

# LANGUAGE AND SELF-INTEREST: PRELIMINARY NOTES TOWARDS A PUBLIC CHOICE APPROACH TO LEGAL LANGUAGE

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## I. INTRODUCTION

Linguistics is the scientific study of human languages. In my view, one of the more interesting intersections between law and linguistics, which, unfortunately, was given scant attention at the Conference, is the use of language to do more than communicate facts, ideas, emotions and opinions. In my view, an equally important role for language is to affect the views of listeners (and readers) about speakers (and writers).

Expanding on this idea, my thesis is that language in general, and legal language in particular, often is used as a tool for the subtle communication of information about the *speaker*. This use of language has little to do with the actual information being conveyed by the speaker. The information is a subterfuge for the real purpose of communication. This real purpose is to *signal* information about the speaker that will cause the listener to regard the speaker in the way that the speaker wants the listener to regard her.

In this Essay I will give a few examples of this phenomenon in action. I will begin with a benign example, in which no damage is caused by a failure to understand the true purpose of the speaker's words. I will then move to some examples in which, it might be argued, real harm is caused by the failure to understand the true purpose of the communication. Finally, I will explain why language is used in the way I am describing in this essay.

## II. LANGUAGE AS A SIGNALLING DEVICE

### A. *Use of the Feminine Pronoun*

I write this brief article using, where possible, the feminine pronoun *she* instead of the masculine pronoun *he*. The purpose that is served by this is

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to signal the listener that, at minimum, I am tolerant, and that I am not a sexist. Perhaps, to some, my use of the feminine pronoun signals that I am a feminist. Are these inferences accurate? Well, in my case, of course they are. Here the use of the feminine pronoun has a purely signalling function. This is because the pronouns are interchangeable, and thus no meaning is lost by substituting the feminine pronoun for the traditional masculine pronoun. And, I assert, the signal is effective, from the point of view of the speaker, anyway, because it is more likely that the listener will believe that a male speaker is not a sexist if he uses the feminine pronoun wherever possible.

The more difficult question, however, is whether the use of this pronoun is a reliable signal from the perspective of the *listener*. I assert that the signal is reliable, but not completely reliable. I have overheard law professors joke about the fact they can say or do anything they like in class as long as they use the feminine pronoun as a shield to ward off attacks from angry feminists. The inference I have drawn from these remarks (made a safe distance from students, of course) is that sexist professors successfully can use the feminine pronoun to hide truly sexist natures. Of course, this will not work against truly blatant sexism or instances of sexual harassment. But it does seem clear that the use of the feminine pronoun can at least provide the speaker with something of a safe harbor for transgressions against the prevailing law school norms of "political correctness."

Interestingly, it would be inaccurate to label a sexist who uses the feminine pronoun as a liar, although, in a sense, this person is lying. After all, the person is *deliberately* signalling to listeners the fact that he is not a sexist when he really is. This use of "false signals" has precisely the same defective effect as actual lying.

### *B. Language as a Barrier to Entry: Linguistic Self-Preservation*

On Saturday, April 1, 1995 at the Conference, there was an extremely interesting exchange between Judith Levi and Fred Schauer about the use of empirics in linguistics. Professor Levi took the position that linguistics was "transformed" into a rigorous scientific discipline, like physics or chemistry, by Chomsky turning linguistics into an academic discipline that did not "just sort of write stories about language" but, instead, developed falsifiable hypotheses using "relevant language data."<sup>1</sup> Professor Levi's thrust was that non-empirical work in linguistics is, to use her words, "like

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1. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 899 (1995).

my aunt's view of marital relations," as opposed to an academically respectable "understanding of language based on rigorous empirical investigations guided by inspired (or less inspired) theories. . . ."<sup>2</sup>

In response, Professor Schauer characterized Professor Levi's views on non-empirical linguistic views as "a bit extreme."<sup>3</sup> What is critical from my perspective, however, is not the relative value of non-empirical linguistic approaches such as those cited by Schauer (Tarski, Davidson, Wittgenstein, Searle, Grice, and Austin), but the exclusionary nature of Professor Levi's remarks. Regardless of the substantive merits of her point of view, by defining linguistics to include only the sort of work that she does, Professor Levi's remarks have dramatic implications for the sort of people who are hired in Linguistics Departments and for the sort of work that should count when making decisions about promotions and hiring within departments of linguistics. Thus, whatever the substantive merits of her arguments, Professor Levi's point of view is consistent with her professional aspirations.

