whether people would attribute a precise understanding to the words at issue (i.e., whether the expression is vague). I imagine this type of expertise could be of invaluable assistance in drafting jury instructions, warning labels, or consumer contracts designed to be intelligible to individuals—informing those who communicate to the populace so that their communications accurately reflect their intended message.

This speaks not at all, however, to the task of interpreting language once it has become part of a legal text. If the legal community were to accept the proposition that all statutes, regulations, and constitutions should be interpreted and applied as the common person would understand them, then the linguists would appropriately be the reference resource to which all would turn in determining what that understanding would be in each case. But the premise simply is not even close to true. Unless we are willing to abandon the vehement theoretical debates that have surrounded interpretation in favor of this simple (and at least at first blush unsustainable) rule, then the value of linguistics to the interpretative task is not established. What was lacking from the discussion at the symposium, I felt, was an effort to grapple with the problem of establishing that value.

The question, then, is whether linguistics can bring to interpretation what other disciplines have usefully contributed to other aspects of the study of law. In the early days of law and economics, some horrified purists thought that economists would simply draw graphs to determine the answers to moral questions, and this caused much distress among those who thought the discipline of economics had nothing to offer to the law. As the law and economics school and the rest of the legal community have matured, however, it has become clear that economics is not going to profess to answer questions such as whether the death penalty is morally justified or whether the Constitution protects a right to privacy. But it can usefully be used to shed light on how people behave under certain conditions, how they make choices, and how they are affected by legal rules. This assistance has proved invaluable to those who strive to develop the law informed by its likely consequences.

Similarly, psychology and philosophy have contributed to the lawyers' understanding of individuals and governments by providing insights into the theory and consequences of law. Principles borrowed from psychology help legal academics understand important relationships in the law, such as that of lawyer to client or prisoner to prosecutor, and the way people process information, which often departs from the rational actor model which dominates economics. Philosophy, of course, greatly influences normative debates about law and interpretation of all stripes. Even in

interpretation, however, there is no automatic relevance of a philosophical principle to a legal question; the importation into law of the moral or philosophical conclusions of others must be justified in each instance. "We like Rawls, you like Nozick. We win, 6-3." Ely's famous example illustrates just this problem.¹ And thus it is not clear to me why we should look to linguistics for help with legal interpretation. Stated differently, what makes linguistics relevant to the legal task of interpreting statutes, regulations and constitutions?

Indeed, I found it interesting that although the symposium ostensibly was addressed to legal interpretation of statutes and the Constitution (I assume that regulatory interpretation was subsumed in the former), the use of linguistics in constitutional interpretation was by and large ignored. If anything, it strikes me that a constitution is—and should be—more likely to be written in conventional language than is a statute. Yet my sense is that few would argue strenuously for a theory of constitutional interpretation inextricably tied to linguistic analysis. If we are not willing to link our governing charter to the conventional understanding of the words it contains, why should we do so with statutory interpretation?

In searching for an answer to this question, I thought of two reasons why a legal interpreter might decide, as a matter of theory, to turn to a linguist for assistance. One would be that those who drafted the text in question were writing in ordinary language, and they wished their document to be interpreted by such means. The second would be that, as a matter of legal policy, the interpreter had a preference for interpretations that comport with the ordinary understanding of the words at issue, as opposed to any specialized understanding which she might, consciously or unconsciously, bring to bear upon the text in question. The difference between these two reasons is that the first is based on the preference of the drafters of the text for common understanding, a preference that the interpretator respects, while the second is based on the preference of the interpreter.

I do not think that these two reasons are inevitably tied to any current theory of statutory interpretation. Either or both could be present in intentionalism (where the interpreter tries to discern the intent of those who created the text), purposivism (where the interpreter assigns to ambiguous language the interpretation that best furthers the goal of the statute or constitution), textualism (where the interpreter follows the interpretation that seems most faithful to the language of the text), dynamic interpretation

1. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58 (1980).

(where the court gives greater weight to intervening events as time passes), or any other theory of interpretation. To varying degrees, all of these theories wrestle with the language of the statute; but they may assess that language in a manner that differs from the ordinary understanding. In particular, they may read the language on the page in the context of their own legal—as opposed to conventional—understandings. Thus, simply adopting one of the many proffered theories of legal interpretation neither mandates nor precludes the use of linguistics. The question must be met on its own terms.

