

## PROCEEDINGS

*Friday, March 31*

*1. Opening Session*

JUDITH LEVI: Let me welcome you to this very exciting, very new, very promising event. Welcome to everybody. Welcome to the new interdisciplinary dialogue and welcome to your continuing education. We've really all had a crash course in the other side's expertise. It's been quite a test, I think, for most of us. At least, it's given *me* some compassion for the plight of my students who often see more pages than they can manage to deal with, as they try to rush through with their highlighters. But suddenly when *I* was faced with all those pages, only half of which had highlighting on them and the other half of which were naked, waiting for me to get to them, I suddenly became young again and could see myself in their place!

But since we really *are* here as students of new learning, I think it would be good if we would assume that role fully and enthusiastically. Let's not be bashful (as some of our students sometimes are) about asking "the questions of the innocent" and instead let's be mature enough to just ask the questions because we're here in order to learn, not in order to provide all the answers.

Let us also be forgiving not merely of *other* people who may not have finished all the readings or who may not have understood every fine point in them, but especially of ourselves who *also* may not have finished all the readings and also may not have understood every point in them. That's okay; just by coming here to spend the weekend together and being committed to that time, we have already accomplished a great deal. We've already built a bridge and it's only 9:15 in the morning!

Before we start, I'd like to express my gratitude to a lot of people who have made this possible. First to Clark Cunningham, whose creative inspiration really started everything off in the summer of 1993 when *Yale Law Journal* had asked him to write a review of Larry Solan's book, *The Language of Judges*.<sup>1</sup> Clark got the idea, "Well, if we're going to be

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1. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

talking about how linguistics can be of use to judges in making decisions about language cases, let's get some linguists and try them out and see what they can come up with for cases that have not yet been argued."

And so it was Clark's creative idea that got Georgia Green and Jeff Kaplan and myself involved. And it was the results of that project<sup>2</sup> that led to *this* conference because at the end of that project, we asked ourselves, "Well, gee, that worked pretty well; that worked actually much better than we would have expected. What should we do next?" And we thought it would be wise to expand the circle of people who helped decide what to do next in terms of bringing the two disciplines together for mutual education.

And I also wanted to thank Clark for his work as the other "team captain" in preparation for this event, for carrying the ball very swiftly and very far down the line just as far as he could take things.

I'd like to thank Jeff Kaplan and Georgia Green for their very extensive input in every stage of the planning, and Jerry Sadock and Fred Schauer who put themselves on the line to be "the quiz kids" to answer questions for the opposing group. Let me also thank everybody who helped to get our two large reading packets together by submitting ideas for readings and for the agenda and everybody who made at least a valiant effort to get through the readings. Last but not least, I would like to express my deep gratitude to the University Research Grants Committee of Northwestern University, and to Dean Dorsey D. Ellis, Jr. of Washington University School of Law for the financial support which made this conference possible.

I have three very general overall objectives that I hope you share with me, in the following ascending order: One is, I'd like for this meeting to be productive. Second, I'd like for us to be really creative and to feel free to brainstorm together and then just watch what comes out, without any prior expectations for what we have to produce. But most importantly, I'd really like for this weekend to be a lot of fun. We're going to be together for most of three days, and I would like at the end to feel that I've had a really good time with my old friends and a really good time making new friends. And I have a feeling that's going to come true.

After all, we have no quizzes at the end, no frantic publication deadlines or funding deadlines. So let's just see what a weekend of talk that is both knowledgeable and naive can accomplish and what it can create in the way of bridges between our professions.

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2. See Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994).

And now Clark will tell us what he knows to date about the special issue of *Washington University Law Quarterly*.

CLARK CUNNINGHAM: The *Washington University Law Quarterly* is going to dedicate the first issue of the upcoming year to the general topic of law and linguistics. The centerpiece of the issue as currently planned is the edited proceedings from this weekend.

Just a word or two about how I got involved in the process that leads us here today. About half of what I teach at the law school of Washington University is clinical—supervising students who are actually engaged in the practice of law, using their experience as a basis for teaching, and also trying to inform that experience from a theoretical perspective. So I'm predisposed to constantly try to connect theory and practice by the way I teach. And that is the way I responded to the request by *Yale Law Journal* to write a review essay prompted by Larry Solan's book, *The Language of Judges*.<sup>3</sup>

One of the things that struck me as I read Larry's book was that it looked at what the Supreme Court had already done. I wondered what would it be like if the Court had the benefit of the insights of somebody like Larry Solan, both linguist and lawyer,<sup>4</sup> to work with before it made a decision. My original plan was simply to solicit linguists to analyze a couple of cases to be argued the following term, and then incorporate or quote their analyses in the review essay. I did not originally plan to have three linguists as full co-authors.

What happened is Judy helped me get into contact with Georgia and Jeff, and all three produced their analyses in an amazingly short period of time. When I then tried to incorporate these analyses into a larger essay, it quickly became apparent that I didn't know enough about linguistics to write the rest of the article. To review Solan's book, you needed someone who spoke as a lawyer, and you also needed someone who was a linguist. The comments I got back from the linguists on my first draft were as long as the draft I sent out, so I said, "You guys have already done the work: does anyone want to co-author the whole thing?" Eventually all three signed on, and the co-authoring experience was a wonderful one, at least for me. And so that's part of the antecedent to this: it really did seem possible for lawyers and linguists to work together on a common task with

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3. See SOLAN, *supra* note 1.

4. Lawrence M. Solan is a partner in the law firm of Orans, Elsen & Lupert in New York City. He received his Ph.D. in linguistics from the University of Massachusetts, Amherst, and his J.D. from Harvard Law School.

only some knowledge of each other's discipline but a willingness to work together on very specific problems. Part of the key to the success of this enterprise was that we were looking at several specific problems, three particular Supreme Court cases, and trying to come up with solutions to them, and so that's been also the approach chosen for this weekend.

Therefore we're going to start today by looking at some specific problems and working on them together in interdisciplinary teams, rather than beginning with abstract discussions of the sort we're fond of as academics.

JUDITH LEVI: So what we plan to do for this first day is to spend the rest of this session discussing our individual goals in the hopes of identifying some collective goals for the next two days. Then we'll meet in small groups of two linguists and two lawyers each, for a series of three working sessions. Since the linguists all know each other, the linguist pairs will stay constant but the lawyer pairs will keep changing—so that all the lawyers can get to meet and talk with all the other lawyers *and* all the linguists at least once today. Each of the three working sessions will focus on one of the specific cases that Clark has given us materials on: first, the "No vehicles in the park" hypothetical;<sup>5</sup> then the *X-Citement Video*<sup>6</sup> case in which the Yale team filed an *amicus* brief;<sup>7</sup> and last, the *Duane v. GEICO* case<sup>8</sup> up this fall. And the purpose of these three sessions is partly to get to know each other and see what kind of views we have on language, and also to uncover whatever commonalities there are between us as well as the differences in the way we approach very specific cases in a legal context.

So the three sessions will take us through the second half of the afternoon. Then after dinner, what we plan to do is to spend the first half hour caucusing in our two respective professional groups. Then we'll come back together in the last half hour to a group of 12 to see how we want to structure Saturday's agenda. But we do know that on Saturday, our overall focus will be discussions of the questions that were raised today as well as those that were raised as you did the readings.

On Saturday, we expect primarily full group discussions, if that works out. If it doesn't work out, we'll disperse into smaller groups. And then on

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5. See H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961).

6. *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994).

7. Brief *Amicus Curiae* of the Law and Linguistics Consortium in Support of Respondents, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723).

8. *Duane v. Geico*, 37 F.3d 1036 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 1251 (1995).

Sunday, we'll look back over the weekend to see what we've accomplished, what we've learned, and what we've been puzzled by and try to look ahead to the future to see what we want to do next.

So now, let's turn to the first question of the day. What do we want to do here and what do we want to have done by the time that we leave? We're going to be discussing these questions first in pairs, one lawyer and one linguist so that you'll interview each other and find out what each would like. The basic questions are: What would you like to learn from this workshop? What would you like this workshop to accomplish for you and also more generally for the larger social group?

[Recess]

*During the recess, participants interviewed each other in pairs (of one linguist and one law professor) about which subjects each would like to see addressed in the days ahead. For the reader's convenience, we present here an edited summary of all the suggestions that emerged from these interviews, followed by the transcript reporting on those interviews.*

#### QUESTIONS OF COMPARISON BETWEEN THE TWO PROFESSIONS

- Q: What is the relationship between legal beliefs about meaning and linguists' beliefs about meaning? Is meaning any different in law than in other contexts (e.g., those that linguists normally study)?
- Q: What constitutes legitimate argument, evidence, authority, and reasoning in law? in linguistics?
- Q: Are "ordinary English" and "legal English" the same language or different languages? different dialects of the same language?
- Q: What is the relative value of (a) judges, (b) linguists, (c) ordinary native speakers (e.g., jurors), and (d) dictionaries for deciding questions of meaning?
- Q: How do linguistics and law treat the role of *context* in interpretation of language?

#### QUESTIONS ASKED BY LINGUISTS

- Q: How DO judges balance the various criteria that they may apply in statutory interpretation? How DO lawyers argue for one weighting over another? Is it all arbitrary and unpredictable? Is it all politics and personal preference?
- Q: Why is it so controversial for judges to rule that a statute means what it says (i.e., that the language cannot be trumped by the many other interpretive criteria, such as intention or purpose) and must be enforced accordingly?

- Q: How do legal concepts of “ordinary meaning,” “plain meaning” and “literal meaning” compare to linguists’ concepts of “conventional meaning”? More generally, is there consistency among legal conceptions of meaning and communication?
- Q: Are interpretive practices/issues different in these different areas of law:  
a) contracts b) Constitution c) statutes
- Q: Linguists recognize different categories of “linguistic uncertainties” (Sadock’s term), such as vagueness, lexical ambiguity, structural/syntactic ambiguity. What categories does the law recognize?
- Q: What is the legal status of “incompetent” documents (i.e., documents that no one can understand)? What interpretive principles apply to them? Which ones should?
- Q: What are useful/appropriate/feasible entry points within the legal system for linguistic expertise?
- Q: Is statutory language only a *guide* to “real” law?

#### QUESTIONS ASKED BY LAWYERS

- Q: What is linguistics?
- Q: How is linguistics a science?
- Q: What are linguistic methods for ascertaining answers to linguistic questions? Which ones are best suited to answering which kinds of questions? Which ones are “empirical” as opposed to “introspective” and what does that contrast imply?
- Q: What can linguists offer as expert witnesses in a case that any (educated) speaker of the language, such as the judge or jurors, could not figure out themselves?
- Q: How relevant/useful is linguistic expertise to statutory interpretation, given the following contrasts between statutory language and, say, conversations?
- a. statutes are (uniformly and seriously) coercive, in order to direct and control citizens’ behavior
  - b. interpretation changes over time [esp. due to precedents and their cumulative effects]
  - c. statutes last much longer than a conversation (sometimes centuries)
  - d. there are “third party effects”—so the language goes beyond the original author and original audience
  - e. there are typically multiple authors (compromising on individual intentions), a complex process of drafting, and a special set of stylistic requirements

- Q: What does linguistics have to offer concerning legal interpretation that is different from contributions made by (a) philosophy of language, (b) literary criticism, and (c) biblical interpretation?
- Q: What is the role of pragmatics in legal interpretation? What is the relationship of pragmatics, especially the work of Grice,<sup>9</sup> to legal process theory?
- Q: What do linguists have against dictionaries? Put another way, in the domain of legal decisions on word meaning, what reliable authority does linguistics have to offer a judge to replace her traditional and familiar reliance on dictionaries?
- Q: Is the language of law/lawyers a separate language from standard English?
- Q: How can speech act theory be used in analyzing language crimes (e.g., perjury, libel, slander, conspiracy)?

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JUDITH LEVI: Jerry, why don't you start telling us about Michael (Moore).

JERRY SADOCK: Well, I found out that Michael is actually a linguist, an ordinary language philosopher with better credentials in the subject than I have. He was a student of Grice's and Searle's at Berkeley and then of Putnam's at Harvard.<sup>10</sup> And I told him that I'm not sure that we linguists would have a lot to offer since what we're doing is basically the same thing, at least as it hinges on the law.

I think very little technical structural linguistics is important to the law. Many linguists can't even understand about linguistic theory, let alone judges and juries. But the readings that we provided the lawyers were basically readings that could have been in a philosophy book rather than in a linguistic book.<sup>11</sup>

So I was really intrigued to find out that Michael is a philosopher of language but uses this background in his legal teachings.

9. Ordinary language philosopher H. Paul Grice (1913-1988) who developed a systematic account of some of the major discrepancies between formal logic and natural language. His seminal work, *Logic and Conversation*, provided the cornerstone of contemporary linguistic pragmatics—the study of how speakers express and infer meaning in specific contexts—while also permitting philosophers of language to better integrate the semantics of formal logic theory with natural language use in ordinary discourse settings. H. Paul Grice, *Logic and Conversation*, 3 SYNTAX & SEMANTICS 41 (Peter Cole & Jerry L. Morgan eds., 1975).

10. Philosophers of language H. Paul Grice, John R. Searle, and Hilary Putnam.

11. See *Bibliography*, 73 WASH. U. L.Q. 1313 (1995), for a list of the readings on semantics and pragmatics provided to the law professors prior to the conference.

JUDITH LEVI: And his objectives for the workshop?

JERRY SADOCK: He said he wanted to learn more about linguistics, but I'm not sure how much he's going to get from us beyond his excellent background already in these subjects.

MICHAEL MOORE: Would you like some first person testimony?

JUDITH LEVI: Yes, Michael, give us some testimony.

MICHAEL MOORE: The way philosophy of language came up is because one of the curiosities I had in reading the materials on linguistics was what had happened to the philosophers of language under whom I studied. One of the gratifying things is to see that you really can't tell the difference between philosophy of language and linguistics. What's nice is not only the serious attention but the deepening and the furthering of the work that some of us grew up with by linguistics. That was a curiosity that was one of my goals to cover.

The other goal that I mentioned was the goal of further understanding legal interpretation. Some of us have been interested in interpretation in law and in linguistics. Quite a lot of linguistics is a plausible ingredient, although only an ingredient, in a theory of legal interpretation in most of its forms, so there is always a practical interest of lawyers in linguistics.

JUDITH LEVI: Okay. You want to tell us about Jerry next?

MICHAEL MOORE: Yes. His goal, it sounds like, is to learn more about the relevance of linguistics to law, and in particular, since he's been an expert witness in a trademark case, a torts case on warning labels, and in a contract interpretation case, he is interested particularly in the way that judges could make use of the knowledge that linguistics brings.

JUDITH LEVI: Okay, Chuck.

CHUCK FILLMORE: Well, Bill (Eskridge) is interested as a teacher of the law in finding out more about how linguistics—syntax, semantics, pragmatics—can be used as tools for analyzing sections of the text. He's also interested in seeing whether pragmatics—in particular, the Cooperative Principle of Grice—<sup>12</sup> is essentially the same thing as the kind of statutory interpretation principles that involve purpose and context; that is, whether pragmatic interpretation principles influenced by Grice support or maybe are identical to now unpopular way of interpreting statutory text that looks to purpose in legal context.

JUDITH LEVI: Which is labeled what?

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12. GRICE, *supra* note 9, at 47.



BILL ESKRIDGE: We call it the legal process approach. Pioneered by Fuller, Hart and Sacks, and dozens of others.<sup>13</sup> It's only a hypothesis. As I did the reading on pragmatics, I was struck by the similarity of the moves suggested by Grice's Cooperative Principle and pragmatics generally, to the approach of Hart and Sacks to statutory interpretation. The general point is that I felt the readings that we lawyers had from linguistics are very suggestive and informative about general legal theories. That's a hypothesis that I'd like to support.

JUDITH LEVI: And now please tell us what Chuck would like to get.

BILL ESKRIDGE: My conversation with Chuck reflected two different things. Thing Number One derives from Chuck's experience in legal cases. Chuck has perceived, accurately I believe, a certain degree of rigidity in judicial attitudes. Courts are very often not welcoming to evidence from a professional linguist about the ordinary meaning of statutory and other texts. Often judges and lawyers cabin linguistic presentations in the courtroom in ways that strike professional linguists as over-simple, constraining and counter-productive. Chuck is interested in why it is that courts exemplify what he considers rigidities. Can such evidence be presented to courts in ways that will be more attractive to them? That's the first concern.

The second concern that Chuck raises is somewhat different. It relates to a specific example, but one that is widely felt in our society. You are presented with a document. It is a document that you either do not care to read because of its complexity or that, even if you do read it, you cannot understand because of the document's complexity and jargon.

Usually the way we navigate such documents is to seek explanation of those documents from some authoritative source, such as a lawyer or the drafter of the document. For example, we often call up the Internal Revenue Service when we don't understand the tax forms.

Chuck's question is this: If the text itself might be seen in such instances as incompetent, then what are we to make of that? If everything depends upon how the document is explained to us, then why should such documents not be treated as functionally equivalent to oral contracts and maybe not as written individual documents at all?

JUDITH LEVI: In short, can we view overly complex documents as incompetent?

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13. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-08 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-72 (1958).

CHUCK FILLMORE: I have in mind a particular document which I think has many passages that are absolutely incomprehensible and that neither the drafters or the judges could understand. And then if the person who signed it under certain pressures had to depend on somebody explaining what each part was, then I think that you just have to depend on their memories of what was said so it should be treated just like an oral contract. One person remembers one thing and another person remembers something else. That's the issue.

JUDITH LEVI: So we're talking about the legal status of incomprehensible documents.

BILL ESKRIDGE: Both legal status and interpretational principles are what you can look at. These are old questions of law.

JUDITH LEVI: Okay, Georgia.

GEORGIA GREEN: I talked to Cass (Sunstein). One thing he was concerned with is the question of whether interpretation is the same thing for linguists and lawyers, or whether for lawyers—I'm using that term to include judges, law professors and so on—it's value-driven and for linguists, it's descriptive.

The second issue was that lawyers seem to have several conceptions of what it means to communicate; are these conceptions compatible with each other or in conflict? Third item: what are the uses and limits of *ordinary meaning* versus *dictionary meaning* versus *intended meaning*?

Well, there is a last one, but my notes aren't real clear. I'll let him speak for himself.

CASS SUNSTEIN: Quine is a philosopher who says that you should not use the word *meaning*,<sup>14</sup> that it's dispensable and the question is—

MIKE GEIS: Hear, hear.

CASS SUNSTEIN: Is the word *meaning* dispensable? Georgia has four things also. One, how should judges use linguistics in interpreting statutes, contracts, and linguistic crimes, like perjury? Second, what is the relation between the lawyer's conception of meaning of legal text and meaning in conversation? The third is what remedies are available to judges when the normal meaning does not correspond to the intended meaning? The last has to do with how lawyers interpret referring expressions and pronouns.

GEORGIA GREEN: Ones whose interpretation is questionable. It's Jerry Sadock's question from the handout. "What are the traditions for resolving disagreements about how referring expressions should be interpreted?"

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14 See generally WILLARD V.O. QUINE, *WORD AND OBJECT* (1960).

CLARK CUNNINGHAM: I listened to these last two interviews, and in listening to them, combined with what Michael said, I came up with a specific project. Ready? Write down three phrases. First, *plain meaning*. Now write down *ordinary meaning*. Now, write down *literal meaning*. Okay. The project is one of purely descriptive linguistics. The law professors here are the informants and the linguists are—the linguists. First, in the United States Supreme Court: are those three phrases synonymous? If the answer is “No,” then how does the first word modify the second? How is *plain meaning* different from *meaning*? How is *ordinary meaning* different from *meaning*? How is *literal meaning* different from *meaning*? Third, are any of these three phrases indeterminate? Fourth, if indeterminate, is the indeterminacy because the phrase is ambiguous, vague, or general? I think this project would move us toward some bigger questions.

FRED SCHAUER: Obviously these are questions that can occupy not only days of discussion, but also hundreds of pages of written analysis. But as a first cut, let me suggest that there seems to be a close relationship between the idea of *literal meaning* and the idea of *plain meaning*, but that the phrase *ordinary meaning*, which seems close to *standard meaning*, is something quite different. Loosely, I take *literal meaning* and *plain meaning* to be something close to *word meaning* or *utterance meaning*. That is, all of these phrases refer to the semantic (as opposed to pragmatic) content of a chunk of language, and all refer to that component of meaning that could loosely be called “acontextual,” and less loosely as relying largely for its understandability on those contextual factors understood by virtually all members of the linguistic community within which the chunk of language is used.

So when we see a sign saying *No Dogs Allowed*, it has the plain or literal meaning relative to a linguistic community, and relative to a domain, where both the linguistic community and the domain might be specialized ones. So it may be that words and phrases like *habeas corpus*, *assumpsit*, *scrum half*, *quark*, and *queen’s gambit* have plain or literal meanings within certain technical domains even though they are unknown to many speakers of Standard English, and it may be that terms like *real party in action* and *penalty* (as in *penalty kick* or *penalty shot* or *penalty box*) can have, in some domains, plain or literal meanings that diverge from the plain or literal meanings they would have in Standard English. And this is what makes it clear that *ordinary meaning* refers to something else, the linguistic community to which we refer, rather than the degree of agreement within some community. So a reference to “ordinary meaning” is, loosely, a

reference to Standard English, or non-technical English, or the language spoken by “the man [or woman] on the Clapham omnibus.”

CLARK CUNNINGHAM: I don't know the answers to these. Are any of them indeterminate? If indeterminate, are they ambiguous, vague, or general? Listening to these conversations is a very helpful starting point for people on the law side, I think. The project would move us toward some bigger questions.

JUDITH LEVI: I interviewed Bob Bennett. His first goal is to make it through our three days, which I think is one that we all share. His first question is about how interpretation changes over time. For example, if there's a statute, “No vehicles in the park,” and it gets interpreted in a certain decade, then how does that legal interpretation affect the way somebody will answer the question later on? If you decide that X is a vehicle in 1965, how does that affect the decision about whether Y is a vehicle in 1975, for example?

CLARK CUNNINGHAM: I assume interpretation of what appears to be the same text.

BOB BENNETT: Yes, a constant text. The problem of precedent.

JUDITH LEVI: Is it a descriptive question? Is the question “How does it happen?” or “How should it happen?”

BOB BENNETT: I suppose both. I could tell you something about how it does happen. I guess I'm wondering about whether linguists want to tell us anything about how it should happen. I think that's something they resist having anything to say about, but I wonder if they are truly faithful to that inclination. Although in the end, I doubt it.

JUDITH LEVI: Then this, of course, ties in with the issue of original intention especially in constitutional law, but for that matter, also contracts. The case we're looking at [*Duane v. GEICO*],<sup>15</sup> of course, goes back to statutes from Civil War times so it's certainly not just constitutional law.

