

THE “LANGUAGE OF LAW” AND “MORE PROBABLE THAN NOT”: SOME BRIEF THOUGHTS

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In the weeks after the conference whose proceedings are recorded here, I have reflected unsystematically on many of the topics we discussed. On two topics, it is worth offering some further development of my own comments. This consists of elaboration, rather than clarification or qualification. In the interests of clear presentation, I say enough here so that a reader need not look at the conference transcript to grasp my points.

I. THE “LANGUAGE OF LAW”

By far the most testy moments of the conference arose out of the following problem. The Supreme Court had interpreted “knowingly” in a criminal statute regulating interstate commerce of child pornography to cover the age of participants, even though the placement of “knowingly” in the statutory provision would, according to standard usages of English grammar, lead to its not being applied to that element of the crime.¹ All participants at our conference *fairly* quickly acknowledged the following two truths: (1) the Court’s construction did not fit ordinary English grammar, and (2) there *might be* appropriate (legal) reasons why statutory construction of a criminal statute would assign “knowingly” a force exceeding that indicated by ordinary English usage. This agreement was accompanied by sharp disagreement over whether one could properly speak of a “language of law” according to which “knowingly” had this special extension in criminal statutes. The lawyers said “yes”; the linguists said “no.” No lawyer asserted that a clear practice of this sort actually exists, only that it might exist and that reasons relating to desirable culpability requirements might support it. The lawyers, at least this lawyer, attached no great significance to whether such a practice could be part of a

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1. United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994). See *Problems*, 73 WASH. U. L.Q. 797, 798-89 (1995); see also *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 898-920 (1995).

“language,” but we were exasperated by the linguists’ assurance that it could not. Modest reading after the conference has reinforced my impression that the state of the discipline of linguistics leads scholars in that field to insist that languages have consistent rules of grammar. Therefore, the legal practice, if it existed, would have to be characterized in other terms. The basis for this underlying assumption about what are languages *may be* (I am not confident enough to assert that it is) the study of natural languages by linguists and their theories about the human mind as it relates to language. I (and others) insisted that whether the legal practice, if it existed, could be called an aspect of “legal language in the United States” was a matter neither of description nor normative judgment, but one of conceptualization. We claimed that it was somewhat arbitrary to preclude a conceptualization of “legal language” on the ground that the treatment of “knowingly” suggested no general, consistent, alternative grammatical practice, but rather amounted to an ad hoc deviation from ordinary practice. My views about this have not changed, but I now see two other questions as more important than the one on which we mainly focused.

The *most important practical* question is how much it will count against an existing or proposed practice of interpretation that the practice violates ordinary rules of grammar. Most of the linguists, I think it is fair to say, believed that conformity with English grammar counts for quite a lot in a proposed interpretation. They did not deny that very strong (legal) reasons could override the argument in favor of an interpretation that conforms with ordinary grammar, but they assumed it would take very strong reasons to do so (once someone recognized the implications of ordinary grammar). Calling deviations a part of a “different language” (“Law English”) might make it appear that weaker reasons could justify judicial disregard of ordinary English grammar. Just *how strong* reasons to deviate from ordinary English grammar need to be is a very complicated question. (For communications mainly from legislators to prosecutors and judges—such as designations about culpability—perhaps the reasons need be less strong than when communications are mainly to ordinary individuals and their lawyers.) My point here is merely that this question deserves careful independent judgment, and it should not be unthinkingly resolved, either way, by one’s choice of characterization of a deviant linguistic practice.

The second question is whether such deviant practices might be regarded as a fit study for linguists, with a potential for insights drawn from their discipline. Some lawyers at the conference expressed the view that the linguists should not simply suppose that a deviant practice is not *their*

business because it is not (for them) part of a language. Perhaps there are reasons why linguists could not profitably study various subsystems that include certain deviations from standard grammatical usage (and do not include any consistent alternative grammar), but no one explained those reasons. Again, the question of aptness for examination by particular specialists should not be determined, either way, by one's choice of explanatory concepts.

II. "MORE PROBABLE THAN NOT"

On the last morning of the conference, I echoed a point made by Bob Bennett: that even if *each* of ten necessary factual conclusions were proved beyond a reasonable doubt, a defendant's guilt might not be proved beyond a reasonable doubt. The reason is that if one *cumulated* slight doubts (each slighter than a reasonable doubt) one might end up with a reasonable doubt overall. Although, I do not suppose that jurors usually think in terms of mathematical probabilities, this issue, and its civil analogue, can be illustrated most sharply by artificially quantifying assessments made by jurors. Suppose the prosecution must establish ten separate factual elements to show guilt. A juror thinks each element is 97% likely. The chance that the prosecution is mistaken about *one* of the elements is 23.26%. The juror thinks that the overall likelihood of guilt is 73.74% (97% multiplied by 97% nine times), a figure less than "beyond a reasonable doubt." Despite instructions that focus on proving particular elements beyond a reasonable doubt, the appropriate inquiry for a criminal case involves a juror's complete appraisal of guilt, not the appraisal of separate elements. (The appraisal of separate elements can, of course, contribute to a reflective, rational general appraisal.)