In assessing the potential contributions that linguistics could make to the interpretative endeavor, it is necessary to spell out what it means to reject conventional understanding. Put differently, what is the distinction between conventional understanding and legal understanding? Linguistics, its practitioners assert, provides a scientific method for uncovering the conventional understanding of language. If judges desired to interpret statutes solely in accord with such measures, the case for linguistics is easily made. Of course, this assumes that linguists will reach agreement on the meaning of any given text. If in fact linguists often disagree, then importing linguistics into law will simply add to the battle of experts that already pervades many legal disputes. Even if there is moderate disagreement amongst linguists, however, it is still the case that judges cannot outperform them in this area. To reject the assistance offered by linguistics, it is necessary to identify an area in which judges have a comparative advantage.

Judges are conversant in the lawyer's vernacular. It is this training on which they draw in reading a statute. Lawyers do not speak a foreign language. Rather, they use english, but they have their own dialect. This dialect is not, however, some attempt to arbitrarily confound nonlawyers. Lawyers have not taken the individual words from the english language and given them meanings which the general populace cannot comprehend. Hence, Justice Scalia's insistence on looking at dictionaries does not necessarily imply that he would consign the interpretative task to linguists. Rather, it is the nature of the utterances which differ between legal english and conventional english. In particular, the texts which lawyers create and interpret have no counterpart in the larger society. Statutes are complex creations. It often surprises entering students that legal education by and large is not designed to convey the substance of the law to them. We do not seek to turn them into supercomputers who can spew out an answer for any given problem. Rather, we attempt to teach them the process of understanding law, a major component of which is the reading of statutes.

This component takes a significant amount of time to learn. Students have to learn to focus on the precise words before them, and also to have some sense of how statutes operate in our legal system. This understanding of the function of statutes leads to certain background norms which lawyers bring with them when they read statutes. Some of these norms are controversial, others not. As to the controversial norms, the disputes stem from differing conceptions of the appropriate judicial role in the interpretative process. Nevertheless, it is the nature of the enterprise that distinguishes legal understanding from conventional understanding. The question thus becomes, when asked to interpret a statute, should judges turn to linguists for conventional understanding, or to their own introspection for legal understanding.

As to the first reason why conventional understanding should be controlling—that those drafting the document in question desired the document they produced to be interpreted in such a manner—it is unfounded both as a matter of current practice and as one of theory. Few would suggest that many, let alone most, of the statutes drafted today are designed to be read by the ordinary person. As every law professor knows, students have to be taught how to read statutes. Their natural ability with conventional language simply does not equip them to parse existing laws. Thus, one cannot base the case for linguistics on current legislative practice.

As a normative matter, one might assert, that it would be desirable for all legal texts to be readily comprehensible to the general populace. Indeed, it was just this thought that gave rise to the Plain English movement. Its goal of creating law readily accessible to the average person is one I, and I would think most people, favor. Certainly the premise of the movement—that many statutes are poorly drafted, regardless of whether they are read in light of conventional understandings of language or legal understandings of language—is accurate. The legislative process is too often a last minute affair that leaves little time for careful drafting of statutory language. This type of confusion has little to commend it. To the extent that linguists, or anyone for that matter, could assist legislators and their staffs in avoiding careless mistakes and needless verbosity, I am all in favor of the project. Statutes should be as clear and as well written as possible. Before we translate this goal into an agenda for rewriting the entire corpus of American law, however, we should attempt to understand why our current laws have departed from conventional language. To be sure, one could tell a public choice story about the legal cabal attempting to maximize their own profits by passing opaque laws. These impenetrable

texts force people to hire lawyers to unlock their secrets.

Yet the existence of statutory language which departs from convention cannot be attributed solely to such rent-seeking behavior. The nature of the law itself, and the way in which law is filtered down to individual members of society, dictates that there be a high degree of complexity and specialization in the statutory realm. Indeed, the task of drafting a statute is such that it is almost inevitable that the final product is not going to be easily understood by nonlawyers, regardless of how careful one is to ensure that legal understandings of language do not creep into the process.