And then he shared with me curiosity about the differences among the three major interpretive areas: constitutional law, statutory interpretation and contracts. Whether meaning is approached in different ways in those three key areas of legal interpretation.

BOB BENNETT: I've got four points here with some subcategories for Judy's questions. One is what legal scholars believe about meaning in language. Rather general. Two is the relationship of (1) to linguists' beliefs about the meaning of language. Three is what are the sociological and

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15. *Duane v. Geico*, 37 F.3d 1036 (4th Cir. 1994).

intellectual differences between the two professions? For example, (a), what counts as authority; and (b), what counts as evidence.

JUDITH LEVI: There is another, better word besides *intellectual*. The question is, how do we proceed in doing intellectual inquiry because I think there are some significant differences between our two professions.

BOB BENNETT: Fourth is what are possible or useful entry points in the legal system for linguistic learning.

JUDITH LEVI: Okay. Jeff and Kent.

JEFF KAPLAN: Kent (Greenawalt) is interested in seeing whether it's the case that the linguistic approach to the kind of questions we're taking up will provide just a more precise way of looking at already recognized questions or a completely new way of looking at things.

KENT GREENAWALT: This is really about interpretation. I don't have any doubt that there's something new in respect to the problem of evidence.

JEFF KAPLAN: The second question was whether it makes sense for some linguistic questions to be investigated empirically the way the meaning of the word *enterprise* was, and others the way the meaning of the expression at issue in the *X-citement Video* case<sup>16</sup> was investigated (without that kind of empirical work). That is, what areas of linguistic work relative to the law are appropriately handled by empirical work as opposed to nonempirical work?

KENT GREENAWALT: This was actually more a question about the coherence of linguistics as opposed to which approach is good for which areas.

JUDITH LEVI: So one question is "What are the methods of linguistics?"

KENT GREENAWALT: Yes, and why do you use one method for one type of question and another for other types of questions?

CLARK CUNNINGHAM: I think the empirical/nonempirical distinction, at least in this context, is on the one hand, surveying a set of speakers to get their reactions to a set of questions versus having a linguist ask herself or himself a question and produce an analysis based on that type of reflection or introspection.

JEFF KAPLAN: I understand that. What I don't yet understand is why many people don't come up with a rational interpretation of *knowingly* in the context of the statute at issue in the *X-Citement Video* case. If empirical work were done in the right kind of way, my guess is that less than 50

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16. *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994).

percent of the population would manage to do it right. Why isn't that as relevant as the 50 percent of the population who think *enterprise* doesn't mean 'economically focused entity'?

And the third question of Kent's has to do with the possibility of using speech act theory to understand crimes involving the use of language, such as bribery or acts of encouraging people to commit crimes.

KENT GREENAWALT: I'm especially interested in extending this approach to things like pornography. Some scholars that claim that pornography is actually a kind of performative utterance. This is not anything we're doing. I just happen to be interested in it.

JUDITH LEVI: Speech versus action.

KENT GREENAWALT: Yes. Jeff had two main things. The first is that he'd like to see progress toward a comprehensive theory of statutory interpretation. Jeff thinks that interpreting statutes probably isn't just a question of the meaning of language. He thinks that language may be inadequate and that perhaps what a court should be trying to do is to find out what the *law* really is: that somehow the statutory language signals to, but isn't really the law. And I have that summarized as "Is statutory language just a guide to real law?"

The second general question is: under the communicative view of legislation, what are the contributions of pragmatics?

JUDITH LEVI: And what you mean by "communicative view of legislation" is that legislation is communication?

JEFF KAPLAN: In particular, that the enactment of a statute is an illocutionary act, that is, a speech act.<sup>17</sup>

KENT GREENAWALT: Jeff went on to say that pragmatics is about what's conveyed by utterances in context. There's a question how much of all that goes into a legal exploration is really a part of pragmatic analysis. He talked about a distinction between literal meaning and use. And he was worried about the wholesale incorporation of every kind of legal technique as being part of pragmatics. So, he's a bit skeptical that everything that lawyers do in analyzing these things should count as part of pragmatics; and I have that summarized as—"Is everything legally relevant part of pragmatics?"

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17. For some discussion of applications of speech act theory to the law, see FREDERICK BOWERS, *LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION* (1989); DENNIS KURZON, *IT IS HEREBY PERFORMED...: EXPLORATIONS IN LEGAL SPEECH ACTS* (1986); Michael Hancher, *What Kind of Speech Act is Interpretation?*, 10 *POETICS* 263 (1980); Heidi Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945 (1990); Peter M. Tiersma, *Linguistic Issues in the Law*, 69 *LANGUAGE* 113, 131-34 (1993).

JUDITH LEVI: I should point out to those of you who haven't read every single line of the CV's that you were sent that Jeff is the only one who has degrees in both fields. He has a J.D. and a Ph.D. in linguistics. He's doubly dangerous.

We have an agenda for the rest of our lives here.

MIKE GEIS: Fred (Schauer) identified three areas that he is particularly interested in. One concerns ways in which ordinary English and legal English are alike and different. Why they are different, if different, and what is the significance of the differences? Is that fair, Fred?

FRED SCHAUER: As I said earlier, nothing turns on whether we use the word *ordinary* as opposed to *standard*, or whatever. The important point is that legal language is potentially a technical language. Lawyers and other inhabitants of the legal system potentially constitute a linguistic subcommunity within a larger linguistic community, and that implicates a range of important and difficult questions about the relationship between legal meaning and ordinary meaning.

MIKE GEIS: Second, he, like Michael Moore, has had a lot of experience with language philosophy and is particularly interested in what linguistics as opposed to language philosophy can contribute to legal issues.

And I would like to say personally, though, that I differ from Jerry strikingly in my belief that linguists have something to contribute that these ordinary language philosophers, like Grice, Searle, et cetera can't contribute.

And then, third, the relative value of linguistic evidence in the resolution of legal disputes or in the understanding of legal issues, as opposed to other kinds of evidence including particularly word use of ordinary people about what things mean.

JUDITH LEVI: Fred, a question. "The value of linguistic evidence"—in the sense of evidence from linguists?

FRED SCHAUER: I think it is an interesting question when, if at all, we (or a judge) might want to rely on evidence from linguists, as opposed to other evidence, such as the self-reporting or self-reflection of a native speaker of the language.

JUDITH LEVI: Yes. We have to be careful because *linguistic evidence* is ambiguous between (1) 'linguists' evidence,' and (2) 'language evidence' so maybe we can try to use those two terms to keep them separate. *Linguists' evidence* and *language evidence* or use a prepositional phrase.

FRED SCHAUER: That sounds fine.

JUDITH LEVI: So it's really "language testimony from everyone versus from experts" for short. Okay?

KENT GREENAWALT: What do you mean by language testimony?

JUDITH LEVI: Testimony about language. Meaning of the language, whether something is ambiguous, what modifies—

MIKE GEIS: That's what I meant by linguistic evidence. Not the evidence of me, Mike Geis, linguist and speaker, but evidence from how ordinary people use and understand language.

JEFF KAPLAN: This is a little picky, but I think normally some of this is not considered "evidence" as lawyers use the word. If you look at a dictionary or even at how a word is used in other parts of a statute or other areas of law, that would not be regarded as evidence. It might be helpful to distinguish "evidence" from all sources bearing on understanding.

JUDITH LEVI: Could we use *argumentation*? The word *evidence* is ambiguous, like *linguistic testimony*; there are a lot of words and phrases that we need for this weekend that will be ambiguous. *Ambiguity* will turn out to be another one.

So we have evidence in terms of a trial as opposed to evidence in terms of an argument; that's why I wanted to use *argumentation*, just to get something that wasn't as ambiguous.

GEORGIA GREEN: Can I take a stab at summarizing what this question is? "Relative value of expert testimony as opposed to the views of ordinary people about what something means."

MIKE GEIS: Can I just illustrate the point I wish to make against Jerry, with respect to the notion of *register* from linguistics? The legal register and linguistic register differ in how it uses language. The term *evidence* has a systematically different meaning in linguistics from what it has in the law.

CLARK CUNNINGHAM: We lawyers don't use that word *register* except for something you put money into.

MICHAEL MOORE: I have a question. How did that get against Jerry?

MIKE GEIS: He was suggesting that linguists have little to contribute beyond what language philosophers like Grice and Searle have contributed. I just think that's quite wrong.

GEORGIA GREEN: The ordinary language philosophers are not linguists; they never claimed to be.

MIKE GEIS: That's part of why I don't agree with Jerry.

FRED SCHAUER: But the ordinary language philosophers also claimed to be people whose ability as native speakers of the language gave them a



useful way of looking at a large domain of philosophical problems.<sup>18</sup> Ordinary language philosophy as a method flourished in Oxford in the 50's, and was applied to moral philosophy, to epistemology, to philosophy of mind, and to a whole range of other topics. People using the method claimed that their abilities as native speakers of the language gave them particular methodological insights. That intrigues me in this context, in terms of whether we should privilege somebody's linguistic insights because she says I am a native speaker of the language, or instead, whether linguists can tell us things that are better than the self-reporting of native speakers of the language.

As for my "interview" with Mike (Geis), he describes himself as a child of the 60's, a social reformer, who in a significant way wants to educate lawyers and the legal system about a number of areas where he sees the legal system going off the rails. In particular, based on his experiences in death penalty cases, in trademark cases, and with jury instructions, he's troubled by what he sees the legal system doing.

We then had a quite interesting conversation about who we, the "lawyers," are; that is, if I count right, there are eight people around this table who are licensed to walk into a courtroom and represent someone else. I could be wrong about licenses, but there are at least eight people around the room who have law degrees.

I think the eight of us have quite different opinions within the group about whether we are self-identified as lawyers. That is, some of us (I may be the most extreme, maybe not) view lawyers and judges as the data for their academic inquiries. In that sense, I don't come here representing the judge's perspective, or representing the legal profession. I am here as someone who studies the legal system, not as someone who promotes its virtues or embodies its participants. Judges and lawyers are thus to me as ordinary speakers of English are to you. Not everybody here shares that view, so it may be useful over the next couple of days to sort out what it is to be an academic who studies law, as opposed to being a lawyer. And of course some would say that there is no opposition at all here, although that is not my view.

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18. It is important to distinguish ordinary language philosophy as a *method* from the philosophy of language as a topic. Ordinary language philosophy—the attempt to illuminate philosophical problems by close attention to ordinary language—can be applied to numerous philosophical domains, including epistemology, philosophy of mind, ethics, philosophy of law, and also philosophy of language. The philosophy of language, as a philosophical topic, can be addressed by the methods of ordinary language philosophy, but also by other methods.

Mike's concern is partly to bridge a gap between two groups of people, linguists and lawyers (and judges and the legal system). He sees both of those groups starting from a relatively similar range of analytic talents and inclinations, but despite this, having gone in dramatically different directions. That is part of why he wants to think about questions of jury instructions in particular. He also wants to think about the kinds of questions that come up in trademark cases. Intriguingly, he says, correctly, that trademark issues inherently involve questions of similarity. Then he says that he would like to know whether lawyers think systematically and theoretically about similarity. The answer to that question, it seems to me, is emphatically "yes." There are people around the table who think systematically about precedent and about analogy, and thinking about both precedential and analogical reasoning involves thinking about similarity and difference.

JUDITH LEVI: Thank you. We're going to have a break first, and then we'll move to our first small-group discussion.

*For the rest of the morning and for all of the afternoon, the participants met in a series of three small-group discussions, focused on specific cases and hypotheticals that had been prepared and sent to all participants before the conference. Each discussion group consisted of two linguists and two lawyers. Then, following dinner, the participants met for about half an hour in two "professional caucuses" (i.e., the lawyers in one room, and the linguists in another) to review the day's events, discoveries, issues, and questions, and to prepare some suggestions for our common agenda in the next two days.*

## 2. *Setting the Agenda*

JUDITH LEVI: Let's start by hearing what the linguists suggested for tomorrow

One of the things we thought might be useful for us to do tomorrow is to compile a list to make a comparison between what linguists believe to be true about language in general (what linguists think they are in general agreement about in regard to language in general), and where we perceive that the corresponding legal community is divided. One example is: we think that linguists will agree that a statute is an instrument of communication, but we have the impression that not all legal theorists agree about that. We also think that English syntax doesn't change in very significant ways as one moves from discourse about ordinary subjects to discourse about legal subjects; but we think that either legal theorists are all in disagree-

ment with us, or at least some of them are in disagreement with us, or at least some of them are interested in exploring that question.

A third topic has to do with audience. A number of the linguists have become interested in the possible differences between our two professions because of (1) statutory interpretation, (2) jury instructions, and (3) what Chuck has referred to as “incompetent documents.” That is, if we look at statutes, there’s a very confused picture. Even if you know everything about statutes and legislatures, there’s a very confused picture, because there isn’t a single easily defined audience, and the audience keeps changing over time. In contrast, linguists are used to having more clearly defined audiences and are used to observing how well ordinary people seem to be able to tailor their language to a particular audience. And we think that legal language appears not to do this as well. This view may be because we have misidentified the audience, but we think that might be a useful topic to organize some discussion around.

In the case of jury instructions, just in the little time we had, we started out saying, “Well, the judges are talking to the jurors, but they’re not making themselves understood.” And then we heard from our legal colleagues, “Well, the juries aren’t the audience, the appellate judges are the audience.” If that’s the case, then we have misconstrued what’s going on. Or maybe both of them are the audience and the double audience interacts in ways that are troublesome, both for linguists trying to work with jury instructions, and also for lawyers who have to write jury instructions or have to make decisions around jury instructions.

In the third domain, Chuck has an example that he brought with him of what he’s calling an “incompetent document” that he thinks nobody—lawyer or nonlawyer—could possibly have understood. It’s a prenuptial contract, which presumably the parties, the man and the woman, should have understood. If they didn’t understand, their lawyers should have understood it. But Chuck thinks nobody could have understood it. And then the question is, “What’s the audience? And if, say, the bride and groom are the intended audience, how come the communication fails so miserably?”

So these are three examples of ways in which the linguists seem to have a belief about language which is not (at least not universally) shared by the law professors. Now, there may be a counterpart; maybe the legal guys can think of things that they all believe about language but about which linguists are divided. It’s not that we’re claiming superiority for having a greater consensus, but rather that we think it’s important for us to identify where our beliefs about language differ.

JEFF KAPLAN: I was going to say it may not be that they have different beliefs about language, but they have different beliefs about statutes, for example, in these particular examples.

JUDITH LEVI: Then another idea we thought of for organizing our discussion tomorrow is differences in how we analyze language. For example, in a group I was in, the claim was proposed for the vehicle case (we were analyzing “No vehicles in the park”) that maybe something, such as a police cruiser, can be a vehicle before it enters the park, but when it’s racing through the park in hot pursuit of a criminal, it’s not a vehicle, or it’s not a vehicle within the meaning of the statute. And then after it leaves the park, it is. And you might not be surprised that the linguists did not believe this.

So if we could figure out differences in how we analyze language, that might be a useful way to begin to see where we differ. In that context, clearly what lawyers do with statutory language goes well beyond what linguists (*qua* linguists) would do with statutory language. So one of the things that we thought would be very important is to take a tally of all the different ways that statutory language is either wholly distinctive or at least unusual as a kind of communication (or as a manifestation of language, if you don’t want to accept it as a communication). For example, that its interpretation can change over time; that it has third party effects; that it can have effects when the utterer is dead and gone or perhaps not even identifiable. And then, what are the consequences of those distinctive features, for the role that linguists can play in statutory interpretation? There may be a few features that we have nothing to say about, or that we are not competent to say anything about, or that we have no experience in dealing with, for example. So (a), what role can linguists play in statutory interpretation given the distinctive features we are identifying? And (b), what are the consequences for lawyers themselves, if the audience is so diverse or so confused? Is there something you law folk should be paying attention to that you’re not, for example? Is there something that should change?

So that’s what we came up with generally.

MIKE GEIS: There was also an interest in discussing what we linguists and lawyers mean by *meaning*, including that list of *plain meaning*, *ordinary meaning* and *literal meaning*. The question is what is meant by each of those and then what senses of the word *meaning* are of interest to linguists.

JUDITH LEVI: Yes. What I said was not an exhaustive list of either what we talked about or what we would like to talk about; it's just what got written down.

Quite a few of us linguists are interested in jury instructions. Clark and I had also shared that interest, but he and I had thought things are complicated enough here if we focus on written statutes, for example, so that we might not be able to get to jury instructions unless it ties in in some way to other questions—for example, by asking, “What are the audiences in question for legal language of different kinds?” That's all I can tell you from the linguists' viewpoint.

CLARK CUNNINGHAM: In brief, the law professors ended up talking about some different functional ways that linguistics related to the field of law; one would be how linguistics might help us think about legal theory at a fairly abstract level. Something like, “What does the theory of meaning look like to linguists?” Could you just state that for us in ten or fifteen minutes? If we heard what it was for you, we might think about how it relates to our efforts. Legal theory seems to have a theory of meaning, or at least can't get by without one.

Second, we didn't really get around to *plain meaning*, and we would be interested to see what could happen with that. One audience is legal theory people. A different audience would be judges deciding cases, particularly interpreting statutes and other legal texts. A third audience would be lay people, jury instructions being a very particular example of that. We sense that linguists are concerned, and rightly so, with the problem of statutes that the person in the street can't understand; or with a situation in which lay people would interpret some statute according to their understanding of English and would come up with a different answer than a judge would come up with. We ought to give notice to the public about what the law means.

Can linguistics help law understand better when it is failing to communicate to the lay public? Can you help us understand how that failure took place, and what, if anything, can be done about it? We want law talk to be clear; we want it to be brief; we want it to be precise, Okay. Now, there are trade-offs there; particularly, the brevity and the precision may be at the price of clarity to a lay audience.

We're also interested in exploring more than we did today what linguists have to say about categories of indeterminate meanings: vagueness versus metaphor versus generality versus ambiguity. How do those categories relate to the way lawyers think about interpreting meaning?

Finally, the other general theme that we talked about was what are the basic rules that linguists play by: what do they think of as a good argument, good evidence, a right answer? We have the sense that linguists expect to be more positive about some things than lawyers do.

GEORGIA GREEN: What do you mean “positive”?

CLARK CUNNINGHAM: We’re not even sure.

KENT GREENAWALT: You think the answers are clearer more often?

MIKE GEIS: Well, do you think physicists would like to think their answers are fairly clear about falling bodies or that chemists could be fairly clear on what would happen when you combine two chemicals to form a compound? We’re a science too; we would expect that our answers be as well argued, as well justified and generally as well accepted as answers in these and other sciences.

CLARK CUNNINGHAM: Yes. So, along with giving us a theory of meaning tomorrow—in five minutes—we also want to know: why is linguistics a science and how is it a science? Law hasn’t claimed to be a science, at least since the late 1880’s.<sup>19</sup> And then having explained that to us, is there then any transference of that scientific method to what we do?

JUDITH LEVI: Is your question “What is the response of the legal system to our scientific discourse?”

CLARK CUNNINGHAM: We first have to understand how you claim to be a science, and what the limits are of your claim that your judgments about language are scientific and inherently verifiable.

GEORGIA GREEN: As inherently verifiable as the statements in any other science. How is that?

CLARK CUNNINGHAM: How is it different from what I do as a lawyer?

BILL ESKRIDGE: By the way, there is a big payoff to this in the plain meaning theory of Justice Scalia. Justice Scalia’s theory of interpretation claims to be producing “objective” results through linguistic analysis. To the extent that you can persuade lawyers that you offer a methodology which is “objective,” or scientific, it seems to me your theories become highly relevant for people like Justice Scalia. And for people like Justice O’Connor as well. Justices like O’Connor actually can be persuaded by these arguments in some cases. So there is a potentially very significant audience of judges and legal practitioners for linguistic analysis. Even if

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19. See C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* v-vii (1871); see generally WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994).

they don't stop with what you tell them, they are interested in what you have to say.

But the key is "objectivity." "Objectivity" is the rhetoric that judges usually use: "This is not our own personal preference; we're just applying the statute as it is written."

MIKE GEIS: But one important difference between linguists and Justice Scalia is that we mean not only to be objective, but to make claims that are verifiable—and he doesn't. If he says that a text means such and such, he's not predicting that some body of speakers of the language will interpret it in that way at all. He's saying that that's his interpretation, period. He may have some reason to think it's objective, but he is not making a prediction about how speakers use the language.

BILL ESKRIDGE: He would have a better theory if he could show that, however.

MIKE GEIS: Right.

BILL ESKRIDGE: So you would have a particularly attentive audience in Justice Scalia, to make his theory better than it is today.

JUDITH LEVI: We won't be able to answer these questions tonight. So let's really focus in the next ten minutes on guidance from all of you to Clark and me, who are going to caucus after we finish, in order to create an agenda out of what you suggest.

MIKE GEIS: May I suggest that we start with how it is that linguistics is a science, using our theory of meaning as an illustration of it, and then go on to this three-way distinction of "plain," "ordinary," and "literal" meaning.

JUDITH LEVI: That's a good chunk. We might devote one session to it. Fortunately, we have four sessions tomorrow; so we can divide our interests up into four groups.

FRED SCHAUER: One thing that hasn't been mentioned is the importance of identifying the major theoretical divisions within the disciplines. With some ease I can describe the major disagreements among the legal theorists that sit around this table. I would find it very interesting to know what are the theoretical disagreements at the deepest level within linguistics. Some of what we are hearing is, I would guess, more unified in method, approach, theoretical foundation, and perspective than in most other disciplines that I know of. Now, maybe that's just the state of the world, but it might just be a function of who is here and who is not. So it might also be useful for us just to learn about what are the fault lines in the discipline. Now it may be that all linguists agree about the meaning of *meaning*, but disagree about something else. In terms of my desire to learn

about the discipline, I don't want to narrow it that much. I want to know what are the fault lines in the discipline, what are the disagreements, what do people fight about.

CHUCK FILLMORE: On another topic, the first question that Jeff and I heard this morning was "What have you guys got against dictionaries?" And the question seems to be "Do you folks think you can give us more reliable information about the meanings of words than lexicographers?" And that's a part of what this discipline is about.

FRED SCHAUER: I was one of the ones who asked the question about dictionaries; that is, my sense is that Georgia's one-page screed against dictionaries was right. But I think some of us have a sense that many linguists have an objection to dictionaries that is an objection to a widely held view that none of us hold. We can, however, have an interesting discussion about dictionaries at a level different from the level of just whether the erroneous view that many people hold is indeed erroneous. So even if we accept, as we should, that dictionaries purport to report meaning (or usage) and not to create it, and even if we accept, as we should, that dictionary reports are often inaccurate, intriguing questions remain. For example, dictionary reports might still be treated as authoritative. Wigmore purports to report and not to create the rules of evidence, and Corbin purports to do the same for contracts, and so on. Yet what Wigmore or Corbin say might still be authoritative, and possibly the same is true for dictionaries in some contexts. At the very least, believing in the possibility of dictionaries being authoritative, in the same way that Corbin and Wigmore are authoritative, does not entail believing that dictionaries create or mandate meaning, or that they constitute statutory linguistic authority.