Of course, this does not mean that Professor Levi is not sincere in her views about the merits of non-empirical approaches in linguistics. I am certain that she is. On the other hand, I am also certain that people's sincere beliefs generally correspond to the points of view that serve their private interests.<sup>4</sup>

In legal education the tendency to embrace convenient pedagogical theories has been particularly harmful. For years, legal scholars have declined either to build useful theories or to pursue empirical investigations of their assertions regarding the most desirable state of the law. Pure phenomenology, otherwise known as the case method, controlled legal scholarship. The practitioners of this sort of legal scholarship have strongly resisted new, more rigorous approaches to legal scholarship. In particular, those who would apply economic analysis to law have met with resistance from traditional legal scholars who feel threatened by impending irrelevance. Here again we see language used not to express an idea or to assert a truth or a mis-truth, but as a means of self-aggrandizement.

Another way that language is used by professionals as a barrier to entry helps explain why legal writing and legal jargon are so incomprehensible. As Steven Stark has observed, it is incorrect to assume that lawyers are

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2. *Id.* at 900.

3. *Id.*

4. Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937 (1993).

simply poor communicators.<sup>5</sup> The truth is that lawyers misuse language “because it is in their economic interests to do so”.<sup>6</sup>

For starters if lawyers stopped writing like lawyers, they might have trouble charging as much for their work. Every time lawyers confound their clients with a case citation, a “heretofore” or an “in the instant case,” they are letting everyone know that they possess something the non-legal world does not. As anyone who has been “sutured up” by a doctor knows, lawyers are not alone in using professional “doublespeak.” One need not be a Marxist to understand that jargon helps professionals to convince the world of their occupational importance, which leads to payment for service.

All professions indulge in this linguistic self-preservation, but the legal profession is worse than most. . . .<sup>7</sup>

### C. *Political Correctness and the Problem of Signalling*

Still another example of the use of language as a means of signalling information about the speaker, rather than as a means of communicating information, may have more harmful effects than the simple use of the feminine pronoun. At faculty meetings and in other forums in which policy matters are discussed, people frequently support certain substantive positions in order to achieve a particular signalling effect. Perhaps the most common example concerns discussions of affirmative action. When a speaker at a faculty meeting says, “I am opposed to affirmative action in law school hiring and admissions,” she may mean several things. First, she may mean that she is a racist and is opposed to any policy that will result in there being more black students or professors in the school. On the other hand, of course, the speaker may not be a racist at all and may simply mean that she thinks affirmative action is undesirable because it stigmatizes blacks who are perfectly capable of competing on their own merits. Thus, when a speaker says that she is in favor of a particular affirmative action policy, the signalling effect with respect to the speaker is a bit unclear. She may mean that she is simply opposed to affirmative action, or she may mean that she is a racist.

On the other hand, in the context of a policy debate at a law school faculty meeting, the signalling effect of saying “I am in favor of affirmative action” carries a rather unambiguous signal. These words are very likely to mean that the speaker is not a racist. This is because the costs to the

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5. See Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

6. *Id.* at 1389.

7. *Id.*

speaker of sending a false signal in this context are much higher than in the previous example of the feminine pronoun. In the previous example, there was no cost other than the personal discomfort of using the feminine pronoun by someone who might prefer to use the masculine pronoun. By contrast, there may be real costs to a racist of using support for affirmative action as a subterfuge, since such support could result in the law school's adoption of a substantive affirmative action policy with which the speaker strongly disagreed.