The reasons why statutes end up being drafted according to the conventions of lawyers can best be demonstrated by considering the problems that would confront nonlawyers if we were to enact statutes written in conventional language. The homey example of "No vehicles in the park" bears little resemblance to the statutes that confront today's lawyers. More realistic examples can be found in many areas, one of which, being familiar to me, I will use to illustrate: corporate bankruptcy law. There is nothing magical about bankruptcy law; my guess would be that in terms of complexity, it is no more byzantine than most areas covered by statutes. Indeed, given that the Bankruptcy Code is the product of a Bankruptcy Commission whose mission was to write a comprehensive statutory scheme, it may be more coherent than other statutory schemes.

The goals of a corporate bankruptcy proceeding, in short, are to resolve the competing claims to a debtor's assets and to decide whether or not the debtor should be maintained as an ongoing firm. Let's assume that a group of linguists got together with lawyers and attempted to draft a new Bankruptcy Code which in plain prose set forth bankruptcy law in a way that nonlawyers could understand. It is highly unlikely that they could achieve any degree of success, especially because the Code is only part of a broader context that renders it meaningful. A reasonably detailed understanding of state debt collection law, for example, is necessary to grasp the effect of many provisions that one finds in the Code. Moreover, the provisions for court-supervised reorganizations are complex. It is thus not at all certain that one could write a Bankruptcy Code that would be transparent to everyone.

Putting this objection to one side, however, the question still remains, what would be gained by writing a Bankruptcy Code for the masses? Would it, in any meaningful sense, make the law more accessible to those affected by it? Probably not. Financial distress tends to be an infrequent event for most firms. They thus have little reason to invest resources in learning about bankruptcy law prior to the onset of financial problems.

Once the managers of the firm realize that the firm is in financial distress and wish to investigate the possibility of filing for bankruptcy, they have one of two options. They could either have an existing employee read the conventional meaning Bankruptcy Code or they could hire someone who is already familiar with it. The odds are that they would take the latter route.

The main reason for this choice is that bankruptcy law, like most law, is more than a matter of understanding the statutes which set forth the governing rules. It is also a matter of experience. Even when lawyers agree on what the law means, the choice of lawyers is significant. The difference between an effective lawyer and an ineffective one is the extent to which the lawyer could use the law to assist her client. Many actions taken in a bankruptcy proceeding are done for strategic reasons. For example, an experienced lawyer may counsel a creditor not to file a claim against debtor. Why? One would think that a creditor would always try to collect on money that it is owed. Expertise, however, adds a level of complexity to the analysis. The creditor may have received a payment immediately prior to the filing for bankruptcy, which the trustee would seek to recover as a preference. Under the Supreme Court's interpretation of the Seventh Amendment, if the creditor does not file a claim in bankruptcy, it is entitled to a jury trial on the preference issue, most likely in the district court. If it does file a claim, its constitutional right to a jury trial vanishes, and the preference issue will be resolved by the bankruptcy judge. Given the backlog of jury cases in most district courts, the creditor may desire to keep its right to a jury trial. It can use the threat of delay to reach a more favorable settlement from the trustee. The threat of delay may be more valuable than the foregone claim. Thus, regardless of the style in which the Bankruptcy Code is written, those entities involved in a bankruptcy proceeding are likely to turn to experts for advice.

This need for specialization, regardless of the clarity of statutory language, exists throughout the law. We live in a complex, regulatory state. Drafting statutes in language that could be understood by all would not necessarily reduce this complexity. Simply because a statute is written in conventional language does not mean that the law is accessible in a meaningful sense. Tax law, at least with its present complexity, requires a mediator between the text and the individual. Bringing a conventional understanding approach to text as complex as most of today's statutes will not allow the nonlawyer to unlock their mysteries.

Once we recognize that legal experts will exist, one comes to the conclusion that the law should be written with them in mind. Specialized

dialects exist in many areas of life, from the military to academic disciplines to manufacturing. Part of this specialization may be due to a socialization process, as a way to distinguish outsiders from members of the community. Yet such specialization also results from the fact that it reduces transaction costs. It allows for easier communication between those who are steeped in the activity. Law, given its inevitable complexity, is thus going to require specialization, which in turn is going to lead to the development of a legal dialect. Thus, one cannot support writing statutes in conventional language on the ground that this would be a more effective way of communicating the content of legal rules to the citizenry. This conclusion removes the most likely reason for using linguistics in statutory interpretation—that the search for ordinary understanding is faithful to the wishes of the drafters.