Now if dictionaries *are* given this kind of authoritative status, they do in a deeper sense create the rules of usage, or at least some of them, but this is a very complex issue. In addition, we might choose to treat dictionaries, for all their inaccuracies, as rules. Often it is too costly or too inefficient to get the right answer in every case, whether it be an answer of fact or an answer of policy. Often we make more mistakes trying to get the best answer than we would in relying on second-best rules with a lower variance in outcome. So we rely on theoretical and practical rules (in the Aristotelian sense of *theoretical* and *practical*) even recognizing their frequent inaccuracy. Dictionaries might serve the same purpose, for we cannot always hire a linguist. And if we (or the courts) cannot always hire a linguist, then another advantage of dictionaries is that everyone is (possibly) using the same source, even given its inaccuracy, and this may bring certain independent advantages of uniformity.



Finally, it would be a mistake to interpret every judicial citation of a dictionary as indicating judicial reliance on that dictionary. The Legal Realist point about citations being rationalizations rather than reasons seems especially apt here. My guess is that most references to the dictionary are references to the judge's own linguistic intuitions. Dictionary-bashing may serve its purposes, but my sense is that this attack is somewhat misplaced in this context. The linguist criticizing the dictionary sounds like the estates lawyer criticizing "How to Write Your Own Will" or the physician criticizing a book about home treatment for back pain.

JUDITH LEVI: One related question: What does linguistics have to offer in place of dictionaries that is not only accurate, but also *functional* in a legal world? We linguists have to remember that we know facts about language that you guys can't make any use of at all. So just because it's true and accurate doesn't mean you lawyers will want to have anything to do with it. So thank you, Chuck, for putting "dictionaries" on the table.

If there's one other idea, we'll take it. If not, we'll adjourn for the evening.

FRED SCHAUER: That's itself an idea.

*Saturday, April 1*

CLARK CUNNINGHAM: My sense is that we came from last night with a reasonably good consensus that we would like to do at least three things this morning. The first is to have the linguists talk about what a theory of meaning looks like or might look like to linguists, and then how linguists view their discipline as a scientific discipline, in terms of what the data are, what the methods are, what verification is and so on. Then we can turn to what kinds of theories of meaning seem to be current in legal theory and how the different approaches are distinguished; and maybe some reflection by those of us in the legal academic world about how we differ, maybe structurally, from linguistics. My own sense is that we're not a discipline in the same way linguistics is a discipline; and that, in terms of how we are trained academically and how we function, we do not share, as perhaps linguists do, fundamental common views about what counts as an argument, what counts as data, what counts as verification.

Then after those two things, the project of comparing *plain meaning*, *ordinary meaning*, and *literal meaning*. As Judy and I talked about it, we thought we could treat this as a descriptive project. Taking the nine current members of the United States Supreme Court as a very tiny but important linguistic community, is it possible descriptively to answer questions such

as “Are those three phrases synonymous for any one or all of them?” and “What does each one mean to one or all of them?” These are obviously important questions for all of us at the table. And after that, we’ll see where things take us.

Are the linguists ready to jump in to explain what a theory of meaning would look like to linguists?

### *1. The Meaning of Meaning: In Linguistics*

MIKE GEIS: There are four senses of the verb *mean* in English that are critical to any discussion of *meaning*. One sense of “mean” occurs in a sentence like “*Ich liebe dich,*” which in German, means ‘I love you.’ And that sense of meaning seems to correspond to the terms *literal meaning* or *linguistic meaning* or, as I call it, “L-meaning.”

There’s another sense of *meaning* which occurs in a sentence like *I didn’t mean to hurt you*, where *mean* seems to mean ‘intend.’ Let us call that “I-meaning.”

There is a third sense of *meaning* that occurs in expressions like *Life without faith has no meaning* or *When you say you love me, it doesn’t mean anything to me*, where *mean* or *meaning* seems to have to do with utterance significance. Let us call that “S-meaning.”

And then there’s a fourth sense of *meaning*, which occurs in *Dark clouds mean rain*, where the connection between the clouds and the rain seems to be causal in nature. Grice<sup>20</sup> referred to that last sense of *mean* as “natural meaning” and would have referred to my first and third senses of *mean*, (“L-meaning” or “literal” meaning, and “S-meaning” or “significance”) as “nonnatural meaning.”

In my own research I never use the word *meaning*, because the word is triply or even four-ways ambiguous; but if I use these little prefixes of “L meaning,” “S-meaning” and “I meaning,” I’m forced to be clear to myself as to exactly what meaning of *meaning* I have in mind.

Now, what I’d like to suggest to this community is that we consider whether legal people have this notion of “S-meaning,” the significance of the utterance in context, or literal meaning in mind when they’re using these three terms.

CLARK CUNNINGHAM: Well, let me ask this: We have Georgia’s *Pragmatics and Natural Language Understanding*<sup>21</sup> as the last of our

20. See *supra* note 9.

21. GEORGIA M. GREEN, *PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING* (1989).

readings in linguistics. On page 5 of her book, her subheading four is "Linguistic Expressions and the Determination of Meaning."<sup>22</sup> I have a feeling that that heading is the kind of thing that the legal scholars would like to hear explicated; in other words, when Georgia, as a linguist, uses the phrase "the determination of meaning," and then goes on to talk about it, what underlying theory of meaning is there? Fred?

FRED SCHAUER: I think part of what some of us were asking yesterday is this: for those of us who think that we might understand, however imperfectly, the distinction among the four senses of *meaning* that Mike draws, we would be interested in hearing more about Number One. We want to hear more about the linguists' underlying—call it *theory*, call it whatever—of literal or linguistic meaning. We can establish relatively noncontroversially that, this is different from Mike's other three, but his Number One is what is central.

CLARK CUNNINGHAM: Michael, Kent, Bill, Bob, is that a fair reflection of our discussion last night on this point, when we said we'd like to hear a theory of *meaning*?

MICHAEL MOORE: Number One, or literal meaning, is exactly what I would want to talk about. I would call it "type meaning," but you could call it whatever you want. It's the meaning that the type of utterance possesses, what Geis is calling "L-meaning," and that is what would interest me as one ingredient in an overall theory of legal interpretation.

CLARK CUNNINGHAM: Are we being sufficiently perspicuous? Georgia?

GEORGIA GREEN: Yes. In my opinion, this is the hardest question, and this is what I have spent a couple of years trying to explicate, namely, what Geoff Nunberg has described in conversation as a "social theory of meaning."<sup>23</sup> I think this is best explained by contrasting it with a more familiar approach. Montague grammar,<sup>24</sup> for example, takes it for granted that words mean things, and says, okay, suppose this word means this, suppose *snow* means 'snow.' This does not help you one bit in figuring out

22. *Id.* at 5.

23. See GEOFFREY NUNBERG, *THE PRAGMATICS OF REFERENCE* (1978).

24. Montague grammar (more accurately, Montague semantics) is a familiar example of a model-theoretic, truth-conditional theory of semantic representation. It provides a way of stating the conditions under which statements in a language are true (or, more generally, satisfied), relative to a model of a universe in which particular individuals exist, with particular properties, and particular entailments hold among particular relations. See Richard Montague, *Universal Grammar*, 36 *THEORIA* 373 (1970); Richard Montague, *The Proper Theory of Quantification*, in *APPROACHES TO NATURAL LANGUAGE* (J. Hintikka et al. eds., 1973); DAVID DOWTY ET AL., *INTRODUCTION TO MONTAGUE SEMANTICS* (1981).

whether something is *snow* or is not *snow*. Suppose it means 'snow', then when we say *Snow is white*, well, what that means is whatever is snow is whatever white is. Thank you, I am done, that's it. That's all you get from Montague Grammar. And they leave it to somebody else to figure out what it means to be snow and to be white. So it doesn't tell you anything, basically. You want to know what it is to be snow and to be white, then you're talking about what is snow and what is white, not about the word *snow* and the word *white*; you're talking about what these categories of experience are and do people classify them the same way. And there are all kinds of interesting empirical questions there, but they're not questions about language directly; they're questions about people's understanding of the world. This actually gets you back to what Geoff Nunberg called, in conversation, "a social theory of meaning," which is that we all work under the assumption that when we use a word people will understand what we mean by it. And what we expect them to understand depends on how much we know about them and how confident we are that they will understand what we are talking about in that particular situation. And that's one of the things that affects how we choose our words in a particular situation, which affects the inferences that we expect people to make about the words we choose, and all of the canons and the Gricean maxims and so on are predicated on that.

Can I stop there? Is that a good place to stop?

MIKE GEIS: That's a good beginning.

GEORGIA GREEN: I mean for questions.

CLARK CUNNINGHAM: There are two. One would be how much do the legal folks understand of what you've said and want to hear more; another would be how much do the linguists want to add to it. Let's start with the legal scholars.

MICHAEL MOORE: I would be curious what consensus there is, of the linguists in the room, about Georgia's program, a program that in the philosophy of language you would call very austere (or truth-conditional) semantics for sentences. I mean, some people think that you can have truth conditions as the theory of meaning for sentences and not be so austere in what you regard as the semantics of the words that appear within sentences. So that on this less austere view of the semantics of words, you wouldn't say that the nature of the thing to which a word refers isn't part of the

meaning of the word; you'd say, with Kripke and Putnam,<sup>25</sup> that there is direct reference, which you talk about later—

GEORGIA GREEN: I'm a Kripkean.

MICHAEL MOORE: I saw that. That's why I was curious why you're so austere in saying that the nature of the thing referred to isn't part of the meaning of the word. Why wouldn't one say something like Putnam says—remember Putnam says, "I want to be less austere about what semantics is, I don't want to be just a Montaguian or Quineian about semantics, where all there is are Tarski truth sentences where truth conditions are all there is to meaning." I thought that's what you sounded like in what you had just said.

GEORGIA GREEN: Well, I want to make it clear that Montague Grammar doesn't tell you diddley-squat about lexical meanings.

MICHAEL MOORE: Okay.

GEORGIA GREEN: They back off from that.

MICHAEL MOORE: Right; but in terms of your own view about meanings—

GEORGIA GREEN: So it's completely consistent with a Kripkean view. Completely consistent.

MICHAEL MOORE: But on your own view of "meaning" is there more to the meaning of the word than its function in a sentence that has truth conditions? Is there more to it or do we stop there when we talk about meanings?

GEORGIA GREEN: Okay, I can't answer that question, because it presupposes things that I don't agree with. I don't want to talk about the meaning of words. The notion doesn't make sense to me. I make this concession because I think I know what other people mean by it. To a certain extent we can talk, and then at another point I have to stop and say that I don't think the meaning is something that is a property of the word. I think my utterances can be intended to convey things to you, but like Mike, I'm going to avoid the word *meaning* when I'm speaking technically, because I can't depend on it to hold still and to be understood the same way by everybody that's talking.

JERRY SADOCK: Can you find another word, Georgia, that describes the contribution of a word to the total understanding of the utterance in which it's found?

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25. References in this discussion are to language philosophers Saul Kripke, Hilary Putnam, Richard Montague, W.V.O. Quine, and Alfred Tarski.

GEORGIA GREEN: I don't want to say that the way in which it makes a contribution is a property of a word. I want to say that when people use a word in a situation, they have an expectation that it will be understood in a certain way. And there are a lot of commonalities to this. Most of the time when most people say *cat*, they expect that it will be understood to refer to domestic felines.

JERRY SADOCK: And that property of the word—that's certainly a significant property of the lexical item *cat* in English. That has that social property.

GEORGIA GREEN: I want to say it's an indirect property of the word. It's a property of the word by virtue of properties of people.

CLARK CUNNINGHAM: This is a translation project. *Property* means lots of things to law professors—

GEORGIA GREEN: Of course.

CLARK CUNNINGHAM: Some of us may think we know what you mean, but I don't want to work on that assumption. I'd like you to tell us what do you mean by *property of a word*?

GEORGIA GREEN: Okay. Suppose that your job is to say everything there is to be said about the words of English by virtue of their being words of English. This is part of the grammar of English. What do you have to say? There are so many words. There's a large number, about 250,000, and to know each word, what do you have to know when you know English? First, you know how it sounds, or you know some things about how it sounds.

JERRY SADOCK: That's the phonology.

GEORGIA GREEN: The phonology. There's also the morphology, whether it's got a regular plural or an irregular past tense or whatever.

JERRY SADOCK: And it has syntactic properties.

GEORGIA GREEN: That's a good question. It's a real interesting question what its syntactic properties are. Suppose you know it's a part of speech, so that the noun *bear* is a different word from the verb *bear*. Beyond that, I'm not sure how much else you have to say. For some uses of verbs there are some classes of meanings, which verbs might be intended to convey. There are constraints on what kinds of other words it will combine with (what is, for a linguist, its syntactic subcategorization).

CLARK CUNNINGHAM: I'm still trying to figure out what you mean when you say *properties*. You said "syntactic properties."

GEORGIA GREEN: How it's pronounced is a property, whether it has a direct object is a property; but whether *bear* can be used by some person to refer to *Ursus major* is to me not a direct property of the word, because

that's a property of what an individual believes other people in the society understand by that word. So if that's what *meaning* is, then including meaning as a property of the word includes everybody's theory of everybody else. That's not just encyclopedic knowledge; that's an infinite kind of knowledge.

CLARK CUNNINGHAM: So for some people, we're talking about the semantic properties of a word, but that's something you're uncomfortable with saying?

GEORGIA GREEN: Yeah; it doesn't go quite deep enough for me.

MIKE GEIS: Well, surely there are certain properties of the word by virtue of which people can use it to refer to something.

GEORGIA GREEN: Well, those properties are what other people believe about the way that word is regularly used in that community, whatever that community is.

MIKE GEIS: I don't believe that for a minute.

CLARK CUNNINGHAM: It would be helpful for the law folks, as it will later be helpful for the linguists, to find out how much is common to the discipline. Is there something that linguists generally agree about that has—

MICHAEL MOORE: This is fascinating too; I mean, this is good.

CLARK CUNNINGHAM: It's also good then to find out what you disagree about. But we will walk away from the weekend confused about the other discipline.

GEORGIA GREEN: You can tell not everybody agrees with me.

CLARK CUNNINGHAM: Right. But until I know what you agree about, it's hard for me to understand what you disagree about, just as it is true, I think, for listening to the law folks.

FRED SCHAUER: One way of focusing on what people agree about is to ask this question.

There are some number of people who do legal theory who are skeptical about the very idea that there can be *literal meaning* or *linguistic meaning*. I am not one of them. Nevertheless, that position exists out there. So one question I might ask is:

Do all of you agree that the category that Mike refers to as *literal meaning* or *linguistic meaning* exists?

Now, you can disagree about the source of the phenomenon, but is it true that you agree that the phenomenon exists?

MIKE GEIS: Shall we have a show of hands?

GEORGIA GREEN: I don't know what the phenomenon is. I don't know what you're referring to.

FRED SCHAUER: That there is something that we can understand as *literal meaning* or *linguistic meaning*.

GEORGIA GREEN: That's not all the same, but...

FRED SCHAUER: I'm just using Mike's terminology.

JERRY SADOCK: I think it's a good question. I think it would be useful to have the linguists individually answer.

KENT GREENAWALT: Could I extend the question a bit? Perhaps this is not the same question, but in legal circles there's quite a bit of reading of literary criticism, and less reading about biblical interpretation (since most legal scholars are not very interested in that). In those disciplines, one gets the impression that what the original communicator was trying to communicate is not now regarded as very important by most scholars. One of the famous quotes is something like: "Authorial intention is not available and, in any event, it's unimportant." I certainly have the impression that the linguistics view is quite different from that. It seems to emphasize very heavily the conversational context; whereas these other disciplines deal with texts that are given at one time and are to be interpreted a lot later. In that respect, some legal texts are like the former, but a lot are like the latter. I'm interested in how your views compare with these general views in those disciplines, which is a problem that ties into the literal meaning.

JERRY SADOCK: It does tie in, but if I could just stick to Fred's question, which I've thought about a little bit . . . With grains of salt, I strongly believe there is something that deserves the name "literal meaning." What that is is something I might not be too willing to wage my next month's salary on. But to this extent there is something that I believe deserves the name "literal meaning": Namely, there are conventions about the applicability of individual parts of the language that we have to learn as conventions. They have no natural explanation whatsoever, and we have to learn these conventions, in association with the other aspects of wordhood that Georgia mentioned—the phonology, the morphology, the syntactic status—in order to know the language. To those conventions, whatever they are, be they social, psychological, epistemological, I would be willing to give the name "meaning."

Conventions about the applicability of this other bundle of things in association with a phonological form, a syntactic form and morphological information—knowing all those things together constitutes "knowing" that word in the language.

MIKE GEIS: Some contemporary formal semanticists in fact have taken to using the term *conventional meaning*, instead of *literal meaning*, because it more accurately conveys exactly what Jerry was talking about.



JERRY SADOCK: Well, to know the entire semantic system, you also have to know the conventions about the applicability of complex items that are composed out of—

CLARK CUNNINGHAM: Right. I'm still trying to get the phenomenon out there that you're willing to call "literal." You are paraphrasing "literal" as conventions about the applicability of a word, and you said something about use.

GEORGIA GREEN: Could you say what you mean by *applicability*?

JERRY SADOCK: No, that's the problem.

GEORGIA GREEN: That's the rug under which you're hiding what I'm trying to collect.

MIKE GEIS: Exactly.

CLARK CUNNINGHAM: Okay, but there are conventions about the applicability of the word that you need to know.

JERRY SADOCK: That's right. I don't know quite in all cases what those conventions are like, but I know that there are such conventions.

CLARK CUNNINGHAM: To be able to speak and understand the language.

JERRY SADOCK: That's right. Now, there are, of course, rather respectable theories of language that skip this stage, that say you go directly from the forms to the linguistic behavior, but I find that they all are, first of all, very artificial and lead to some really crazy results. I think you need this Saussurean concept<sup>26</sup> ultimately of something like meaning, which we can skirt the details of just by calling it *conventions of use*.

Sure there are other things that influence the use, but they're not conventions, and we have to know what the conventions are to know what the meaning is if we want to use the word.

CHUCK FILLMORE: I don't want to take the assignment of saying something about "literal" meaning right now. I'd like to go back a little bit and give it a slightly different perspective.

It seems to me that we have the phenomenon of somebody saying something to somebody else or somebody writing something that somebody else is going to read, and we have the phenomenon of the person who hears this or who reads this reaching some kind of understanding as a result of the encounter with this message. The linguist's job is to sort out the various things that contribute to the understanding that's achieved. And this will include things that the speaker and the overhearer overhear, things that the

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26. See FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GÉNÉRALE* 63-95 (2d ed. 1948).

hearer or overhearer believes about the speaker, the conventions that exist in the society about the individual words, the functions of the grammatical constructions that the words in the utterance have been put into, the principles that people know about how to combine what they know about words into what they can figure out about the phrases or sentences. And what you end up with is some kind of a skeleton or blueprint, rather than something that could—you know, if you look at just the language part, maybe you end up with some kind of a skeleton or blueprint that just about everybody would accept, and you have to flesh that out or fill in a whole lot of stuff to know exactly what is being said. And there may be several disciplines that can contribute to that.

So one of the jobs of the linguist is to say let's look at these individual words, the individual lexical items, and ask what it is that people who speak this language know about them that helps them figure out what's going on. Then you look at the grammar and ask what are the grammatical resources of the language that enable us to figure out how these things are being put together and so on, and then what do we have to add to this in order to figure out what is being said in the various layers of that actually? So the job is to sort of sift out all of these things. As for the concept of *literal meaning*, well, I like what I think Jeff says, what a sentence says; that is, you can look at a sentence and if you give some really straightforward interpretation of this sentence, then you get a particular pattern or interpretation; that may not be the full story of what somebody gets out of an encounter with the sentence, but it's something that you could pin down in some way.

MIKE GEIS: I'd like to add something to what Jerry said. One recent development in formal semantics is the recognition that conventional meaning (which is the term a lot of semanticists use now, instead of *literal meaning*), depends on context in ways they didn't previously recognize. They've long recognized that the truth value of a sentence like *I love you* depends on the reference of the pronouns *I* and *you*, and that can only be determined from the context. So if John says to Mary, "I love you," that could be true. If Mary says the same sentence, "I love you" to John, it could be false. The same linguistic expression can be true in one case and false in the other, because they're spoken by different speakers. The time reference of a sentence is critical to its truth conditions. What's been

recognized is that there are more expressions besides indexicals<sup>27</sup> like these that are dependent on context, including in particular the interpretation of anaphoric pronouns.<sup>28</sup> So if someone says "I saw John, he's a nice guy," the truth conditions for *he's a nice guy* cannot be determined independently of the referent of the noun *John*.

JERRY SADOCK: You're just arguing against a purely truth-conditional theory of meaning—

MIKE GEIS: That's right.

JERRY SADOCK:—which I don't think anybody believes in anymore.

MIKE GEIS: Well, I think there are some hardcore Montagovians [scholars who do Montague Grammar]<sup>29</sup> that are acting as if they do.

CLARK CUNNINGHAM: This is helpful. Of the six linguists in the room, none of them believe a truth-conditional theory of meaning.

GEORGIA GREEN: That's completely false. There is a difference between requiring a theory of meaning to make empirical predictions about when speakers will judge a particular sentence to be true or false (and I think we all agree that this is necessary), and believing that an account in terms of truth conditions is the beginning and the end of a theory of meaning. (I think we all agree that more than this is required.)

CLARK CUNNINGHAM: Well, don't assume I understand what you just said. But let's suppose that there is a legal theory out there which explicitly or implicitly is based on a truth-conditional theory of meaning; it would be very helpful for us law folk to know that essentially the same theory has been thoroughly thought about and discarded by linguistics as a discipline.

27. Indexicals are words or phrases whose *reference* cannot be determined independent of the context of the utterance in which the indexical appears. The most familiar examples are pronouns like *he*, *you*, or *we* which refer to individuals in the discourse context, but other examples include temporal adverbial expressions like *now* or *two days ago* or *recently* which refer to a time which is calculated in terms of the time of the utterance; locative adverbial expressions like *home* or *here* or *not far from there* which refer to a place whose location must be calculated in terms of the place of the utterance and/or the speaker and hearer; and other expressions using word or phrases like *do so*, *such*, *however*, and the demonstratives *this* and *that*. See Yehoshua Bar-Hillel, *Indexical Expressions* 63 MIND 359 (1954); GREEN, *supra* note 21, at 17-35 (1989).