However, while the chances of a false signal by speakers voicing support of affirmative action are small, they are not non-existent. For example, if it appeared clear that the majority on the faculty was going to support or oppose a proposed affirmative action plan, then the possibility for subterfuge would exist, as a faculty member could voice support for a proposed affirmative action plan to send a signal that she was not a racist when, in fact, she was or vice versa.

There are two points that emerge from the previous discussion. First, it is far more likely that language will be used as a means to send a false signal by those who oppose affirmative action than by those who support it. This is because there is nothing to be gained by appearing to be a racist when one is not. On the other hand, there is much to be gained by sending the signal that one is not a racist, despite one's true beliefs.

The second point that I would like to make is that the above discussion is a grossly oversimplified account of the use of language as a signalling device. The signalling effect of voicing support for affirmative action is not reserved for racists. After all, even non-racists have a strong incentive to make it absolutely clear that they are not racists. Thus, if the account of the use of language that I am presenting here is correct, it is likely that support for affirmative action among liberals is not as high as generally believed. This is because at least a portion of those who voice support for affirmative action are doing so because they value the message that such support conveys about them. These speakers, who are likely to be among the most vocal supporters of affirmative action, are less concerned about the possible detrimental effects of affirmative action than they are about making sure that they are perceived in a congenial light.

The above discussion applies with even more force to other issues such as abortion or the right of gays to serve in the military. People who support women's rights can signal their support for such rights by supporting abortion. But, to the extent that this signal results in abortions being more widely available, such signalling, while beneficial to the speaker, imposes severe costs on aborted fetuses. Similarly, it is not at all clear that it is in

gays' interests to have the legal right to serve in the military, at least where there is a possibility of conscription (*e.g.*, the lack of agitation for having gays in the military or for placing women in combat roles during the height of the war in Viet Nam). But advocating the introduction of gays in the military sends the clear signal that the speaker favors equal rights for gays.

### III. WHY LANGUAGE IS USED FOR MORE THAN COMMUNICATION

As noted above, language often is used to accomplish more than communication. At times, it is used to obfuscate, and it is used to advance the speaker's narrow self-interest, sometimes at the expense of truth. As I pointed out, lawyers and other professionals use language to create a barrier to entry into their profession. This may explain why lawyers write so badly, but it does not explain the other examples given above, such as the use of the feminine pronoun, or the decision to support affirmative action by someone who: (a) believes affirmative action is socially undesirable, but (b) wants to signal that she is not a racist.

Here this motivation stems from a desire on the part of the speaker for credibility. Anyone can say that she is not a racist. But the assertion gains credibility when the speaker accompanies the declaration by voicing support for a program such as affirmative action. The credibility is derived from the fact that the speaker who voices support for programs such as affirmative action is sacrificing something if she is lying. For this reason, assertions of support for such programs are more credible in situations where one's assertions might actually change the outcome of an election. Thus, it is a desire for a meaningful, *i.e.*, credible, means of expressing one's self that prompts the use of language in the ways I have described above.

### IV. CONCLUSION

Locating and analyzing the meaning of words is an extremely important enterprise. The roles played by context, assumptions, and shared experience all are interesting subjects of study. At least as interesting, in my view, however, is the role played by language as an instrument of self-aggrandizement for the speaker. In this brief essay I have tried to expand on some of the ways that speakers and writers use language not to communicate, but to further their own interests. In my view, this use of language is important for two reasons. First, to have a complete understanding of language, one must understand all the different reasons for using language. Understanding one's motivation for communicating is critical to understanding one's

meaning. For this reason, the analysis I have presented here is fully within the spirit of the Conference.

However, the use of language I have described in this paper is important for another reason as well. If the view of language espoused in this Essay is correct, then people's substantive positions on such issues as affirmative action and abortion may well be *determined* by their desire to be perceived in a particular way. For this reason, linguistic analysis of the type presented here suggests that the true support for such issues as affirmative action and abortion may be overstated by polling data, which may construe the speaker's desire to appear tolerant and progressive as support for programs that the speaker actually considers harmful or misguided.