My musings after the conference have focused on an interesting conceivable divergence of treatment of factual elements from legal components in the ordinary civil standard that plaintiff must prove a case to be more probable than not. Suppose that the law is clear that a person under eighteen cannot give away property even if it is treated as "hers" within the family. Gertrude has received a car for her high school graduation; she has given it to her very close friend, Rachel, who desperately needs a car and comes from a poor family. Gertrude's parents bring a suit to get the car back. Rachel claims: (1) that Gertrude's mother was there when Gertrude made the gift and said, "This is very generous. We'd rather you keep the car, but if this is what you want to do with it, that's fine."; and (2) that Gertrude is over eighteen. If *either* of Rachel's

claims is true, she has a clear legal right to keep the car. Gertrude was born in a remote village with no birth records and testimony is conflicting about her date of birth. The trier of fact decides it is 60% likely she was under eighteen when she gave Rachel the car. Similarly, after hearing the testimony of Rachel, Gertrude, and Gertrude's mother, the trier of fact decides it was 60% likely the mother did not actually acquiesce in the gift. With these estimations, the trier of fact concludes that it was 36% likely that the gift was invalid. How this case should be treated is not uncontroversial, and instructions to juries typically indicate a plaintiff need only prove each element to be probable; but I believe the better view is that the parents have failed to carry their burden of establishing that the gift was invalid.²

One might challenge the foundations of this hypothetical by arguing that such talk of probabilities about singular past events is inapt. However, it makes sense to think of rational betting odds given available information, or to think of what would be the percentages of instances either way if a very large number of circumstances arose with this amount of information available. Their approaches are sufficient to sustain use of the language of probability, although I shall not try to defend that usage further.

As I was reminded by a challenging research paper I received this year from Michael Fried about the determinacy of law,³ one might think of decisions about legal rules in a somewhat similar way. A judge, for example, might conclude that it was 60% likely he had reasoned his way to the soundest legal conclusion, recognizing that he may have erred in his judgment. I do not suppose that this perspective captures all judgments about difficult legal issues or settles all questions about the determinacy of law, *but* it does represent one aspect of legal (and moral) judgment. We often experience a kind of tentativeness in judgment, feeling we have done as well as we can, but doubting whether we have made the decision that is best in some sense that we accept.

Consider an analogy to the gift case. The facts are undisputed. Gertrude was two months short of eighteen and her mother remained silent during the transaction. Rachel claims that someone who is close to eighteen and a high school graduate should have legal authority to give property away *and* that parental silence should count as acquiescence. A judge finds each claim plausible but is persuaded by neither. She concludes that it is 60%

2. See generally Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 404-07 (1986); RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY* 40-43 (1983).

3. A student paper, a copy of which is on file with its author.

likely a strict line at age eighteen should be maintained and 60% likely that silence should not count as acquiescence.

Rachel might argue that it is probable overall that she should win the case. But, barring some complication concerning the legal issues—such as a special rule that combines a mature age short of eighteen with parental silence—Rachel will lose. Courts do not *cumulate* uncertainties about resolutions of legal issues as triers of fact might cumulate factual uncertainties. The reason is not difficult to grasp. Courts are trying to resolve each legal issue in the soundest way possible. The result in a case is the consequence of that series of resolutions. Especially when appellate courts write opinions, judicial resolutions of legal issues have independent importance. Courts do not tell us just how much they doubt their legal decisions. Levels of uncertainty remain unrevealed. This practice is so ingrained that judges may not consider how levels of legal uncertainty could add up in a case. But it is interesting to note that in a case in which one party must succeed on a number of legal issues to win, and judges believe the decision of each of the issues is close but resolves itself in that party's favor, that party *will win*, even though a reflective judge might conclude that, overall, it is probable that at least one of the issues (which she is not capable of identifying) should have been decided in a contrary way, and that the contrary resolution of that issue would have generated a victory for the other party. What is at least a possibly appropriate treatment of factual uncertainties is not appropriate for uncertainties about legal conclusions. Factual uncertainties may sometimes cumulate to tip the decision; legal uncertainties do not.