28. Anaphoric pronouns are pronouns that refer to an entity referred to earlier in the discourse (in contrast to *cataphoric* pronouns, which refer to entities referred to later in the discourse). An example is *her* in *Susan shrugged her shoulders*, which necessarily refers to the same individual named by the proper noun *Susan*; however, the pronoun *her* in *Susan lost her book* is harder to interpret since it may refer to the person called here *Susan* or to someone else mentioned at an earlier point in the discourse. See GREEN, *supra* note 21.

29. See *supra* note 24.

MIKE GEIS: That wouldn't be fair.

CLARK CUNNINGHAM: Why?

JUDITH LEVI: I'm going to do what Chuck did, which is to try to explicate some fundamental notions about meaning that are not very controversial.

Meaning is very complex and when we ask, "What is *meaning*?" we'd probably be better off asking (along the lines of what Chuck said, actually) "Goodness gracious, how is it that we ever manage to understand each other as well as we do using language?" because there are so many dimensions of what we can call, loosely, *meaning*; and each of them needs to be studied in different ways. So one reason I didn't want to answer Clark's question is that it is my understanding that some aspects of meaning can be usefully and insightfully explored when you focus on truth conditions; that is, you can compare sentences, for example, and ask "If this sentence is true in some world, what other sentences must be true in that world?" or "If this sentence is true in some world, what other sentences will never be true in that world?" So there are some relationships among sentences (and this is at the level of sentence meaning) where framing your questions "in terms of truth conditions" can reveal some parts of how we communicate and how we understand each other. But I would be very surprised if there was a linguist alive who thought "That's it, all you have to know is truth conditions," because as Georgia pointed out, you can talk about *snow* and *white* and all this stuff, but it doesn't tell you what snow is and what white is.

So there's the level of how individual words contribute to meaning, and much of that is *not* studied in terms of truth conditions. There's the level of how words arranged in sentences contribute to meaning, and some of that *is* studied by focusing on truth conditions. And there's an enormous part that is due to what we call pragmatics. And this enormous part of what we understand is not explicitly stated by the words and sentences that we use. It must be inferred, it must be calculated, it must be implied by the speaker. And there's this very complex social interaction that goes on when we talk to each other, which Georgia has said something about, that's a different dimension that cannot be studied in the same way as the other dimensions.

So different linguists get really excited about doing one thing or another. For example, Chuck and I share a fascination with "Good God, look how complicated what one might loosely call word meaning is!" and we like to explore that in great detail without necessarily constructing some formal theory that will knock the socks off people who like formal theories. Other

people really get into truth conditions and other people really get into pragmatics. So the fact that we do these different things does not necessarily mean—in fact, does *not* mean—that any one of them suffices to account for all of meaning. . .

GEORGIA GREEN: Or excludes any of the others.

JUDITH LEVI: Or excludes any of the others. So it's just that we're interested in different things, and all of that is necessary to give us clues about how we communicate, how language helps us communicate, and where we need much more than just language to communicate.

MICHAEL MOORE: May I just ask a question of you, Judy and Chuck? I understand the division of labor between linguists who want to do pragmatics, as opposed to those who want to do truth-conditional semantics. But am I to understand that you agree in your disagreements about how to draw the jurisdictional boundaries that divide what each of you does? Namely, is it true for you that stuff having to do with the truth conditions for sentences is allocated to semantics and that everything else that contributes to the meaning of the utterance is allocated to pragmatics? In other words, do you use truth-conditional semantics as the dividing line between semantics and pragmatics?

JUDITH LEVI: The truth conditions do not focus on what the word contributes, as in "Gee, how do we use the word *risk*?" which is the focus of a lengthy research project that Chuck has been engaged in.<sup>30</sup> But I myself am not involved, having spent so much time on language and law in the last 15 years, in trying to ascertain where there are lines between, say, word meaning, truth-conditional meaning, and pragmatics—all overlapping areas—but there are other people in the room who can answer that question.

But one of the things I *would* point out is that just as we had an example of how truth conditions of a sentence like *I love you*, or many other sentences, must have a pragmatic component in actual use, so also many words—many more words than any of us used to think—also have a pragmatic component. That is, in trying to ascertain the meaning of the word, not only can you not just look at a dictionary, but you must bring in the context in ways that pragmaticists have learned to understand because

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30. See Charles J. Fillmore & B.T.S. Atkins, *Toward a Frame-Based Lexicon: The Semantics of RISK and its Neighbors*, in *FRAMES, FIELDS, AND CONTRASTS: NEW ESSAYS IN SEMANTIC AND LEXICAL ORGANIZATION*, 75-102 (Adrienne Lehrer & Eva Feder Kittay eds., 1992); Charles J. Fillmore & B.T.S. Atkins, *Starting Where the Dictionaries Stop: The Challenge of Corpus Lexicography*, in *COMPUTATIONAL APPROACHES TO THE LEXICON* 349 (B.T.S. Atkins & A. Zampolli eds., 1994).

there are pragmatic regularities, such as Grice's Cooperative Principle, that end up applying to lots of words .

So, for example, I was intrigued when Georgia told me not long ago that she stopped teaching word meaning courses (what we call lexical semantics) in the early '80s because of her growing conviction that there wasn't a thing called "word meaning" and it all, basically, fell into the category of pragmatics. I am not ready to do that (but I have looked at it much less than Georgia), but I certainly bring her view into my beginning course on word meaning, because I wouldn't be surprised if we end up there, even if I'm not ready to commit to that right now.

CLARK CUNNINGHAM: I don't think I fully understand what the linguists have said for the last 20 minutes. I'm struggling toward it. What I wanted to do was just check with the other law professors to see how we're doing on comprehension. Not the merits, but are there things which have been said which we need some help to understand?

BILL ESKRIDGE: I want to ask the question somewhat more obliquely, because I have found the last three minutes to be useful and interesting. However, I want to return to Georgia's original proposition and ask a concrete example. I want to think about either the ambulance wanting to go into the park to rescue someone who has had a heart attack or the police vehicle wanting to ride into the park to apprehend the crook who has just entered the park. And my question is: Justice Scalia and many lawyers would say the literal meaning of the statute, "No vehicles in the park," would embrace the ambulance and the police car. Now, that wouldn't necessarily end the inquiry in law, because you still might say it's an absurd result. But I want to ask: Is there a literal meaning of the statute which says, "Yes, the ambulance is covered; yes, the police car is allowed into the park, under these circumstances?" Can Georgia's proposition be expanded to maintain that a legislature or a mayor promulgating the no-vehicles-in-the-park ordinance would *not* understand that application to embrace an ambulance going into the park for lifesaving purposes? Or is that too ambitious a use of your concept?

I'd like to address it first to Georgia Green and then to any other linguist.

GEORGIA GREEN: I wanted to say something about the way in which what I was saying, which sounds really crazy to some people, how that relates to and actually is not very different from what Jerry was saying. And I think in doing that I can answer the question.

Some people want to say that the literal meaning or the conventional meaning of a sentence is its meaning out of context. You can't quite say

that, because sentences don't occur out of context. And when you say to somebody, "Well, here's a sentence; interpret it out of context," they can't do that. They always import what they believe to be a plausible context in order to interpret it.

JERRY SADOCK: Subconsciously, but—

GEORGIA GREEN: They don't realize they're doing it, but they cannot function otherwise.

There are also people who have wanted to say, "Well, the literal meaning or the conventional meaning of a sentence is the meaning that it has in every context." Well, it doesn't take us very long to figure out why *that* won't work, because there will be incompatible meanings, so that's not a possible one. But you can get a lot closer with something like treating "conventional meaning," (which again I'm much more comfortable with than assuming that there's such a thing called "literal" meaning) as the meaning it would have in normal context, but to understand that, of course, you have to explain what you mean by *normal*. By *normal*, what I mean—and this is hard, because this is not exactly a conventional meaning of *normal*—but what I mean is, the normal context is the context that everybody supposes everybody else supposes. So that the conventions of applicability pretty much amount to the normal beliefs about the use of a word; in other words, the conventions or beliefs about when a word is usable that everybody believes everybody has. That's how we can say, yes, *cat* means 'domestic feline.' And, of course, it means a lot of other things too. It can mean 'person.'

BOB BENNETT: Could I just break in here for a second? Why is it that everybody has an understanding of what everyone else supposes?

GEORGIA GREEN: It's only context-relative and community-relative.

BOB BENNETT: Okay, but once you've acknowledged that there is such a thing, why can't you eliminate the step of all this supposing and refer simply to a conventional understanding in context?

MIKE GEIS: Good question.

GEORGIA GREEN: Well, when we talk about the meaning of a word, that's exactly what we do.

BOB BENNETT: What we do—exactly. Why don't *you* do it? You acknowledged that there is such a thing as supposing what everyone else supposes, so why doesn't that just become conventional understanding?

JUDITH LEVI: Because we can be wrong and because everyone can change. There are many words that I will use to linguists that I won't use to lawyers. In fact, we keep coming up against this; we have to ask each

other, "Wait a minute, how are you using that word?" There isn't one set of "supposes."

JERRY SADOCK: That's a slightly pathological case, Judy, because now you're really talking about different dialects or maybe even different languages; and you don't, therefore, know what the other person is supposed to know. When we stick to the clear cases, I think Bob's question is extremely well put.

We can recognize that what you're saying is true, Georgia: you have to have at least some level of context to evaluate any sentence. But since we all, more or less, all do the same thing, we can eliminate that and pretend that it doesn't occur and just say that whatever power appears in a word to cause us to conjure up the same context is what we might call "convention."

GEORGIA GREEN: If we agree that that's what conventional meaning is going to be and we really can trust ourselves to hold onto that and not get confused about what somebody means on an occasion of utterance.

## 2. *A Vehicle in the Park By Any Other Name . . .*

CLARK CUNNINGHAM: Let me try this paraphrase, see if it works: All vehicles are prohibited from the park. Question 1 is: Does the literal meaning of *vehicle* include ambulances?

GEORGIA GREEN: You're using "literal" meaning and I thought we were using "conventional."

CLARK CUNNINGHAM: Okay, let's say "conventional"; does the conventional meaning of *vehicle* include ambulances?

GEORGIA GREEN: Yes.

BILL ESKRIDGE: Do all the linguists believe that?

JERRY SADOCK: I believe it only with some reservations.

CLARK CUNNINGHAM: Then the next question is: Does the conventional meaning of *all vehicles are prohibited from the park* include [the meaning of] *all ambulances are prohibited from the park*?

MIKE GEIS: Yes.

CLARK CUNNINGHAM: Is that a reasonably good paraphrase of the problem?

BILL ESKRIDGE: Yes, exactly.

GEORGIA GREEN: Insofar as conventional meaning contains this reference to beliefs about society—that's what "convention" means right? I said "means," you notice—

BOB BENNETT: Conventionally means.

MIKE GEIS: Right.



CHUCK FILLMORE: In this context.

GEORGIA GREEN: Yes, *all vehicles are prohibited from the park* includes *all ambulances are prohibited from the park*.

BILL ESKRIDGE: So your answer is the literal meaning of *vehicle*?

MIKE GEIS: Conventional meaning.

GEORGIA GREEN: Conventional.

KENT GREENAWALT: Just to be clear, Bill put something at the end of his question, which I assume is still there, which was that in this particular kind of situation where the ambulance is actually saving somebody's life, this may be a situation that nobody would have wanted covered by the ordinance. I think he asked, "Would you still say the conventional meaning of the ordinance covers the ambulance in this situation even it is understood that the people who issued the ordinance wouldn't want the ambulance covered?" Is that right, Bill?

GEORGIA GREEN: That's why it's a 50-word question.

KENT GREENAWALT: Right.

GEORGIA GREEN: And it's not the question I'm answering.

KENT GREENAWALT: No, it's not the question you are answering.

BILL ESKRIDGE: Well, how would you answer the 50-word question?

GEORGIA GREEN: When you examine the 50-word question, you can see that it is not about word meanings; it's about making rules and people and why people are making rules.

JEFF KAPLAN: I think it's clear, in response to the last question, if the conventional meaning of *all vehicles are excluded from the park* "means" that all ambulances are excluded from the park, that conventional meaning does cover the case in which the ambulance is going in to rescue somebody. No question about that, the conventional meaning.

I have one more point to make. The earlier question was "Does the conventional meaning of *vehicle* include ambulance?" and everybody was blithely saying yes. I think that's an empirical question. I think that a conventional meaning is relative to a community of language users, and we only have intuitions about that by virtue of being native speakers and members of that community. But empirical work must be done to answer that question.

GEORGIA GREEN: I was giving an expert opinion on the empirical question.

JEFF KAPLAN: Okay.

CLARK CUNNINGHAM: A point of order here: By *empirical question*, let me see if I understand you correctly. Georgia has said, and one can imagine perhaps that I'm an aborigine from Australia who is trying to learn

English, okay? So Georgia is the linguist. I'm trying to figure out what this word "vehicle" means so I ask her, "Does the conventional meaning of *vehicle* include ambulance?" She says, "Yes, it does."

Another linguist, Jeff Kaplan, says, "Hmm, as a scientist, I would like to empirically test this assertion." Is it fair to say you can go about empirically testing it and potentially come up with evidence that would sway Georgia, your fellow linguist, to change her assertion?

JEFF KAPLAN: Sure.

GEORGIA GREEN: Sure. I mean, I was giving an expert opinion which, as I mentioned to Jerry, was a speculation, since this expert opinion can be an opinion; right?

JEFF KAPLAN: Definitely.

CLARK CUNNINGHAM: And that suggests that you share some common assumptions about what counts as data, what counts as empirical method, such that you can actually persuade Georgia to change her view on that question, which is the other part of what we wanted to get to. Judy?

JUDITH LEVI: Jeff's point actually reminds me, strikingly, of what we did with *enterprise*,<sup>31</sup> because we could have just opined in our expert opinion that *enterprise* means 'profit-seeking business' and some of the judges and some of the circuits did just that. But in fact, we didn't opine at all, until we got lots of data beyond our intuitions—we got 150 examples—and the data screamed at us that, by God, it doesn't mean that. But then, in addition, we did survey work on this word, which you know about, and discovered some really interesting things that none of us would have expected. So this is interesting: the question, "Does *vehicle* include *ambulance*?" or "In what way does *vehicle* include *ambulance*?" is somewhat parallel to "In what way does *enterprise* include *business*?" I'm now finished with that reference to the past.

As we discuss literal meaning or conventional meaning, there are a couple of points that I think will be helpful. One is in regard to your question about when somebody writes a statute (and I think in this case, we could first take one person writing a statute and then the complicated cases when lots of people are involved in writing a statute)—we're rarely, if ever, pushed to analyze what we mean by the words we're using. And that's part of the problem, of course, because if there was a committee of 12 writing the statute and you gave them this problem that we had to contemplate for our first group yesterday about the different kinds of vehicles, you would

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31. See Cunningham et al., *supra* note 2, at 1588-1613.

not get agreement, *but they would not have realized how much they disagree*. So that's part of the problem for all of us when we use language; as Georgia said, we have expectations that other people will share the way we use the word—and yet our expectations are not always met. That's just a fact about words, whether we call it a fact about word meaning or a fact about word usage or a fact about word conventions. That's something that I think the layperson overlooks to an enormous degree and perhaps also all nonlinguists who have not been involved in looking at word meaning, which would include some legal people.

The second point is about the vehicle. Coming back to the *vehicle* example, we wouldn't be talking about the problem of ambulances, for example, racing into the park to save somebody from a heart attack if ambulances didn't fit in a category of vehicles for all relevant people. It creates a problem; it pins us to the wall, so to speak, because, of course, an ambulance *is* a typical example of a vehicle, we believe (although we could do survey research to confirm this hypothesis of ours), but we don't like what happens, we don't like the outcome if it *is* a vehicle, because we want ambulances to save dying people.

So I want to put out for everybody something that Bill Eskridge and I came up with yesterday at one point, the notion that at some point in statutory interpretation, words stop being treated as words and start being treated as *regulatory variables*, which I found a helpful concept. That is, if you ask the linguist, "Isn't an ambulance a vehicle?" you'll get one kind of answer, based on one kind of analysis. But what legal interpreters have to do all the time—from policemen to judges—is *both* look at the words *and then* decide what they're going to do about them. And what happens is they start treating the words as "regulatory variables." That is, I'm not going to treat *ambulance* always as a vehicle for prosecution's sake. Now I'm going to shift and say, "See, if they were linguists, they would say that *vehicle* includes *ambulance*, but I'm not going to prosecute despite the fact that it's within the scope of the statute."

But legal people don't talk that way, because they're not focusing on language, they're focusing on rules and their effects, and therefore they shift to say something else. But they express it sometimes as if the *meaning* were changing; and that's what drives linguists up the wall, because we want to separate out "What do we understand from language in all the

richness of its context?" and the different question of "What does the law do with this language in the richness of the interpretive question?"<sup>32</sup>

So I really like this notion of regulatory variable, because it helps me see how different your—loosely speaking—your responsibilities are, from the linguist's in just analyzing language.<sup>33</sup>

One more thing I'd like to point out: We ought not to be misled when we talk about "the" literal meaning or "the" conventional meaning as if there is always one, because there are very, very few words for which there is only one meaning. So for many more words than the layperson would guess, there are multiple meanings and Georgia and Geoff Nunberg<sup>34</sup> would say there's a potentially unlimited set of meanings. And you had some reading about the word *newspaper*, which I thought gave some good examples.<sup>35</sup> But also individuals differ about word meanings. And that's another way in which we are misled, if we ask, "What is the conventional meaning of the word?" The original question was: Does the conventional meaning of *vehicle* include *ambulance*? And I would have said, "For whom?"

So those are the points I'd like to put out that might help clarify matters.

MIKE GEIS: There's too much focus on the word *vehicle* and too little focus on the word *all*. You can't get the reference of the noun phrase without both words, and universal quantifiers like *all*, *each*, *every* in English are virtually always [sic] restricted quantifiers. We rarely mean by *all*, 'every damn one of them.' You could argue in this sort of case that *All vehicles are prohibited from the park* means 'All vehicles entering the park under normal and expectable conditions are prohibited from the park.' And that would be people driving their cars in the park, it might be motorcycles in the park, it might be bicycles in the park.

On the other hand, an ambulance racing into the park is not a normal and expected vehicle to be entering the park, under the understanding of this whole utterance; and, therefore, it could be argued not to have been meant to be a part of the class of "all vehicles" in the first place.

32. See Michael L. Geis, *The Meaning of "Meaning" in the Law*, 73 WASH. U. L.Q. 1125 (1995); Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L.Q. 1095 (1995).

33. For further discussion of the regulatory variable concept, see William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995); Harold J. Krent, *The Failed Promise of Regulatory Variables*, 73 WASH. U. L.Q. 1117 (1995).

34. GREEN, *supra* note 21, at 51-52 (drawing on GEOFFREY NUNBERG, *THE PRAGMATICS OF REFERENCE* (1978)).

35. *Id.*

KENT GREENAWALT: So if you took this version, in answer to Bill's question, you could say the meaning doesn't cover this situation?

GEORGIA GREEN: But they didn't say that.

JEFF KAPLAN: But they didn't say.

GEORGIA GREEN: It's not one reasonable and expected interpretation. That's the problem.

FROM THE TABLE: You think restriction is relevant?

MIKE GEIS: It's relevant and expectable.

BOB BENNETT: Universal quantifiers.

MIKE GEIS: Universal quantifiers. Suppose I say, "I'll promote you to full professor if you publish that book you're writing," and she publishes the book, but she does something really horrible that violates all principles of morality, and so I say "I'm not promoting you."

JUDITH LEVI: Maybe she said there is no such thing as word meaning!

MIKE GEIS: I would argue that I mean that I'll promote you in any circumstance which is relevant and reasonably expectable in which you publish the book. Well, your molesting a student was not reasonably expectable.

JUDITH LEVI: But that's not in the meaning of that sentence: *I will promote you if you write that book.*

MIKE GEIS: It's the meaning of the utterance.

JUDITH LEVI: No, it's the context of academia.

CLARK CUNNINGHAM: I'm going to exercise my proxy on behalf of the others to try to understand what you've said. You're saying that by putting the word *all* in front of *vehicles*, something happens.

MIKE GEIS: Absolutely, something happens.

CLARK CUNNINGHAM: So that there is a difference to a linguist, as a matter of conventional meaning between the sentence *vehicles are prohibited from the park* and *all vehicles are prohibited from the park*; is that what you're saying?

MIKE GEIS: That most certainly is a difference. But, yes, there is a difference, a clear difference in meaning between *Vehicles are prohibited from the park* and *All vehicles are prohibited from the park*.

KENT GREENAWALT: That can't be right. What you just said was that *all vehicles* had an understood restriction, so it doesn't *really* cover "all" vehicles. So the only possible clear difference could be that *vehicles* alone means 'all vehicles' more than *all vehicles* means 'all vehicles.'

CLARK CUNNINGHAM: That's what I thought he said. Kent.

KENT GREENAWALT: But Mike has to say, given his general view, that *vehicles* also has an implicit quantifier, a restricted quantifier in the same way as *all vehicles*.

MIKE GEIS: It does. I'm sorry. It does.

GEORGIA GREEN: Is that what you're saying, that that's what it means? That it means that *all* implicates all relevant and expected somethings?

MIKE GEIS: That, I fear, is what I'm saying. But listen to this: I can say truthfully *lions have manes*; I cannot say truthfully *All lions have manes*. Now, clearly they're very different. Now, when I say "Lions have manes," I'm talking about a large class of entities. But obviously not all of them. There is an implicit restricted quantifier.

BOB BENNETT: But not the word *all*.

MIKE GEIS: There's one in the analysis of bare plurals.

JUDITH LEVI: Please explain that term.

CLARK CUNNINGHAM: I want to just state an example. I think that as a member of the law speaking community, I would have had a sort of naive feeling as either a writer or interpreter, that when I put *all* in front of *vehicles*, I would seem to expand the category; that is, it's more likely that the conventional meaning includes *ambulance*, than if I didn't have *all*. And are you suggesting that as a matter of description of the way *all* operates in English that I may be misunderstanding what happens when I put *all* in front of *vehicles*?

MIKE GEIS: Now, *all* does expand it, but let me illustrate a typical time you get a restricted universal quantifier: Your child comes to you and says "Daddy, buy me X, all my friends have one." Now, your child doesn't really mean literally every person she counts as a friend has one. She means every person she counts as a friend who she regards as being especially cool has one.

JUDITH LEVI: Yeah, but sometimes she does mean 'all'.

MIKE GEIS: Sometimes, exactly.