One might object that accepting the current complexity and specialization of the law consigns the ordinary person to legal ignorance. After all, most individuals cannot afford an attorney to help them navigate through the United States Code. One response to this concern is that this problem is inevitable. Indeed, I would be surprised if any western democracy had laws which could be easily understood by the majority of citizens. A more satisfying response is that this problem is ameliorated through a number of measures. One method is that government often attempts to translate laws to the specific persons to whom they are targeted. The most notable example of this is the federal income tax form, but other examples abound. Regulatory agencies often spend significant resources to ensure that the average person can, without legal assistance, learn the law as it applies to them. By and large, most people can muddle through with the help of the bureaucratic mediator.

A second response to the problem of legal complexity and specialization is the market. People often want to know the contours of their legal rights, but cannot afford the services of a high-priced law firm. It is thus not surprising that there are now low-priced attorneys for routine affairs. Similarly, there are a number of books on any given area to apprise persons as to their legal rights. There are even computer programs which help people fill out their taxes and write their wills. Indeed, at least in terms of tax software, there is an annual battle over which program can be the most comprehensive and yet user friendly. The market, which responds better to the preferences of individuals than does the government, provides meaningful access to many otherwise inaccessible legal rules.

There is thus no reason that legislatures will or even should draft statutes in language intended to be understood by all. One cannot justify resorting

to linguistic analysis on this basis. Even recognizing this to be the case, one might argue that courts should nevertheless turn to linguists. Courts that adopt this approach would do so not because they are attempting to discern what the language meant to those who drafted it. Rather, they would be asserting that there is a value in reading statutes as if they were drafted in conventional terms.

This judicial preference for having conventional understanding trump legal understanding would be difficult to justify. If the legislature has cogent reasons for drafting statutes steeped in legal convention, it is hard to imagine why these reasons would not apply to the judicial branch as well. The inevitable specialization of law leads to statutes drafted in light of legal understandings. No conception of the role of judges in interpreting statutes would suggest that judges would turn a blind eye to this prevailing practice and engage in the fiction that statutes are written in the same manner as is the daily newspaper.

The one exception that might be proffered is that of criminal law. Indeed, Professor Cunningham's suggestion that conventional understanding be the interpretative baseline is limited to this area. Before evaluating this suggestion, we have to ask why criminal law is different from civil law. It cannot be the case that criminal law is more likely to be read by the average person before engaging in questionable activity than is civil law. No one believes that most criminals actually consult the Statutes at Large before embarking on illicit conduct. We would be surprised to see defendants attempting to avoid punishment by claiming that they read the law at issue and believed that it did not cover their activity. Nevertheless, our intuitions are that there is something different about criminal law, something that requires more clarity than does civil law.

I share this intuition, and I think that it stems from two sources. The first is that it strikes us as unfair that someone would be punished for an act which they could not have learned was illegal. We do not punish persons who had no ability to control their actions; similarly, we are uneasy about punishing persons who had no opportunity to learn that their conduct is prohibited. But again this begs the question of what counts as accessible. Criminal laws can be every bit as complex as civil laws. Certainly many environmental, money laundering and securities law crimes involve what appears to the ordinary person as bewildering levels of complexity. For these laws, assiduously following conventional language provides no assurance that they will be readily understood by the nonlawyer. We are thus not surprised that numerous lawyers specialize in these areas and many nonlawyers seek professional advice before they tread too close to the line.

As with civil law, specialization is inevitable.

The second reason for our added concerns with transparency in the criminal law is that we want to ensure that the legal system is not depriving people of their liberty simply because either the judge or the jury views them as undesirable. Clarity provides a check against arbitrary decisionmaking. This goal does not solve the puzzle of whether linguistics can be relevant to legal interpretation. We still have to ask the question of clarity to whom? Lawyers are far more likely than average citizens to be monitors of the legal system. If the legal system demands that a statutory prohibition be clear to this relatively large class of people (which it does), the evils generated by granting greater discretion to judges and juries to create new offenses will not come to pass. Criminal law thus does not offer a home to linguistics any more than does civil law.

In the end, the discussion at the symposium was captivating, and I learned a lot about linguistics, a subject that I have always wanted to know more about. My disappointment was only that I did not learn anything more about law.