JUDITH LEVI: So you were misleading earlier, because you were saying—I understood you to say: Well, *all* is never 'all.' But *all* is sometimes 'all.' You can say, "All the people in this room are here for a purpose," and that's *true*. And I mean every single damn one.

MIKE GEIS: Sometimes that restriction is empty.

GEORGIA GREEN: Or sometimes everything is relevant.

MIKE GEIS: That's another, better way to put it. Sometimes everything is relevant and reasonably expectable.

FRED SCHAUER: This is all fascinating to watch and listen to.

MICHAEL MOORE: Every bit of it or most of it?

FRED SCHAUER: Most of it. The larger questions are the ones we were talking about before the discussion of *all*. Consider again this idea of a regulatory variable, which hooks onto many of the most important questions of legal theory. Assume for the sake of argument that there is something called a regulatory variable, although I have a problem with the terminology because it misleadingly suggests an almost inevitable feature of legal language, as opposed to a contingent feature of American adjudication. Indeed, the term may be part of a larger problem of trying to mask the contingency of certain dimensions of American judicial power. So when Bill and Judy say “regulatory variable,” I want to say “the power of judges to override the literal meaning of a legal rule in the service of larger political, moral, or even legal goals.” When put this way, we can discuss both whether the phenomenon exists, and whether it is a good or a bad thing. I am afraid the neologism *regulatory variable* impedes this discussion. Still, even if we use the term *regulatory variable*, something could be (or should be) a regulatory variable for some decisionmakers but not for others. This is because it is implicit in the idea of the regulatory variable that some decisionmaker (or other agent) has the authority to engage in the task of determining which outcome will best serve the regulatory goals.

But this is just the question that is central to many discussions of legal theory, since it is not necessarily the case that all agents within the legal system should have this authority. Perhaps some should, or perhaps all should, but another quite plausible view is that as a matter of institutional design certain agents should be barred from treating some things as regulatory variables just as other agents are empowered to treat the very same language as a regulatory variable. Now of course when we prohibit a class of agents from recognizing a regulatory variable—when we prohibit them from ignoring the letter of the law in the service of its spirit, or in the service of larger moral or political or pragmatic values—we will inevitably reach some number of suboptimal results. But as a question of institutional design, we might say that the expected negative consequences of such suboptimal results might in some domains be less than the expected negative consequences that would be reached by empowering a class of agents to recognize a regulatory variable, because in the latter case they might make many mistakes in assessing the regulatory goals, or might intrude on what as a matter of political theory is a decision that ought to be made by someone else.

So Justice Scalia might be saying that to allow judges to treat statutory language as a regulatory variable is to intrude on the domain of the legislature. Implicit in this, of course, is a deep political theory about who ought to be doing what in a democracy. And even those who disagree with Justice Scalia embrace the same idea in other contexts. When those of us who might disagree with Justice Scalia are reluctant to permit police officers to treat the language in search warrants as a regulatory variable (and this is supported by a great deal of concrete legal doctrine), we believe that there is some tension between the goals of the Fourth Amendment and the typical police officer's self-definition of her role in terms of apprehension of those who commit crimes. Consequently, we worry that empowering police officers to contextualize the language in search warrants will lead to a larger than acceptable number of erroneous results, where "erroneous" is measured in terms of some Fourth Amendment goals. So we prohibit police officers from treating the language in search warrants as a regulatory variable, and encourage them to rely on literal, conventional, plain, acontextual, thin meaning. We recognize that this will lead to some bad results, but we believe as well that it may lead to fewer bad results than would come from a "regulatory variable" approach.

Thus I come back to my objection to the very term *regulatory variable*, since it suggests that it *is* something that appears in legal language, when in fact what is going on is a decision to allow certain decisionmakers certain kinds of powers. I would rather search for the terminology that does not occlude recognition of the contingency of all of this, and which thus allows us to determine openly when the letter of the law should not be enough, and when for various reasons it should be.<sup>36</sup>

CHUCK FILLMORE: I was going to bring up the question of the quantifier too; that is, the thing in the Hart article<sup>37</sup> says a legal rule forbids you to take a vehicle into the public park. But Bill brought up the statement, *all vehicles are prohibited*. And once you do that, then you ask yourself why does the word *vehicle* have any special importance at all? Why don't we say well, does the word *all* really mean 'all' in this context or does *prohibited* really mean 'prohibited?' I mean, it's not a real vehicle in the category that it gets us, but there's no reason for focusing on *vehicle*, rather than *all* or even *prohibited*.

KENT GREENAWALT: Yes; it's the entire phrase.

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36. See Eskridge & Levi, *supra* note 33 (commenting on their shift away from the potentially reifying term *regulatory variables* to the more dynamic term *regulatory variability*).

37. H.L.A. HART, *THE CONCEPT OF LAW* 123, 125-26 (1961).



CHUCK FILLMORE: Yeah. So it's the whole thing. But I'd also like to say about *vehicle* that the question of finding out from the folks what *vehicle* really means doesn't seem to me to be relevant, because it seems to me that *vehicle*—

JUDITH LEVI: In this case.

CHUCK FILLMORE: In this case, *vehicle* seems to me to be more like a word like *vertebrate* than a word like *dog*, because it's sort of a classificatory term. It's a different register. And it's not so much a word that the folks use, but *vehicle* is used for a certain kind of classification and you have it in sort of semi-technical discourse as in *vehicular manslaughter*, and in cop talk.

CLARK CUNNINGHAM: It's not a basic level category.

CHUCK FILLMORE: It's not a basic level category phrase.

JUDITH LEVI: Chuck, give us something else that you told me the other day to show the law people why it works real differently.

CHUCK FILLMORE: Okay, well, you wouldn't say "Look Daddy, I just drew a picture of a vehicle" or "Watch out, a vehicle is coming"; it's not the word that you use for talking about things around you. You use this word when you are in some kind of a semi-technical state of mind and you're classifying things for some purpose. And certainly if you did a children's picture book entitled *Vehicles*, you would include ambulances and baby buggies and tricycles and everything when you're trying to teach the kid this concept. So it seems to me that given the function of the word *vehicle*, there can't be a question—I'm speaking as an expert—because of this semi-technical sense of *vehicle*, that ambulances are vehicles.

CLARK CUNNINGHAM: Would it be, therefore, looking at it as a semanticist, a somewhat different problem if it was *All bicycles are prohibited from the park*, because *bicycle* is more a basic level category than *vehicle*?

CHUCK FILLMORE: Yes, I guess.

MIKE GEIS: But your first point was detached from your second point; right?

CHUCK FILLMORE: Yes.

MIKE GEIS: Because even if the category was very clear, you could still ask whether the whole phrase really covers this situation and you might answer that "no."

CLARK CUNNINGHAM: Does *all* really mean *prohibited*?

CHUCK FILLMORE: Yes. And of course here the question isn't what the word *all* means or the word *every* means, because, you know, if I say, "Everyone is invited to my party at my house tomorrow night"—and I find

out that you've put it on e-mail, I'd be very disappointed, you know, I'd be shocked, because I would assume that there is a universe of discourse that is shared or some kind of a common ground, and within this common ground *everyone* means 'everyone within this relevant universe.' But I wouldn't say that the word *everyone* has different meanings, but that there is some flexible frame of reference within which we use it.

MIKE GEIS: That's the point of the restriction; is it not?

CLARK CUNNINGHAM: Yes, it's not the word, but the restriction.

MICHAEL MOORE: Three interesting comments. Let me just make some comments about all three of them, since I am not going to get the floor again before we break.

On the word *all*: if I were someone like Georgia, I think I'd start to get worried if I listened to someone like Mike, because I'd say to myself, you know, I've let pragmatics take over most of what I used to teach as lexical semantics. Now this guy across the room is going to actually have pragmatics take over all the way through syntax to logic, at least with respect to universal quantifiers. He's going to regard as synonymous the word *all* and certain uses of the indefinite article, as in *A lion likes red meat*, and the detached plural, *Lions like red meat*, for both of which he is quite right that, idiomatically, typical speakers do not mean everything. Idiomatically, in *A lion likes red meat*, you mean stereotypical lions typically like red meat, right? But if you do that to the universal quantifier as such, if you actually gave the canonical regimentation "Everything, if it's a vehicle, is prohibited in the park," . . .

MIKE GEIS: And if it's X which is—

MICHAEL MOORE: "For all things "x," if "x" is a vehicle, "x" is prohibited from entering the park"—if you're going to use the canonical formulation and yet say you're going to restrict the domain of your quantifier, then it seems to me you've allowed your pragmatics to erode any distinction between logic, syntax, semantics and pragmatics. You've basically said you're not going to regiment usage with these divisions at all. If I were a linguist, let alone a lawyer, that would worry me about my discipline, because all of a sudden it looks like people who like pragmatics are going to claim the whole territory. That's just the first word.

Now, there is a choice—and I take this to be, for you guys, a scientific choice; for the lawyers, it's a little bit different. But for you folks, you know, like all science, whatever succeeds is terrific. If the division we obtain by regimenting our usage of the word *all* separates off aspects of communication that could be usefully systematized, then we should stick to the regimentation. In other words, if by pragmatizing the universal

quantifier in line with our usage of detached plurals and indefinite articles, you can't systematize communication, then it seems to me that's a good reason not to do what you want to do. That just seems to me a matter of how best the theory of linguistics is filled and what compartments best fill it out. I'd be worried about pragmatizing *all* with the limitations it sometimes does have in ordinary usage, but not always. Georgia gave an example of where it does not have those limitations built into it. That's just a plea to leave logic alone.

Turning to the second comment, Fred has a wonderful book<sup>38</sup> that goes through the complex calculation that should be made on whether you want nonordinary meanings to be given to the words appearing in legal rules because of the better decisions you think you will get. There is a further choice beyond that one. Suppose you make the choice, contrary to Scalia, that you want judges, sometimes at least, to use the word *vehicle*, in Bill and Judy's terms, as a regulatory variable; that is, we're going to say something like "An ambulance is not a vehicle for purposes of some legal rule," even though we all know perfectly well *vehicle* includes ambulances. There are two different ways to put that.

One is to say "That's what the law means"—that's what drives linguists rather crazy, right?—"That's what the law means." Now why do we lawyers say that? We say that to keep our notion of ethics and political obligation simple; namely, we want to say to a judge, "You're obligated to follow the law." That means if we want judges to do what Fred sometimes wants them to do—and so do I, so does Bill—which is to say ambulances aren't vehicles for certain good reasons, we want nonetheless to say that those judges are following the law when they do that. Notice that that forces us to say law is about *legal* vehicles, which often don't have much to do with what are ordinarily classed as vehicles. And that we say because we want to keep our ethics simple; it makes our semantics more complicated.

You could go the other way. You could say the law takes the semantics whole, but sometimes judges don't have to follow the law. Well, we don't like to put it that way. It makes the ethics much more complicated. There is thus a real choice here.

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38. FREDERICK L. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

FRED SCHAUER: A footnote to this is that this is the choice that connects much of this discussion with classical debates between natural law and legal positivism, which we can and should talk about later.

MICHAEL MOORE: Yes, it certainly does. That's okay. I was just going to say with respect to the third comment, that what Chuck introduced is the notion that . . . I don't know how much you want to put into simple or basic or primitive versus—

JUDITH LEVI: It's not a value judgment.

MICHAEL MOORE: No, I just mean in terms of how much of a distinction there is. You do get a sense that children's books are about bicycles and not about vehicles. I think that's right. But I don't know that that would change the way in which the meaning of the word—even in Georgia's context-sensitive meaning of *meaning*—enters into our theory of legal interpretation. It would simply mean we get less out of semantics for our overall legal decision than we might if more determinate words like *bicycle* were used, but we'll still take what we can get. Sometimes we won't go with it with that semantics, but often times we'll take what we can get from the semantics.

BILL ESKRIDGE: The regulatory variable idea poses the question that it might make a difference, as to our enterprise, how you conceive statutes. One of the things that often often divided the linguists and the lawyers in sessions yesterday was that the linguists were treating the statutes as communicated acts, words on a page, simple commands, whereas the law professors were treating statutes as more than that, either as social policy or as some kind of public value or natural law. I see the continuum differently. It's a continuum where most lawyers and law professors are not positivists or natural lawyers. They are "regulatory variable" people, social engineers, social policy people. That's where one of the linguists in one of my groups—I think it was you, Jeff—said, "So what you're saying is the words on a page underdetermine what the legal meaning is going to be."

CLARK CUNNINGHAM: I'm going to start by putting into context the quotations that have been on the flip charts behind me all morning.

"First, find the ordinary meaning of the language in its textual context."<sup>39</sup> This is a quote from an opinion by Justice Scalia in which he summarizes what he thinks the rules are in today's U.S. Supreme Court; that is: "When applying the statute, the first thing we do is find the ordinary meaning of the language in its textual context." Following this

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39. *Chisom v. Roemer*, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting).

quote are earlier statements somewhat similar to this. Justice O'Connor said: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."<sup>40</sup> And last is a statement from Justice Blackmun: "The assumption [is] that the legislative purpose is expressed by the ordinary meaning of the words used."<sup>41</sup>

Those three statements do not all obviously mean the same thing. No one, including Justice Scalia, asserts that the result in a case is always determined by the answer to this question. Legal theory is full of debates about what the steps are between step one and the result of the case, which is in part what Fred and Michael were talking about. But one thing to think about, it seems to me, is whether "ordinary meaning" bears some relationship to what the linguists have been calling "conventional meaning." And so, as to this step only, the question that at least intrigues me is what, if anything, linguists could contribute to step one. For example, we had the question about the conventional meaning of *ambulance* and of *vehicle*. Jeff suggested that when Georgia asserted that the conventional meaning of *vehicle* included *ambulance*, as a linguist, Jeff might propose an empirical test, with the expectation that having performed the empirical test, he might possibly change Georgia's opinion about that conventional meaning.

GEORGIA GREEN: Or confirm it, yes.

CLARK CUNNINGHAM: Or confirm. Now, in law, the interesting question is if Antonin Scalia and Ruth Bader Ginsburg sitting around the table disagree about what is the ordinary meaning of the language in its textual context, what happens? Is there any way for them to resolve the disagreement, since they're both native speakers of English? That's a separate question from what then happens *after* you reach agreement about conventional meaning.

The other flip chart also suggests that step one in interpreting the statute relates to ordinary meaning. This quote comes from Hart and Sacks. "A court should decide what purpose ought to be attributed to the statute and then interpret the words of the statute immediately in question so as to carry out the purpose as best it can making sure, however, that it does not give the words a meaning they will not bear."<sup>42</sup> So the legal process Hart and Sacks approach I think does make reference to what looks to be the

40. *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993).

41. *Russello v. United States*, 464 U.S. 16, 21 (1983).

42. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374-75* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

conventional meaning, but at a *different point* in the process. This quote seems to assume that reference to conventional meaning is a real constraint on the approach they suggest. In other words, interpretation based on inferred purpose is limited by whatever it means to “not give the words of a statute a meaning they will not bear.” In *X-Citement Video*, this standard is what was invoked by Justice Scalia in his dissent.<sup>43</sup> He said, in effect, “The majority broke this rule.”

So, do the words *A meaning they will not bear* have some relation to what linguists call conventional meaning? This is, for linguists, an empirical question. Are there certain meanings that words of statutes simply will not bear? If you can look at that question empirically, what relevance could that have to people in the legal system who claim that this is a constraint upon the way they determine statutes?

This background leads into what Jerry has been waiting to say about conventional meaning and he’s written the article, which we all read, about a range of what he calls “insecurities” of meaning.<sup>44</sup>

JERRY SADOCK: I’ll give you the short version of this lecture; I hope it will only take a couple of minutes. But what I want to remind you of (I think we’ll probably all agree on this) is that once you’ve accomplished the first step, and found what the ordinary meaning of the language in its textual context is, you don’t necessarily have enough, in any case, to know whether the statute applies in any situation.

The first problem is this says “Find the ordinary meaning”; and that assumes that there’s one and only one ordinary meaning. It totally neglects the problem of ambiguity—but ambiguities occur all the time. And that means that you have to select, among the various ordinary meanings, just that ordinary meaning that will serve as a starting point. How do you do that? Well, in doing this very first step you have to bring in pragmatics—purposes, intentions and so on. That’s why someone carrying a can of paint which is “87 percent vehicle” through the park will never be subject to arrest under this law, because we immediately eliminate that ordinary meaning—and it’s an absolutely ordinary meaning. It says right on the can of paint “87 percent vehicle,” right? It says “Pigment 13 percent, vehicle 87 percent.” And if you look in any dictionary definition—the ones that we got, were they edited? If they weren’t edited, then it does contain that meaning.

43. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 473-76 (1994) (Scalia, J., dissenting).

44. Jerrold M. Sadock, *The Position of Vagueness among Insecurities of Language*, 7 QUADERNI DI SEMANTICA 267 (1986)

MIKE GEIS: That's the base of the paint.

GEORGIA GREEN: Right; the same for drugs—they have a vehicle and they have an active ingredient.

JERRY SADOCK: Okay, so “the” ordinary meaning means the *intended* ordinary meaning out of the many ordinary meanings; that's problem one. And you need pragmatics just to determine this ordinary meaning.

Now, once you have the ordinary meaning, you still don't necessarily have much, because that ordinary meaning, “conventional meaning” for us linguists, might itself not be a fully explicit guide to reference, but might contain built-in uncertainties of the kind that linguists call “vagueness.” And I think the word *vehicle* is a word of exactly that kind. *Vehicle* is not an expression which sharply divides the world into two categories, vehicles and nonvehicles, as, say, a term like *even number* exactly divides the class of natural numbers into two partitions with no uncertainties. But there are uncertainties and *vehicle* shades off; and so items shade off in vehicularity in various different directions, sometimes regarding, among other things, purpose. Most artifact words of the English language have built into their meaning some kind of purpose; and the word *vehicle* is one of those words. And the purposes for which the transport is conducted is at least a part of the meaning. So even if we've not decided that we know absolutely which sense of *vehicle* we mean, the vagueness in *vehicle* is going to have to be determined. How? It's going to have to be determined not only in its textual context, but in its contextual context also by the same pragmatic mechanisms we needed before.

MICHAEL MOORE: I think there's a kind of linguistic necessity you're building in, Jerry, that some lawyers—“some lawyers” means at least one, here's one, me, so this is true—would not agree with. The necessity is that to find the ordinary meaning of the language must mean to find the utterance meaning. Yet such ordinary meaning could simply mean the sentence meaning; that is, the meaning of a type of utterance. So that if a word like *vehicle* is ambiguous or vague—but let's take ambiguity—if it's ambiguous, then the sentence meaning is indeterminate between *vehicle*, as the base for paint; *vehicle*, as in *vehicle of thought* like a book; and *vehicle* as in something to ride in. But lawyers might well think that, for normative reasons, we stop there. That's where our interest in linguistics stops, right here at sentence meaning. We may not care about the pragmatics of appropriate utterance under any theory of interpretation for statutes that says we fundamentally don't care what the legislature meant. And why might we lawyers not care what the legislature meant? Well, we might not care about such speaker meaning because we do care how the words would

be taken by a reader who did not have access to anything about what the legislature meant.

Let me give you a different example: defamatory utterances. We explicitly don't care to disambiguate them by what the speaker meant; we only care about how any audience could have taken it and it's not even a majority of the audience. The standard language in tort law is a "sizeable and respectable minority of the targeted audience." If they understood it as having a defamatory meaning, even though it wasn't meant to have a defamatory meaning, it's a defamatory utterance. Whether statutes are like that is a normative matter. You have to argue about it, it's not solvable in any event by any sort of linguistic necessity (such as that you must disambiguate a statute by context to find what the speaker meant). You may read this conclusion, but we need a normative, not a linguistic, argument to reach it.

JERRY SADOCK: Well, okay, let me give you a different type of example where I think it's really clear: the reference of pronouns.

KENT GREENAWALT: Could I just interrupt here, because it seems to me that with some of the examples, whether one is talking about what the communicator was trying to communicate, or how the audience would take it, one could go through Jerry's analysis. So, in the paint can example, even if one went through an audience analysis, the results would be the same. It sometimes would make a difference, but often the analysis would be the same, whether the focus is on the communicator or the audience. Saying that we might be focusing on the audience doesn't eliminate the relevance of what he said so far.

JUDITH LEVI: It's still pragmatics, because it's not just the communicator.

MICHAEL MOORE: It could be, if audience understanding is your focus, that you want to ask the type question because you think that the audience is someone who will not have access as you do to the context that allows you to find what was meant. That's what is going to give you a divorce between speaker's meaning and the audience understanding.

KENT GREENAWALT: Yes, but if the law says *No vehicles in the park*, you don't need a context of knowing legislative history or what was in the minds of the legislators, because everybody understands the law has got nothing to do with carrying paint cans in the park.

MICHAEL MOORE: Now, why do we understand that? It's because we understand the moral significance of such a statute; that is, we see what it's aimed at. And I think it's fruitful to distinguish our moral knowledge about the values that such a statute can intelligibly serve from the semantics of



what the words mean. And I don't think that we should parade our moral knowledge as a matter of semantics or even of pragmatics.

JERRY SADOCK: For linguists—I believe this might really be a point where the linguists are in pretty close agreement and maybe differ from most of the lawyers—for linguists, the sentence meaning of an ambiguous sentence is not a single thing; there are two sentence meanings. So the sentence *Vehicles are prohibited from the park*, does not have one sentence meaning for us, but two. So you can do this: Find the ordinary meaning without narrowing it down and choose one of those. And—

MICHAEL MOORE: That's okay. We can just amend our requirement that legal interpretation pay attention to ordinary meaning to “an ordinary meaning.” Then what we really mean by “the” ordinary meaning is *all* ordinary meanings at the type level.

JERRY SADOCK: Oh, no, I don't think so. I don't think Scalia was suggesting that you include the possibility that *vehicle* would include paint thinner or anything like that; do you?

KENT GREENAWALT: What are the two sentence meanings?

JERRY SADOCK: Well, there are probably many, but let's restrict our attention to two: “Conveyances are prohibited from the park” (or “Any device for carrying passengers, goods or equipment is prohibited from the park”) and “Substances of no therapeutic value used as the medium in which active medicines are administered are forbidden from the park.”

KENT GREENAWALT: Oh, I thought you were making a general point about sentence meanings; but you were talking about this particular example.

JERRY SADOCK: I'm making the point about ambiguity in general and ambiguity is pervasive.

MIKE GEIS: Suppose a cop arrested someone for spray painting graffiti on the wall and used this law as his justification?

MICHAEL MOORE: This is in the park; the wall is in the park, right?

MIKE GEIS: Right; the wall is in the park. And he used this law as a justification, because in order to spray paint, he had to carry the can, and the can contained this vehicle. Now, how would Scalia or anyone else say, “Oh, no, that was a wrongful arrest”?

CLARK CUNNINGHAM: I want to get back to this, for a second: *Textual* has a force in Scalia's sentence, “First, find the ordinary meaning of the language in its textual context.” He's willing to say “I may need to look at context to disambiguate.”

JERRY SADOCK: I had a question about that. Does it literally mean 'textual,' just the words surrounding it in the statute, or does it mean the context?

GEORGIA GREEN: The situations.

CLARK CUNNINGHAM: Let me say what I think and then other people can correct me. I believe that when Scalia says this, he first wants to look at—if it's a word—the sentence in which it appears, and then next, the paragraph in which the sentence appears. He may also sometimes be willing to then look at a larger context, like the entire chapter of the U.S. Code in which the paragraph appears. But as much as possible he wants to stay with ink on the page.

KENT GREENAWALT: Could I give an example that he used at a Princeton lecture? The case involved a law forbidding using guns in drug transactions; if you used a gun in a drug transaction, you received a more serious penalty. In the case,<sup>45</sup> somebody was going to trade his gun for drugs, and the majority of the Supreme Court said that was using a gun in a drug transaction; Scalia said that using a gun in a drug transaction meant using it *as a gun*, which meant firing it or threatening with it or something like that. He said that using it in exchange for the drugs was not using a gun in the sense it was meant.

CLARK CUNNINGHAM: In a conventional meaning or an ordinary meaning?

KENT GREENAWALT: The sense of *using a gun*. That was certainly an approach that looked at the particular facts of the case. I don't know quite how one would characterize the approach, but it wasn't *extremely literal*.

JUDITH LEVI: It was a weird literal use.

KENT GREENAWALT: No, no.

MIKE GEIS: No, actually I think you can defend it linguistically. Say the statutes now say "use a gun in a drug transaction." We don't ever say *I used a dollar in a cigarette package transaction*.

KENT GREENAWALT: I think Scalia's position is defensible; it's just a question of how to put it.

CLARK CUNNINGHAM: In terms of what this is, I'd like to refer back to the *vehicles in the park* example. This may be a linguistically naive thing for a lawyer to say, but I think that we would like to say just by reading "All vehicles are prohibited from the park," from that textual context, I

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45. *Smith v. United States*, 113 S. Ct. 2050 (1993).

know we're not talking about paint cans without having to find out anything about the person who uttered the sentence.

JERRY SADOCK: No, you don't know that.

CLARK CUNNINGHAM: Well, I'm describing to you a state of mind, at least, that this lawyer has. We can try to figure out what's going on—and I can be wrong about that, okay?—but that's what textual context means to me. That even though it could by itself mean all these different things, in a sentence or paragraph I can eliminate some of the ambiguity.

JUDITH LEVI: No.

JERRY SADOCK: You're making lots of assumptions about the background situation and they needn't be so ambiguous.

JUDITH LEVI: Assumptions about why somebody wants vehicles prohibited from the park.

CLARK CUNNINGHAM: Okay, but let's take another classic example of ambiguity. What are the examples about ducks?

GEORGIA GREEN: *I saw her duck.*

CLARK CUNNINGHAM: Okay, *I saw her duck.* Okay, we don't know whether we're talking about the poultry that she owns or her doing this [lowering his head].

GEORGIA GREEN: Right, if you just see it written on a stone somewhere.

CLARK CUNNINGHAM: *I saw her duck*, period. Okay, you don't know if it's a bird or a motion. If the sentence is, however, *I saw her duck and I bought it*, period, is it still possible that *duck* means this [lowering head]?

MIKE GEIS: Yes, because I could have bought her signal that I should duck, because there's this bad thing flying around at head height.

GEORGIA GREEN: There's a common colloquial sense of *bought* that means 'agree with.'

JERRY SADOCK: But here's a textual sentence that clears it up absolutely: *I saw him and her duck*, okay? No ambiguity left.

CLARK CUNNINGHAM: Because?

JERRY SADOCK: Because the grammar of the language—

CLARK CUNNINGHAM: And it seems that that's the kind of textual context I'm referring to.

FRED SCHAUER: Subject to bringing in the operation of a whole range of canons of statutory construction, Clark is basically right; that is, he is right in the sense that when judges use the word *textual* or something like that, they are intending to refer to the marks on a printed page, but not just to single words or even sentences.

BOB BENNETT: Naively.

FRED SCHAUER: Maybe. Still, implicit in these references—I mean, let's not make them more naive than they are—is recognition that words exist within sentences, sentences exist within paragraphs, paragraphs exist within statutes, and statutes exist within codes, and have certain relationships to other parts of codes.

BOB BENNETT: And they all exist within a social political economic context.

FRED SCHAUER: Right. Now, at some point in doing all of this, one can imagine areas in which the social/economic/political context is more variable or more contested. People using this phrase tend to be urging towards the narrower, rather than the broader. However, even assuming that much of what Clark is saying is right, which I think it is—

BOB BENNETT: Descriptively.

FRED SCHAUER: —I think we've lost Michael's point, which is that at the point at which the text doesn't get us enough (and we can argue about whether that's in all cases or in some cases), but at the point that the text, broadly speaking, does not get us enough, one of the things that at least two of us hear Jerry saying, maybe inaccurately, is that at the point that that does not get us enough, we must necessarily go to the mental states of those who have written the words or enacted the words.

Some of us believe that although that course of action may be sometimes, frequently, or always desirable, it is not necessary; and that one can imagine other approaches to resolving the ambiguities, the vaguenesses and so on. For example, we might decide on the basis of what would produce the morally best result right now, or on the basis of how would it be understood by a significant majority of the people, or by flipping a coin, or some number of other things. I think all that both of us are saying—I won't speak for Michael, but I think I am—is that to suggest that one must in cases of doubt always go to the mental states of the original producers of the linguistic item is something that needs more argument, because some of us are skeptical.

KENT GREENAWALT: Is that what you were saying, Jerry?

JERRY SADOCK: I was saying that whether you pretend to or not, you will always import ideas of intent and purpose in the interpretation of these words at this first level to try to find out what the actual sentence meaning is, before you even proceed beyond that.

FRED SCHAUER: But now it's possible that there is no disagreement, if you are talking about a presupposed intent, or a fictionalized intent, or a presumed intent, rather than an actual intent.

JERRY SADOCK: Yes, what the natural intent is, okay.

FRED SCHAUER: But then, of course, if you're talking about a presumed or fictionalized or presupposed intent, then some of us might think it odd to use the word *intent* to refer to that, given the frequency with which we use the word *intent* to refer to actual mental states of actual human beings.

GEORGIA GREEN: What's a word you like better?

MIKE GEIS: How about *goal*?

CLARK CUNNINGHAM: Or *purpose*?

FRED SCHAUER: That comes back maybe to the e-mail exchange that Judith and I had about the difference between *intent* and *purpose*. It is possible that having, for institutional design, political and moral reasons, picked the point of recourse in cases of doubt, we might want to call it *intent*. We might want to say this is the intent we presume to have, but I guess I'm a little bit troubled by whether the last move is necessary. Having made recourse to, say, morality in order to locate the tie breaker, it may be more misleading than helpful to then identify the moral tie breaker as a presumed intent, rather than just saying, "This is the moral tie breaker."

JUDITH LEVI: One comment on what Fred said, then I want to go to what I was going to say anyway. When you say we must "go to the mental state," there's this metaphor that we can get there. That should be explored because of course you never can "go there" in any physical way. Even in face-to-face conversation, I can't get to a mental state; and, of course, with statutory interpretation, we're a million miles from that. But I agree with Jerry totally that when we look at the language, we cannot help but guess—unconsciously, most of the time—at what we think the person who put these words down meant, in order to resolve what some of the—

MIKE GEIS: Intended to mean.

JUDITH LEVI: Intended to express.

MIKE GEIS: Intended to accomplish.

JUDITH LEVI: And intended to accomplish, right. And we *must* do that, because we so often encounter ambiguous words and vagueness and Jerry covered those two dimensions. I want to add a couple of other dimensions that I think will continue the discussion of what it is that linguists would do at this stage. And, in fact, what it is that human beings do at this stage, including Justice Scalia.

BOB BENNETT: And that includes linguists.

JUDITH LEVI: Yes, people who use language, speaking human beings.

So another dimension that introduces linguistic indeterminacy is what we can very loosely call "extended meaning" and some people will quibble

about whether that presupposes a basic meaning. Well, let me say “the extensions of meanings.” So we had an example in the readings about newspapers.<sup>46</sup> Now, *newspaper* can be extended in fairly predictable ways to mean the management, as in *The New York Times is an oppressive employer*. But in *The New York Times went on strike*, that’s not the management; that’s the labor force that’s unionized. In *The New York Times got my hands dirty this morning*, that’s the concrete object, and so on and so forth. It is astounding how we can extend words, and how many words we can extend in these predictable ways. And Georgia has done research just taking ordinary text and finding out how many word uses are not in the dictionary, which is not merely a critique of the inadequacies of dictionaries, but also a comment on how creative normal human beings are in using the relatively few words in our vocabulary to describe the relatively complex world we live in. In other words, we extend our use of words all the time. Sometimes we extend them in systematic ways that we have names for, like irony or hyperbole or metaphor or metonymy. And so we can identify some of the patterns. And Geoff Nunberg, who Georgia draws on a lot, has identified additional patterns, like, if there is a corporation, you can talk about its product using the same term, like *GM makes GM*. So *He always buys GM* can mean he buys GM cars but *Donald Trump buys GM* can have *GM* referring to the whole corporation—or just some of its stock. So that’s a pattern and we can do that with lots of corporations. And there are lots of patterns we can identify.<sup>47</sup>

But there are also ways in which we extend words that just don’t fit patterns, and that force our interlocutors to guess at what we mean. But we do this frequently. And that is another problem in interpreting just the text, because the word may be used in one of these extended sentences without a flag saying “Hey, I’m going off in the metonymy direction” or “I’m going off in the metaphor direction.”

FROM THE TABLE: Do you think that would be included under ordinary meaning?

JUDITH LEVI: Yes.

FROM THE TABLE: Do you? Metaphorical use?

GEORGIA GREEN: *He saw a face in the mirror*. Is that a metaphorical use? Is his face *in* the mirror?

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46. See GREEN, *supra* note 21, at 47-60 (1989); NUNBERG, *supra* note 23.

47. *Id.*

JUDITH LEVI: There are thousands of cases that we don't have to bat eyelashes at and nobody has trouble with. And I think in our reading<sup>48</sup> there was another example about *window*, you know, there's the frame and there's the glass and there's various other things. So there's a much larger percentage of word uses where we're doing these extensions, where we're sort of flowing effortlessly back and forth among the extensions that we are already familiar with.

And then, Jerry, I would grant there are certainly new ways of extending the word where we might have to guess, or we might have to ask somebody, or we might make the wrong guess, that's true. But there are, as Georgia points out, zillions of examples where we effortlessly flow back and forth. So that's another dimension of what we have to do, even if we think we're limiting ourselves to ascertaining textual meaning alone.

The last thing I wanted to say comes back to something Mike was saying earlier about *all*, whether *all* has a whole lot of meanings, whether it has the pure universal quantifier meaning, plus the restrictive one that he identified as restricted in terms of relevance and something else. And I would suggest that the pragmatic principles that have been elaborated by linguists and philosophers of language following Grice function a little bit in the way that lawyers can in some interpretations and they don't have to be attached to individual words. So I was actually surprised to hear Mike saying *all* can have this meaning. I think probably many of our words have to be interpreted by bringing in these principles. Let's ask what's relevant, let's be cooperative and the Cooperative Principles will apply; but those don't have to be attached to the individual word meanings.

So with *vehicle* again, we can have one or more conventional meanings, and we demonstrably have more than one conventional meaning—there is the paint can meaning and the ambulance meaning—but we will automatically ask, as we read anything, “Which meaning, which dimensions of the possible corners of the word's use are relevant here?” And we will assume that the speaker is trying to be cooperative; and we will assume things about the audience also. And that's part of the way in which pragmatic research in the last 15 years has helped us understand what we used to think was only semantics, especially in metaphoric meaning. So I think linguists would agree that all of that goes into even this first level of statutory interpretation.

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48. JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION: PROTOTYPES IN LINGUISTIC THEORY 124-125 (1989)

CHUCK FILLMORE: I came here from a conference on artificial intelligence, and I wanted to make a sort of computational analogy to the difference between the ambiguities that are sort of on the page, so to speak, and some of these other things. That is, there are lots of automatic parsers which will take a text that you type in and give it a kind of grammatical analysis, and they don't all work terribly well, but let's assume that they worked fine and you put in the sentence and it gives you a proper grammatical analysis. Then there are a lot of people in A.I. [artificial intelligence] doing natural language understanding who want to give semantic parsing of the sentences; and for this sort of thing they develop theories of coherence and goals and knowledge-based attempts to establish the common ground or the starting point or something like that. And somehow if you look at this, at these things as strings of words that can be given grammatical analyses in English, then *I saw him and her duck* is perfectly okay if "him" is one of the things that I saw and "her duck" was the other thing I saw and so on; but *I saw his and her duck* could be analyzed if *his* was understood as simply missing the noun head and so on. So the discussion is a little bit like: what does the language itself tell you about the various interpretations the sentence can have and what kinds of information do you have to bring to it to get individual interpretations in that context? And all of those are very tricky and some of them are very specialized and so on. And so the question we're asking is what kinds of starting points can you assume for a particular kind of statutory text or something like that, that would be unquestioned.

And the other thing I wanted to do was add a bit more to the business about these "insecurities"—that's a funny word for it, but anyway—

JUDITH LEVI: Indeterminacies.

CHUCK FILLMORE: Indeterminacies or whatever, yeah. Sometimes you get the idea that the polysemy of a word is the number of itemized things you can find in the dictionary— sense A, sense B, sense C and so on. But there are certain words which in the dictionary look like words of that type, but if you think about it more carefully, they're not. So, for example, a common definition of *heathen*: sense 1, someone who is not a Christian, a Jew or a Muslim; sense 2, someone who is not a Christian or a Jew. I've seen in a British dictionary under *foreigner*: sense 1, someone who is not British; Sense 2, someone who is not English. So—

JERRY SADOCK: Sense 3, someone who is not me.

CHUCK FILLMORE: So you'd like to say that these are not different senses of the word. The word *heathen* and the word *foreigner* each have a single sense, but what is variable is the frame of reference, the place where



this is anchored, the “me.” These are “them” and “us” concepts, and they can be used by different USs.

GEORGIA GREEN: Barbara Partee<sup>49</sup> talks about the indeterminacy of words like *local*.

CHUCK FILLMORE: Right; and Geoff Nunberg has a huge study of *local*.

JUDITH LEVI: Didn't you study the word *home*, which works similarly?

CHUCK FILLMORE: Yeah. So there are lots of cases where there are words that are treated in the dictionary as set membership concepts, but they're not set membership concepts; they're disguised relational concepts. And in order to understand them you have to know where you're starting from, how is it anchored, what frame of reference; it has a single meaning, but a flexible frame of reference. So it is not the sense that slops around, but it's the starting point.

JERRY SADOCK: Would you say that those are sort of concealed indexicals?

CHUCK FILLMORE: Yes, absolutely.

JERRY SADOCK: So they're something like pronouns *I* and *you* that shift their reference, but they're much more subtle.

CHUCK FILLMORE: Yes.

JERRY SADOCK: Still to know even what they pick out in a particular use, you have to regard the context in which they're used; just the word itself is not enough.

CHUCK FILLMORE: Correct.

JUDITH LEVI: But Chuck's name for them as “them” and “us” concepts puts it squarely in the domain of pronouns because *us* varies, depending on who I am and who else I put in the *we*. So it's a very nice term.

CHUCK FILLMORE: And who I accept as my friends.

JUDITH LEVI: Yes; it's a great term.

CHUCK FILLMORE: And then the notion of prototype, which I guess is represented in dictionaries by *esp.* or *usu.* (*especially* or *usually*); in one of the definitions at least of *vehicle*, there is *especially along the ground*, suggesting that the examples of “vehicles” that move on the ground are better examples than the other ones. So it's more central to the concept and that seems to be true.

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49. Barbara Hall Partee, a specialist in formal semantics, is professor of Linguistics at the University of Massachusetts, Amherst and a member of the National Academy of Sciences.

BOB BENNETT: Well, I was intrigued by Michael's comments before the break about the trade-off between semantics and ethics for us lawyers. But I still am a little uncertain about what the linguists are telling us about this "meaning" notion as it's applied to the interpretational task of lawyers. The linguists all seem to be comfortable calling it "conventional meaning" with an emphasis on the conventions of it, with Georgia perhaps most insistent on that, emphasizing the various actors' assumptions about what the other actors are thinking about the words being used. And given that, I am still left with the question that Kent started to ask at an earlier time and we never got into it—if you had this "vehicles in the park" example, and a judge was confidently assuming that the mayor would not have wanted this sentence to be applied to exclude an ambulance coming in to rescue someone; and we're quite confident that the legislature or mayor, had he thought about it, when he promulgated it, would not have wanted a judge to apply it in such a case, why do all the linguists seem to think that nonetheless, the language, given its conventional meaning, forbids the ambulance coming in?

JEFF KAPLAN: Because when a speaker—and I would like to include within the concept of speaker the enactor of a statute—performs an illocutionary act of legislating, then that speaker or that enactor is bound by what it does. So even if he didn't want it to, it ended up prohibiting ambulances from the park; even if he didn't intend to, he did. I might not intend to promise something to you, but if I say something which entails that promise, I have made that promise.

BOB BENNETT: But that use, your use of the word *entails* assumes that there's some entailment beyond conventions. And that's why—that's where the dilemma that I'm trying to get at is, because on the one hand you and all the other linguists seem to be insistent that "meaning" is a matter of convention, but you're resistant to accepting the conventions that I've articulated—you might say they're false, they're not realistic, but assuming they are realistic, you're resistant to accepting the conventions in this particular context and I want to know why.

GEORGIA GREEN: We don't consider that conventional, because it's specifically about the mayor's state of mind. "Conventional meaning" means everybody believes everybody believes it. So that's why it's not a hard question for us.

JUDITH LEVI: A second simple answer is: I hope you would agree that the following two expressions are not synonymous: *No vehicles in the park* versus *No vehicles except ambulances in the park*. Do those two mean the same thing? And is it a question of language? We linguists would say

they're different and we would say *No vehicles except ambulances in the park* is not redundant; the expression *except ambulances* is not redundant in that phrase. That's why we say it's a matter of language that ambulances are included; you cannot exclude ambulances unless you *say* that you exclude ambulances by a phrase like *except ambulances*.

BOB BENNETT: I agree entirely that as a matter of the conventions in ordinary discourse in contemporary American society at large, those two things have different meanings. It is far less clear to me that as a matter of the discourse that goes on between legislators and lawyers and judges, in contemporary American law, pursuing the enterprise of statutory interpretation, those two formulations mean different things. And what I'm trying to probe is, if you accept my assumption that lawyers and judges and legislators having passed this particular statute would assume that those two expressions were equivalent, why you're resistant to saying that's the meaning of them.

MICHAEL MOORE: May I just elaborate that a little bit? I think what Bob is throwing to you linguists is this: Okay, so you care about the context of the utterance, and you have this thing called conventional meaning—whether you assign it to semantics or pragmatics, it doesn't matter. Bob says: here is a set of conventions we lawyers use for the illocutionary act of legislating and now you have to make some assumptions that are not really true. So assume that we have a convention about what such sentences as uttered in that context mean. We, meaning lawyers. This is how we natives do it here, and if you anthropologists want to understand us, you will have to treat our convention as related to meaning.

GEORGIA GREEN: What's the convention in this instance?

MICHAEL MOORE: The convention in this instance would be: Look to the value served by the rule and give the word as used in its legal utterance that meaning that maximally serves that value.

GEORGIA GREEN: You should love my theory of meaning then.

BOB BENNETT: I'm just trying to figure out why you don't love it.

MICHAEL MOORE: No, no, Bob is being ironical. He's using your theory of meaning in trying to give you an application of it to "lawyer's talk," and he's saying, why don't you love it? Actually, our example from yesterday is the same,<sup>50</sup> because notice there was the same linguist's resistance to overcoming the scope limitation with regard to the word *knowingly*. There is a convention about mens rea provisions of criminal

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50. See *Problems*, 73 WASH. U. L.Q. 797, 798-99 (1995).

statutes like *knowingly* that is not just a convention; it's the law, as we say, about how they are to be construed. The law is to ignore the ordinary English syntax, to replace *if* with *and*, if that is necessary to applying the mens rea requirement of the statute to all material elements of the actus reus for that crime. That's how we do it in our culture, *i.e.*, we lawyers.

Now, Bob wants to say if we're right in our description of our culture, why don't you linguists apply your theory of meaning to say this is what the word means in the legal culture?

JEFF KAPLAN: If you use morality to disambiguate a legislative utterance, the person who makes the judgment about the morality is someone other than the enactor, someone other than the utterer. This assumes that a statute is not communicative. But it must be, because it's illocutionary. It has the effect of changing the world by virtue of being uttered. So it's got to be communicative. So I think that using morality to disambiguate a statute isn't really statutory interpretation, although that's what legal scholars call it, but rather, saying what the law ought to be or is, which is not the same thing as saying what a statute means.

KENT GREENAWALT: Could I jump in because this is directly relevant to what he says? I think the point that Michael and Fred are making has slipped by, and it seems to me it's fundamentally important. I think it is complicated a bit by talking about morality, but a communicative utterance involves a speaker and a listener. In some contexts if one is asking the meaning, especially if the listener is trying to figure out what the meaning is, he is trying to figure out what the speaker meant; so that if you're asking about what a letter meant, then we would definitely focus on what the letter-writer meant. But a very typical context, or *the* typical context for legal situations is that somebody else has to decide what something meant, somebody who is *neither* the speaker nor the primary listener.

Now, it sounds as if you all are assuming that the way the pragmatics works has got to be in terms of the intentions of the speaker. If that is a general assumption, it seems to me to be incredibly arbitrary, because there's a choice here. There is a communicative act, somebody has communicated, but there is also somebody that is listening or that makes up the audience in some other kind of sense.

One might also ask, or as well ask, "How would the ordinary listener in this situation, who was in receipt of this communication in all of its context, have taken the communication?" Now, the answer to that might be different from the answer to the question of what the speaker actually intended. I don't see how, in terms of a general theoretical level, one could

prefer one approach rather than the other. Certainly when we get down to legal analysis, it is a critical question which approach to take. This is the simple version of the question as to whether the speaker's intent is going to control. When I tried to respond initially to Michael, I thought that much of what Jerry said would survive even if one focused on the ordinary listener, and I think that's right. But is it right that all of you linguists think it's *necessarily* the speaker's intent that controls?

JUDITH LEVI: I want to respond to a bunch of things from the last five minutes.

The conventions that Bob referred to, when he refers to the mayor not wanting ambulances to be impeded by this statute, I would say, as a linguist, are not conventions about language; they're about morality or law or justice. And you have been slipping from looking at the language as language, to looking at the language as a regulatory variable, so to speak. And a linguist, *this* linguist, would still draw that line, and I will say ambulances are in that category [of vehicles]. And the reason it is a tricky question, as I said before, is exactly *because* ambulances are in that category.

BOB BENNETT: Let me just jump in here. I think we're getting at something and I think this could help. The enterprise of statutory interpretation is or could be appropriately characterized as an enterprise of giving meaning to language. Now—

JUDITH LEVI: Not merely.

BOB BENNETT: It could be characterized quite plausibly as an enterprise of giving meaning to language. Now, if one thinks about it that way, and if one observes that in the law world, one uses morality and all sorts of these fancy notions to give meaning to that language, why do you resist saying that doing it with those tools is giving meaning to language?

MIKE GEIS: You're using that triply ambiguous word, *meaning*.<sup>51</sup>

JUDITH LEVI: Because I think it's not the language you're giving anything to, it's the statute—which is more than the language. It's a social act, it's a political act, it's a legal act with legal force and linguists don't talk about legal force. We shouldn't. We talk about language. So that's why I think we're slipping from the facts of language into what people *do* with the language that expresses an act of a legislature. So that was one point I wanted to make.

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51. For Geis' explanation of this multiple ambiguity, see *Law and Linguistics Conference*, 73 WASH. U. L.Q. 825 (1995); Geis, *supra* note 32.

Secondly, the example about whether ambulances are vehicles or not is much more complicated than the question first suggests. Because what if the ambulance has brought the person to the hospital and is leisurely going back to its garage? It's not just a matter of ambulances; it depends on what they're doing, and why, and where, and when. So it's very, very specific to what exactly is happening in that case. But I don't think it's the *language* that is changing in that, and I don't think it's a *language* decision that the policeman or the judge is confronted with in trying to decide whether you ticket or you arrest or you convict the ambulance driver.

The next point that ties in with what Kent was saying is: I don't think anything that linguists can do with lawyers is controlling. And within what linguists can do, neither speaker intent alone nor audience interpretation alone nor words alone is controlling for arriving at what understanding is reached, on the one hand, and what understanding the speaker wanted the person to reach, on the other hand. It's just a very complex process. And we linguists are not saying pragmatics controls, we're not saying speaker intent controls, we are not even saying what linguists can offer, in all those domains, controls. We're saying we can help you with what linguists understand about the way language works. And then you guys take that as perhaps maximally the first step. And then you take it further, for example, turning it into regulatory—

KENT GREENAWALT: Forget about the law. With an ordinary communication, are you saying that if the ordinary listener would understand it differently from what the speaker meant, are you saying the "meaning" of what was said is what the speaker meant, or the "meaning" of what was said is what the ordinary listener would understand, or that we have two meanings and we can't really say one is *the* meaning, rather than the other?

JUDITH LEVI: What I would say about language is: I have something that I want to communicate to you, I use words to attempt to describe it to you, and if I'm working hard and I'm articulate, I will do a reasonably good job of describing or representing something that I'm experiencing or thinking. So the words are basically a picture or description, which is imperfect, of what I'm trying to describe. In fact, I'm doing this at this very moment. I'm trying to tell you what I'm thinking about language. You then have to take those words only as signals or clues, at best imperfect, to try to figure out what you think I mean. And both my description and your reconstruction will inevitably be imperfect and, therefore, there will inevitably be some mismatch. Lots of times it doesn't matter, but when it gets into court, it does matter and it becomes more visible. But the nature

of language is such that—well, the nature of language is the way I've described it, I believe.<sup>52</sup>

MIKE GEIS: With communication certainly.

JUDITH LEVI: Yes.

FRED SCHAUER: We can debate what label we want to give to the conventions that Bob describes, but let us suppose that Bob's descriptive claim, his anthropology, is right. We can call it whatever we want. We can call them conventions of morality, we can call them conventions of law, some would call them conventions of language (but many would not). But whatever they are and whatever we call them—we can call them "Ralph"—let's assume that he is right in identifying their existence. Then it is important to recognize that the conventions, whose existence Bob has identified, are the conventions that exist in the background of statements like Justice Scalia's, Justice O'Connor's, and so on. So the too easy claim that Scalia, O'Connor, Hart and Sacks and many others are making linguistic blunders may misunderstand the background conventions that inform the kinds of statements they are making.

So we come back to a question we talked about somewhat yesterday: What is this moral, political, institutional, and linguistic thing we call "law"? And does this thing exist as a sufficiently differentiated entity that it may have not only some of its own moral, institutional, and political conventions, but some of its own linguistic conventions as well? Relatedly, how do the linguistic conventions that are a part of the language that Scalia, O'Connor, and Hart and Sacks are speaking relate to the linguistic conventions of ordinary English—the linguistic conventions of native speakers of the English language who are not lawyers?

GEORGIA GREEN: Okay, what I want to say relates most directly to what Kent said, but I think it relates indirectly to what Fred is saying and also a little bit to what Bob was saying.

First, I want to address this issue of the Hydra that is the lawmaker: many heads, not all of which agree with or even understand what the other heads are saying. That's the speaker. I'm going to assume that the audience is citizens, ordinary people with ordinary understandings of how language is used. They assume—incorrectly, as it happens—that there is a thing with one mind, with one purpose, that was trying to express that purpose in that law. So they expect that whatever it is that they're supposed to interpret

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52. This description follows closely the insightful and influential analysis first provided in Michael Reddy, *The Conduit Metaphor: A Case of Frame Conflict in Our Language about Language*, in *METAPHOR AND THOUGHT* 284-324 (Anthony Ortony ed., 1979).

will have an interpretation that can be arrived at by assumptions about what it would be rational for this thing to be doing. So there is a mismatch here, but if you want to look at ordinary meaning of a statute, you could do it from the point of the addressee. It obviously is insane to try and do it from the point of view of this Hydra, and even if you tell me that it's a Hydra, that it's got a bunch of ideas, obviously I am paralyzed; I cannot figure out—I have not got a strategy for figuring out what it could mean under those circumstances. I just can't do anything at all.

When people say that the Congress makes the law, and the court says what it means, the court gives meaning to it—if you put it that way, then again I have a real problem trying to figure out what this Hydra or its individual heads could think they could be doing in making a law in circumstances where they didn't know what it meant. I presume that each of the heads in this Hydra thinks it knows what the law is and maybe has beliefs that the other heads think it's the same thing.

FRED SCHAUER: One possibility—I basically think you're right—but one possibility is that we have here something that looks like, although I'm slightly misusing the term, Hilary Putnam's division of linguistic labor.<sup>53</sup> One of the things that could be going on is that there could be a convention such that the heads of the Hydra or some of the heads or one of the heads are in some way delegating a certain kind of responsibility to someone else, for example, judges. It might be that a complete or partial delegation of interpretive responsibility is a part of every legislative act. Not everybody would agree with that statement, but many would. In any event, the notion of delegating some of the responsibility for "completing" the meaning hardly seems preposterous. When Congress prohibits "contracts, combinations, and conspiracies in restraint of trade," it does just what Georgia seems to think is unthinkable.

KENT GREENAWALT: There would also have to be delegation at the legislative stage, because in a multi-page statute, virtually no actual legislator has read the statute and tried to figure out in any detail what's done, so you really would have to think that the heads of the Hydra are also delegating to the draftsman and committee members how to deal with the specific problems.

GEORGIA GREEN: Okay, suppose that's true. What that means is when the Congress as an entity passes a law, it's saying, "Here's some language,

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53. 2 HILARY PUTNAM, *The Meaning of "Meaning"*, in *MIND, LANGUAGE, AND REALITY* 227-29 (1975).



it means whatever the heck you the court say it means.” And I just think this is not a plausible view.

FRED SCHAUER: That does not follow from what I said. To suppose that the delegation of interpretive or meaning-creating authority *within a range* entails that courts can do whatever they want is to make a logical mistake. It is entirely possible for Congress to give a degree of freedom within boundaries without giving up on the idea that the boundaries guard against what Georgia fears.

BILL ESKRIDGE: I want to continue Bob’s point, respond to the Hydra metaphor, and conclude with a caveat. You can look at the canons of statutory construction as an interpretive regime that has been created by our courts over the centuries and that can be set forth systematically. Phil Frickey and I actually collected the canons as an appendix to the Foreword in the *Harvard Law Review*<sup>54</sup> last November. But you could have done it at any point in our history.

Who is the audience for the canons? It seems to me the audience for the canons is not only other judges, but also Congress and the population. Now, if we are taking a conventional approach to meaning in the treatment of statutes, the Supreme Court has been saying for 200 years to Congress “When you pass statutes, you can safely assume that these are the conventions that are going to be brought to bear in interpreting the statutes [that you pass].” For example, the rule against absurd consequences is the canon you would apply to the ambulance hypothetical. And there’s nothing new about that; it is a well-known canon. The leading case, *Church of the Holy Trinity*,<sup>55</sup> is over 100 years old. In the pornography case,<sup>56</sup> the canon about mens rea is also very old and well known. If Congress and also if the population have been told that for 100 or 200 years that the statutes passed by the legislature will not be interpreted to produce absurd consequences, or that criminal statutes will be interpreted to have a mens rea requirement, as a matter of purely *conventional* meaning you ought to read statutes in light of these canons. That’s point number one.

Point number two is that looking at the canons as an interpretive regime is the way Scalia seeks to solve the Hydra problem. Scalia solves the Hydra problem by saying we don’t care about the Hydra problem, because both houses of Congress have to vote on the statute; they have to vote on the

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54. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

55. *Rector, Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

56. *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

same thing and then present it to the President. Scalia says they are then bound by the language they voted on. And when he says that, he explicitly means the language as it would be interpreted in an ordinary way by reference to dictionaries, ordinary usage, and the canons. Significantly Scalia is the biggest user of canons on the Court.

So the way that Scalia and many other lawyers in various forms solve the Hydra problem is by saying we don't care about the actual intent of the legislature. We care about the conventional intent, and we hold them to what we've been telling them for 200 years. They're fools if they haven't paid attention to it, because those are the background assumptions just like dictionaries and other things that might be used. Okay, that's point number two.

JERRY SADOCK: Clarify your term *conventional intent*.

BILL ESKRIDGE: I think "conventional intent" would be the intent we attribute to a body that has promulgated this language.

JERRY SADOCK: I don't see how there's any "convention" involved in that.

BILL ESKRIDGE: The "convention" would be the canons' interpretation. For a criminal statute we interpret the statute to have a mens rea requirement ordinarily.

JERRY SADOCK: That's it, "interpretation"; that's not "convention."

BILL ESKRIDGE: It's a convention—

JERRY SADOCK: "Convention"—you use a certain interpretation or interpretive strategy, but when we linguists say "convention," we mean something very, very different.

GEORGIA GREEN: I wonder if the canons are conventionalized implicatures.

BILL ESKRIDGE: My third point is that once the law professors insist on talking about the canons, the linguists should not be fooled into believing that the canons are objective or scientific or determinate, in these cases.

JUDITH LEVI: Don't worry about that!

BILL ESKRIDGE: You are aware that Karl Llewellyn's critique<sup>57</sup> is the most cited law review article in history probably, and it's still more or less the conventional wisdom among law professors. So I don't want to oversell

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57. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-406 (1950).

the canons and do want to remind us of the standing critique that Karl Llewellyn has given us.

CLARK CUNNINGHAM: We're about to break for lunch, and I'm going to make a concluding remark. Something that Kent said suggests to me a different direction for the afternoon session. So I want to give people time over lunch to think about whether we'd like to take this in a different direction. Kent's comment was that one could—instead of looking at the intent of the speaker—ask how the person who *heard* it, understood it. One could have a rule that said for *vehicles in the park*, we start by asking what do the people who use Lincoln Park think it means? And it seems to me that linguists could approach that as an empirical question and give us some information about what people who typically use Lincoln Park think *All vehicles are prohibited from the park* means. It would be a normative question as to where that fits into the job of the lawyer. But instead of asking "What does the mayor mean?" which is hard for linguists to do, you can say "What do the people understand it to mean?"

KENT GREENAWALT: That's actually what an appellate court does when it reviews jury instructions.

CLARK CUNNINGHAM: Yes. I was about to give three examples in the law where audience understanding does seem to be the standard. Jury instructions, number one; what we care about is not what the judge intended when he gave the jury instructions, but what did the jurors understand them to mean? Defamation is the second example; not what did I intend when I uttered it, but what was it likely that the person who heard it understood it to mean? And third, much of contract law.

BOB BENNETT: That's correct.

CLARK CUNNINGHAM: So that in the law there are some areas where the threshold question looks like it might be amenable to the empirical work that linguists do. Okay, that's something to think about; that would be a different way to talk to the linguists.

And the second related thing—we've been preoccupied with judges. But of course lawyers produce legal language mostly in the private sector by writing contracts, wills and the like. And as a producer of legal language, I am primarily interested in how the people who read it understand it. I would like to know what those people will think it means. As a producer of legal language, I definitely want to eliminate ambiguity if I know it's there. So if I received some evidence that *all vehicles in the park* might mean paint cans, then I would like to eliminate that before I promulgate it. I think I generally want to maximize generality and minimize vagueness, and it's hard to do both. A linguist could definitely help me eliminate

unintended ambiguity, and might help me maximize my generality and minimize my vagueness. So those would be different ways for our discipline to talk to the linguists. It's a different setting than consideration of the judge's task. I throw it out now over lunch to see if other people would be interested either this afternoon or before we depart in putting it in that context.

### 3. *The Meaning of Meaning: In Law*

CLARK CUNNINGHAM: We'll start by doing the thing we said we would do this morning and didn't do, which is have the law types talk about what a theory of meaning might look like in legal theory, with some effort to indicate if there are different approaches within legal scholarship to that question. After that there are two things; the first is the plain meaning/ordinary meaning/literal meaning project. I don't know quite where we stand on that, if we need to return to it or not. I had some sense that there was interest by both lawyers and linguists in what could be called the front-end issues, which might be jury instructions or writing contracts or even writing statutes. That is, what connection is there between our disciplines when you are producing the language rather than trying to interpret what has already been produced? Fred, I think, is willing to take the hot seat that Georgia started off in this morning.

GEORGIA GREEN: Could I say something about the agenda before we get too far? Kent suggested that it might be useful to talk about what it means to be a theory of anything in the legal field. I just wanted to toss that over to you to decide what to do about it.

CLARK CUNNINGHAM: Which kind of relates to—before the day is over let's see if we can also get a fairly clear statement of why linguistics considers itself a science.

FRED SCHAUER: Clark asked me to put on the table some issues that haven't yet been put on the table. One of them is the question of what a theory of meaning might look like from the perspective of legal theory.

To some extent I'm going to take a pass on that, in part because we have talked a fair amount about theory-of-meaning kinds of issues, and in part because once we think of issues of legal theory, a great deal seems to turn on the question of whether there is something called a theory of *legal* meaning that is different from the theory of meaning. And that leads to much of what we were talking about this morning. So in a minute, I'll hand off to Michael, to see if he wants to give one or more theories of meaning.

I do think that a large question is whether a theory or theories of meaning imported from elsewhere will dominate the question of legal

interpretation. That is not that different from the question we finally wound up talking about this morning: Is there a theory of legal meaning that incorporates the normative dimensions of what legal systems ought to do? If there is a theory of *legal* meaning, is it a theory of meaning that incorporates the goals of a legal system—recognizing that the goals of a legal system are, of course, contested?

A great deal of talk this morning illuminates a division. Some people who do legal theory talk about theories of legal meaning that presuppose and incorporate certain goals of the legal system. Whether there can *be* a theory of legal meaning is a big and interesting question. I would be happy to have an afternoon of discussion about various different nonlegal theories of meaning, and about their implications for law.

First, we are discussing various accounts of interpretation, but the accuracy of any given account (or theory, if you prefer) varies with the part of the legal system the provider of the account seeks to explain. This weekend we seem to be spending most of our time discussing courts. But many people believe that accounts of what courts do or should do in statutory interpretation cases address a different problem from that arising when the interpreters are not judges but rather the person in the street, the cop on the beat, or a legislature, for example.

The difference between the interpretive tasks of judges and the interpretive tasks of other addressees of legal rules becomes especially important in the context of what economic analysts of the legal system call the selection effect. They have recognized that it is rare for people to litigate cases unless they believe that there is some chance of victory. Consequently, the cases that wind up in court, and even more the cases that wind up in appellate courts, are disproportionately likely to be those cases in which both sides think that there is a plausible chance of their winning. The result of this is that within the set of legal events or legal conflicts the subset of appellate cases represents quite a skewed sample. Because of the operation of the selection effect, cases in which there is a moderately determinate answer (irrespective of the source of the determinacy) tend to drop out (by non-dispute, or by non-filing, or by settlement, or by non-appeal) earlier in the process, leaving for appellate courts a field disproportionately dominated by legal indeterminacy. It is therefore important in these discussions to make clear whether descriptive accounts or prescriptive theories addressed to appellate courts are applicable, and if so how much, to other domains of statutory interpretation.

Relatedly, it may be important to be tighter than we have been so far in distinguishing the descriptive from the prescriptive. I believe that most of

the legal theorists in this room have a moderately similar *descriptive* view about the American legal system, and about the way that American courts address questions of statutory interpretation. For example, most of us believe that American courts are more likely to use multiple sources—formal legal, informal legal, political, economic, moral, etc.—than are the courts in most other countries. And I think most of us believe that American courts are more likely to set aside plain statutory language in the service of statutory purpose, or in the service of larger systemic, moral, pragmatic, and political goals, than are courts in most other countries. Thus it is moderately well-accepted that statutory interpretation in the United States tends to be, and has been for some time, a more dynamic, creative, and aggressive process than in most other countries, although this is of course a matter of degree.

Prescriptively, however, there are larger differences about questions of what judges ought to do, or, to put it differently, whether judges ought to do what they are in fact now doing. People who are pejoratively labelled as “formalists” or “textualists” (and the two are not the same) tend to believe that conventional meaning and formal legal sources ought to play a somewhat larger role (or have somewhat heavier weight) in questions of statutory interpretation than is currently the case in the United States. This view is commonly caricatured (since I hold the view, I am hyper-sensitive to the caricatures), but its essence is that the conventional meaning of the marks on a printed page, at certain times and in certain places, ought to make more of a difference than is now commonly the case.

There is another pejorative label out there—“originalists,” sometimes “intentionalists”—and those who subscribe to this view tend to believe that in cases of vagueness or ambiguity in a statutory text, the mental states of the authors of that text, at the time they wrote it, ought to be given something between heavy and conclusive weight. The strongest version of this view would take those mental states as superior to even a contrary conventional meaning of the text itself.

And mixed into all of this is the question of precedent. Most of what we have been talking about in the context of statutes or constitutional provisions could also be applied to questions about prior judicial decisions. Because a regime of precedential constraint entails granting past decisions authoritative status, questions about how to interpret what some court said ten years ago look like the kinds of questions we are considering here. Indeed, given that most judicial decisions are even messier than the messiest of statutes, the problems are compounded. Still, there is a similarity between the problems that arise in the context of interpreting ten

pages of statutory text and those that arise in the context of interpreting a ten-page opinion in a particular case.

Now of course there are also defenders of the current American approach, an approach that goes under a number of labels.

CLARK CUNNINGHAM: Dynamic?

JUDITH LEVI: Multidimensional.

FRED SCHAUER: I don't think the label is important. But in contrast to more text-based approaches, or more intentionalist approaches, consider the argument made by now-Judge Guido Calabresi in *A Common Law for the Age of Statutes*.<sup>58</sup> He argues that statutes may at times become obsolete, even if and when they are neither vague nor ambiguous. And he then goes on to maintain that it is plausible to empower American judges to engage, essentially, in an interpretive outlook that involves updating these obsolete statutes. Now the important point here may not be whether Calabresi is right or wrong. Rather, the fact that Calabresi took this position when he was Dean of the Yale Law School, and the fact that taking this position did not disqualify him from becoming a judge of the United States Court of Appeals for the Second Circuit, says volumes about the respectability of a position that many people, especially outside of the United States, would find extreme. Thus, giving judges the power to ignore the plain meaning of an obsolete statute is at least within the playing field of American legal argumentation, although it might not be elsewhere. And then the question arises as to the materials and perspectives that provide the purchase for the decision to update. Some would call upon efficiency, others on morality, others on political pragmatics, but it is clear that this is an approach that is more open-ended than one more tightly tied either to conventional meaning of the text or to the best evidence we have of the mental states of the authors of a piece of statutory text.

All of this is best captured in the work of Ronald Dworkin.<sup>59</sup> Arguing partly descriptively and partly prescriptively, in an attempt to justify and ground an existing practice, Dworkin relies on cases like *Riggs v. Palmer*<sup>60</sup> to show the longstanding permissibility of an approach to legal interpretation that does not treat the conventional meaning of the formal

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58. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

59. See, e.g., RONALD M. DWORKIN, *LAW'S EMPIRE* (1986); RONALD M. DWORKIN, *THE PHILOSOPHY OF LAW* (1977); RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

60. 22 N.E. 188 (N.Y. 1889).

legal text as lexically prior to all other interpretive sources.<sup>61</sup> Rather, for Dworkin legal, moral, social, and political norms are part of a relatively undifferentiated whole. If Dworkin is right, to suppose that the standard meaning of statutory terms is or should be the dominant or conclusive factor in statutory interpretation is to be dramatically at odds with existing understandings. So one way to understand our discussions over these few days is to consider whether there is a unique domain of the legal in terms of the permissibly usable interpretive sources. This is an understanding that may lie behind what many of the linguists here believe to be the case, but the work of Calabresi, Dworkin, and many others makes it clear how different this is from existing American practice.

CLARK CUNNINGHAM: What about what I would roughly call critical legal studies? That theory of meaning is worth reporting, isn't it?

FRED SCHAUER: There are a number of branches of Critical Legal Studies. Two might be worth noting here. One is Critical Legal Studies as the contemporary extension of Legal Realism. That is, Legal Realism earlier and some branches of Critical Legal Studies now maintain that the primary feature of judicial behavior is something internal to the judge. For Jerome Frank it was psychology, broadly speaking.<sup>62</sup> For many people in Critical Legal Studies it is more likely to be ideology. For people like Llewellyn it is more likely to have been a personal view about policy.<sup>63</sup>

Both Legal Realism and Critical Legal Studies believe that this something that is, in some rough and ready way, internal to the judge is the laboring oar (descriptively) in explaining what judges do. Therefore, external instructions, whether it be canons of interpretation, statutes, constitutional provisions, precedents, or the importunings of law professors, make very little difference in what judges do, as a descriptive matter. The claim is that there is in American legal materials enough wiggle room that judges can reach a very wide range of decisions, and enough seemingly authoritative sources out there that when judges reach decisions, on whatever grounds they want to reach them, they can then festoon the decisions with the appropriate number of precedents, statutes and everything else, such that the decisions appear externally determined even though they are not.

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61. For a discussion of the term "lexically prior," see JOHN RAWLS, *A THEORY OF JUSTICE*, 42-45 (1971).

62. *See, e.g.*, JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

63. *See, e.g.*, Llewellyn, *supra* note 57.



Another branch of Critical Legal Studies embraces, broadly speaking, postmodern or deconstructionist or related ideas about language.<sup>64</sup> They subscribe to a view about language that is far more skeptical about the potential determinacy of language than would appear comfortable to anyone now sitting in this room. The soundness of this would fuel an interesting discussion, but it is probably not the one that we want to have with the people actually here in this room, since none of us subscribe to something too close to this view. Still, if you believe that language does not have the ability to constrain, then it is even easier to say that a whole range of internal factors govern legal interpretation.

CLARK CUNNINGHAM: The only thing I would add to that last point before we go to Michael is that although there is no one in the room who actively subscribes to this—though, Bill, there is some use in your Stanford article of the postmodern tradition<sup>65</sup>—you can pull down any of the top five or ten law reviews in any given month and find an article written in this vein—that generally asserts that judges do what they think is best and are not constrained by statute, constitution or precedent or canons. And then they make the move that that situation is inevitably so because language is, in fact, so indeterminate that you can not use it to constrain judges. If linguistics has some insights about that point, they would not be irrelevant to legal theory. It's one thing for some of us to say on the radical indeterminacy claim, "Oh, come on now!" But it's another to have a rejoinder that's other than, "I don't find that an appealing assertion about the nature of language."

FRED SCHAUER: I am just trying to give a map of the contemporary terrain. We have spent the morning having quite interesting discussions about literal meaning, conventional meaning, ordinary meaning and so on. But to draw an accurate map of contemporary American legal theory we have to include a group of people who would think that expressing any

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64. See, e.g., Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994); Robert L. Hayman, *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 20 HARV. C.R.-C.L. L. REV. 57 (1995); Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 TENN. L. REV. 69 (1993); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. ILL. L. REV. 1095; Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992).

65. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

sympathy for the notion that there is such a thing as literal meaning is ample evidence for not taking seriously anything else the sympathizer had to say.

MIKE GEIS: Do those people provide argumentation based on hosts and hosts of statutes that demonstrate that they are hopelessly indeterminate or do they just make this assertion?

FRED SCHAUER: Like most academic arguments these positions are caricatured, and there are more and less sensitive versions, and more and less sound versions of the indeterminacy argument. The most serious versions of the indeterminacy argument make (or should make) the following claim: Lawyers and judges and legal scholars have traditionally overestimated the constraints in legal interpretation. They have overestimated the constraints of precedent, they have overestimated the constraints of statutory language, and they have overestimated the constraints of particular legal styles. A useful corrective, therefore, is to underestimate these constraints, or at the very least to point out the way in which these external constraints have been overestimated. A strong piece of evidence to support this claim is the typical judicial opinion, which is written very heavily in the language of discovery, very heavily in the language of inevitability. Most judicial opinions mask the degrees of freedom that the judges in fact have. That overwhelming feature, to me, makes it quite important to take seriously the claims of those who, regardless of the language that they use, seek constantly to remind us of the legal system's proclivity to overestimate its own determinacy.

CLARK CUNNINGHAM: Is it fair to say that your article, *Formalism*,<sup>66</sup> and your book, *Kent, on objectivity*<sup>67</sup> are to a certain extent a response to this position?

KENT GREENAWALT: Yes.

FRED SCHAUER: Yes.

CLARK CUNNINGHAM: Okay. Bill.

BILL ESKRIDGE: I want to present a different view of what I would call critical theory. And I want to start out with a caveat that almost none of it is about statutory interpretation. Most critical theory is about general jurisprudence, constitutional interpretation, and common law interpretation. So it's not fair, in my opinion, to make strong characterizations about

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66. Frederick Schauer, *Formalism*, 97 YALE L.J. 509-548 (1988).

67. KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992).

critical theories of interpreting the sorts of devices we have been talking about. And I think all that we say should be very provisional.

There are several dimensions to critical theory, even if we speak provisionally. One dimension is what Fred is characterizing as a more sophisticated revival of some themes of legal realism. The legal realists maintained that more was going on in judicial decisions than simply the raw analysis and deduction and that very often legal interpretation, indeed, was the personal view of the judges; critical theory, I think, has deepened this in ways that we cannot summarize adequately. But what I would insist upon is that critical theory is not just an exposure of the judge's personal politics—a liberal judge is going to be a bleeder on certain issues and a conservative judge is going to be stingy on some issues. It is an important pervasive analysis of ideology.

What is called Critical Legal Studies often tends to emphasize a Marxian<sup>68</sup> or Gramscian analysis,<sup>69</sup> but the more current branches of critical theory reflect criticisms of ideologies of racism, of sexism, of what you might call heterosexism. The critical theory you often see in the law reviews today is feminist critical theory or gay and lesbian critical theory.<sup>70</sup> The different *kinds* of critical theory is a complexity we need to be aware of.

Since no one in the room writes in this vein, it's impossible for any of us to summarize the deconstructive features in critical theory. But I would say that many critical theorists either consciously or unconsciously are taking up the continental European deconstructionist views of the death of the author, the denial of causal cause/effect relationships, and an insistence upon the contingency of the relationship between words and things out there. And this is a very large chunk of legal academia.

I take it by the expressions of remorse, and by the surprise and dismay on the faces of my colleagues in linguistics that there is not as lively a critical movement in linguistics.

JUDITH LEVI: It's just as lively but it ain't that one.

CLARK CUNNINGHAM: That's helpful. It was tempting to caricature. That was a good corrective.

BILL ESKRIDGE: One other thing I might add is that critical theory has lessons even for the Kent Greenawalts, the Fred Schauers and the Bill Eskridges who are all fairly conventional theorists compared to the critical

68. See generally RAYMOND WILLIAMS, *MARXISM AND LITERATURE* (1977).

69. See generally ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971).

70. See, e.g., William N. Eskridge, Jr., *Gaylegal Narratives*, 46 *STAN. L. REV.* 607 (1994).

theorists. Critical theory actually, I think, has potential for influencing statutory interpretation if critical theorists ever turned their eyes in that direction. The analytical techniques and the argumentative techniques that critical theory has brought to thinking about common law, and to some extent constitutional law, are very powerful. People like Gary Peller and Catherine MacKinnon (to name just two of many examples) and the arguments that they bring to bear have influence way beyond people who are critical or leftist theorists and indeed saturate legal academe over time.<sup>71</sup>

MIKE GEIS: Does it influence the courts at all?

BILL ESKRIDGE: It's hard to trace a direct influence in the courts. Yet I think it infiltrates the court system at least through law clerks. Which is to say that you are not going to see Chief Justice Rehnquist becoming a post-modernist or Justice Stevens turning to deconstruction. On the other hand, many of their law clerks are from schools where they have been taught by these fancy theorists who use analytical techniques that are taken either directly or indirectly, consciously or unconsciously, from critical theory.

CLARK CUNNINGHAM: Fred, what's the opening line of your 1990 *Supreme Court Review* article?<sup>72</sup>

FRED SCHAUER: "The Justices have not been reading their Derrida."<sup>73</sup> This article was a descriptive claim about Supreme Court statutory interpretation practice in cases perceived by the Justices to have relatively low political, moral, or emotional stakes. As a descriptive claim I argued that notions of plain or ordinary or literal or conventional meaning seem to be playing a larger role in those cases than they had in the past. Consequently, quite pre-modern conceptions of language seemed to be more important in the field than many legal scholars supposed, which is

71. See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); Catharine MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994); Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. (1991); Catharine MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1982); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231 (1993); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

72. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

73. *Id.*

why I started the article, “The Justices have not been reading their Derrida.”

CLARK CUNNINGHAM: But the fact that you would begin the article that way says something about the current discourse. People understood what you meant, the reference to Derrida, the fact that that was considered kind of a clever thing to say.

JUDITH LEVI: Well, some people reading this article might have just *pretended* to understand it because they might not want to reveal that they don’t know a flying fig about what that meant, but they certainly weren’t going to reveal it because it’s “in” to know it.

MICHAEL MOORE: I can’t resist just a brief commentary on the critical folks. I actually think the discipline of law, fortunately, is not so permeated with followers of Habermas, Derrida, Gadamer et al., and I actually think it’s a passing phase but we’ll see if that predicts or not. I actually think, in Bill’s case, it’s a pleasure to see that his work is uninfluenced by what he thinks it’s influenced by. Because he is much better than the Gadamer he cites and I think that’s terrific. But he obviously wouldn’t agree with that reading as complimentary, as it’s intended to be.

KENT GREENAWALT: He might think he’s better than Gadamer although Gadamer is terrific.

CLARK CUNNINGHAM: But he wouldn’t say so.

MICHAEL MOORE: One of the things, actually, the American Academy of Arts and Sciences is doing next month is assessing interdisciplinary disagreement with specifically the challenges of the post-modernist view in various disciplines. And they have got a sort of Noah’s Ark, two from each discipline, that is going to assess the state of things. There is a general concern about all disciplines and the extent to which they disagree so much that they can hardly talk to each other.

And I think linguistics, from this conference, is looking pretty clean as opposed to say, cultural anthropology, which you could have looked like, but you don’t. And that’s kind of nice.

MIKE GEIS: If you brought some linguists over from Europe you would have this problem replicated.

MICHAEL MOORE: Sure. Let me say something about theories of interpretation in law and then about what meaning is in law—I guess that’s what we’re supposed to say something about, to correspond with what the linguists gave us this morning.

In terms of theories of interpretation, there are two sorts of theories, one descriptive and the other normative. When I teach a theory of interpretation I usually teach what I think of as a normative theory, that is, it’s recom-

mentary. I can recommend to the judges (and to lawyers who argue to judges) how they ought to interpret legal documents. You only succeed at that if the content of such a normative theory at least resonates with the descriptive practices judges actually employ.

But one of the beauties of running seminars for judges is that if you do it long enough, your recommendations—if they sell—become descriptively true. So we actually get a little more control over our data than most social scientists. Our recommendatory theories can become descriptive theories if we keep at it long enough and say the same things.

A second basic distinction is this one: with regard to a normative theory there's two different ways to take it, and this actually has an impact on some of the things that Jerry and Judith were saying this morning. You can take it as recommending what are the right making characteristics of a judicial decision. What is it that makes it a correct judicial decision? What makes it such that you ought to reach it? Call those the right-making characteristics as opposed to the psychological recipes about how to reach those results.

There's two different recommendations you might make about any vacation: one is where to go and the other is how to get there. The right-making characteristics are where to go and the psychological recipes are how to get there. They don't have to be the same.

I'm going to give you ten possible ingredients to the theory of interpretation but they might not be ones that judges should pay conscious attention to in their decisional processes. Why does that matter? Well, because when Jerry says you inevitably have to look to the purpose to understand the meaning of the sentence we had on the board, psychologically that could be true, and yet you might have good theoretical reasons to pry the two things, purpose and meaning, apart.

Suppose you care very much about whether judges are being guided by language or whether they are being guided by their moral judgments. You want to pry apart something that psychologically, perhaps, won't be pried apart, given the way people actually make decisions. You'll want to do that for your own theoretical reasons; for example, to make an assessment of how much of judging is moral theory and how much of it is something else, say, linguistics. You might want to do that in linguistics itself if you have your own concerns. Anyway, these two distinctions are about all I want to say preliminarily about a theory of interpretation as such.

In terms of what meaning is for lawyers, I find it fruitful to distinguish the meaning of the text in Bob Bennett's sense where you view the law as itself having meaning, which means we lawyers are going to do lots of

things that violate all sorts of linguistic canons—as opposed to the meaning that is only an ingredient in legal meaning, which is the stuff that, I think, linguists tell us about.

Meaning in your linguistic sense, I see to be an ingredient in meaning in our lawyerly sense. I usually call the latter “interpretation” just to distinguish the two. So what I recommend to judges to do, I call a theory of interpretation. One of the ingredients in that theory of interpretation I call a theory of meaning. One of the things, but only one of the things, judges should look at when they construct an overall theory of legal interpretation is the meaning of the words and sentences in the linguistic sense of *meaning*.

Let me run through the ingredients, and perhaps the distinction becomes clearer. The first four things I mention I take straight out of my theory of communication.<sup>74</sup> First, you look to speaker’s meaning in two different potential senses, namely, what you might call the locutionary intentions (what the speaker meant) and the perlocutionary intentions (what they meant to achieve).<sup>75</sup> I ignore the illocutionary intentions because I don’t think they have any interpretative import although there is an illocutionary intention of legislative speakers too. Two different sorts of intentions. They might have meant something in the sense of a concept different than the ordinary meaning of the word employed, and they certainly meant to achieve something (if they’re rational) with their statute. That’s the “significance” that Mike Geis likes to talk about. So that’s the first possible ingredient in an overall theory of legal interpretation, the intentions of the speaker.

The second possible ingredient is what you might call the semantics in your sense, although I think it’s a little broader, it includes compositional semantics so it’s going to include syntax. It’s going to be what I think of as, and what I called earlier, *type meaning*; it’s the meaning that the sentence as a type could have in the natural language of English. Ordinary meaning, I think, is what many of the Justices refer to as that second

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74. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 288-291 (1985).

75. Moore’s distinctions between three kinds of intentions—locutionary, illocutionary, and perlocutionary—are built upon but differ from the three distinctions among acts (locutionary, illocutionary, and perlocutionary) originally made by language philosophers. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1965); see also Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 246-56 (1981)

possible ingredient. I think there are at least four competing theories about what meaning is, but that's a longer discussion.

The third possible ingredient is what I would think of as the pragmatics of statutory and constitutional utterance. Let me just leave it at that. I actually divide up pragmatics; part of it I recommend to judges to look at and part I recommend they ignore.

MIKE GEIS: Excuse me, could you actually spell out what those two parts are? I'd be interested in that.

MICHAEL MOORE: Well, in an earlier article<sup>76</sup> I tried to articulate what I call *essential context*. Essential context deals with: indexicals if you get them, which fortunately in statutes you don't very often; ambiguous predicates; pronouns, if you don't have clear cross reference; idiomatic speech that is so well established that, although you might assign it to usage rather than to semantics, you still ought to take it into account. That last one is a sloppy one. Roughly, however, that is what I think you should look to as pragmatics in legal interpretation.

As opposed to the non-linguistic context in which this particular speech act of legislation took place, which would be what often is referred to as legislative history, that is, what was going on in society at the time the legislature acted. *That* I recommend they not look to. Short answer.

The fourth thing—if it differs from the first three, which it could, although it usually doesn't—is audience understanding. If communication succeeds, you ought to have some audience understanding that tracks what the speaker meant. But I've been playing on situations where it fails, as it obviously can, and that's why it's a potentially distinct ingredient. You could look to audience beliefs different in content from both speaker's intent and from sentence meaning.

Most people distinguish two different audiences for statutes, citizens versus judges, and some people distinguish rules by the audience appropriate to them. The ones for citizens they call *conduct rules*, the ones for judges they call *decision rules*. And the problem about decision rules is that citizens sometimes eavesdrop, that is, they listen in to rules they shouldn't really hear but that they can hear because they're out in the public domain. So anyway, you have the beliefs of the audience, whoever that is, with which to interpret a particular norm.

That's four things that, I think, come pretty straightforwardly out of a theory of communication. Some things peculiar to law are the following:

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76. Moore, *supra* note 74.



Number five, hypothetical intentions. What would the speaker have meant had the speaker thought about the question? This is sometimes called "imaginative reconstruction." We have some famous ancient and some modern purveyors of that notion.

The sixth thing: you can actually ask the present sitting legislature. Wade McCree, when he was Solicitor General under President Carter, suggested that for tough issues of statutory interpretation, courts should not guess at what the legislature actually meant when they passed the statute or even what they would have meant if they had thought about it. Rather, courts should ask the ones sitting over there in the legislature now what they would like done. The sixth possible ingredient.

Seventh is what lawyers often call purpose, in the sense of function, not of motive. This purpose is the value served in some overall system of values by a rule of this kind.

JUDITH LEVI: "Sense of function" is what?

MICHAEL MOORE: In the sense of function, not of motive—*purpose* as a word is ambiguous between 'function' and 'motive.' Take the purpose, for example, of the rule prohibiting vehicles in the park. You look at that rule and ask, What could that be for? "What's the rule's function?" That is not to ask what the speaker meant to achieve by it, nor is it the motive with which the statute was passed. Rather you, the judge, must make a moral judgement. What's a good value for a statute of this kind to serve?

Number eight is what I call "the safety valve question." This calls for an all-things-considered value judgment, not merely a judgment about the value served by this statute. The question: Is this too damn dumb an interpretation to live with? That's what I call the safety valve question. *Absurd* not in the sense of 'contrary to purpose in this statute,' but absurd in general. I'll give an example in a minute.

Nine, prior interpretations by other courts. And ten, a great big grab bag including all sorts of presumptions or tie-breaker rules including some that we've talked about and some that we haven't.

MIKE GEIS: Are those the canons of interpretation?

MICHAEL MOORE: Canons fit there but you also have whole bunches of other things that do as well. You can have tie-breakers such as those calling for deference to the expertise of lower courts or of administrative agencies. You can even have a default rule that makes burden of proof allocations with regard to the law and not just with regard to the facts.<sup>77</sup>

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77. See, e.g., Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U. L. REV. 859 (1992).

For proof of foreign law we have such a default rule. The suggestion is that we could have it for domestic law too. By such a rule, one side in a law case has to prove that there is law entitling that side to recover, and if the court is in equipoise on that question, then the side that has that burden loses. You can have that kind of a default rule for legal meaning as well.

CLARK CUNNINGHAM: The rule of lenity is a little bit like that as well, isn't it?

MICHAEL MOORE: The rule of lenity is like that. In criminal law cases, if it's not clearly prohibited, it's permitted. This is with regard to half the criminal law, the conduct rules but not the decision rules.

Now, notice how much is in an overall theory of legal interpretation that is *not* linguistics. This doesn't mean linguistics wouldn't have a place in a theory of interpretation that included some subset of these ingredients. Even if such a theory used all of them, there would be a place for linguistic knowledge that lawyers would want to utilize. It may turn out that in many instances you will want to overrule what linguistics tells you, even though linguistics is something you always consider.

KENT GREENAWALT: Could I just add a small comment to what Fred said? I thought what Fred, Bill, and Michael said was very clear, and I agree with it. There was one thing that could have misled someone in what Fred said. He is right that the same questions arise about precedents that arise about statutes. But nobody thinks that the language of a precedent, insofar as it covers other situations than the one that is before the court, has quite the same authority as the language of statutes. So one shouldn't think that anybody within the law believes that treating precedents is quite the same as treating statutes.

FRED SCHAUER: I think that's right, although it might be worthwhile to note that actual language and direct quotes in prior opinions have more purchase in legal argument than most legal theorists recognize. But still I wouldn't disagree with what you just said.

JUDITH LEVI: I just want to say that what has been described so far would correspond, I believe, more to what linguists might characterize as approaches to interpretation or recommendations for interpretation but not as a *theory* of interpretation in the way that we use the word *theory*. And I look forward to hearing whoever it is that Clark will call upon to talk about linguistics as a science in order to clarify more what we mean by *theory* in a more technical sense.

We recognize that everybody can use the word *theory* in a broader sense, as in *I have a theory about why the newspaper didn't arrive this morning*. We can all use it in that broader sense. And I think Michael's careful

distinction between descriptive and normative commentaries and between descriptive and normative analysis is helpful. But what he has told us he tells judges about how he thinks they should go about interpreting does not constitute a theory in the technical scientific sense, the sense that we use in linguistics when we say linguistics is a theory building enterprise. That's a little preview of an important distinction.

MIKE GEIS: I was just wondering, you said the part of pragmatics that you suggest they ignore is the historical background of the statute yet you concern yourself in the first part with speaker meaning.

MICHAEL MOORE: I have to erase that possible ingredient. You're right, it would be rather inconsistent to care about speaker meaning if you didn't care about the non-linguistic context.

MIKE GEIS: The legislative history, yeah.

MICHAEL MOORE: What I actually recommend to them is that they ignore the attempt to find legislative intent in any psychological sense at all. A truly historical sense of legislative intent would be the historical intentions of those who passed the bill. This I recommend they give up.

JEFF KAPLAN: You began by distinguishing between meaning in the linguistic sense as the sort of meaning that a document or text might have, and the meaning of the law. Well, "the meaning of the law" seems to use a different sense of *meaning* from "the meaning of a text or discourse."

Your first four sorts of meaning, which you said seem to be linguistic meaning, do indeed seem to be. Then why do you—I'll say this is as tendentiously as I possibly can—why use the term *meaning* for that second kind of meaning?

CLARK CUNNINGHAM: Five through ten?

JEFF KAPLAN: Yes.

FRED SCHAUER: You can be more tendentious than that.

MICHAEL MOORE: Well, as I said I actually don't. What I call it is a theory of interpretation.

JEFF KAPLAN: I think that's just as mistaken because it's an interpretation of what?

MICHAEL MOORE: I don't want to quibble. I think you have another sort of linguistic necessity operating for you, which is that *interpretation* means recapturing speaker meaning. Fine. If you want it, you can have the word *interpretation*. "Application of law" will do for me.

JEFF KAPLAN: I'm much happier with that. It's application of the law—

MICHAEL MOORE: As long as reference succeeds, I don't want to quibble with the label.

KENT GREENAWALT: How about *construction*?

JEFF KAPLAN: Well, construction of what? *Construction* is the nominalization of the verb *construe*.

MICHAEL MOORE: But you don't want to forget Bob Bennett's very important point, which is that, even by your own notions of meaning, if you regard us lawyers as the local native tribe whose linguistic practice is what you are looking at, well, we have a peculiar way of speaking and what we call "the meaning of the law" is indeed an output of these ten (or some other mix of like) ingredients.

JEFF KAPLAN: Why couldn't you say, it's not "the meaning of the law," but simply "the law." The law says thus and so. Aren't you discovering or figuring out what the law contains?

MICHAEL MOORE: I'm not sure what you gain by that. I would distinguish general propositions of law—such as those expressed by statutes and which are universally quantified statements—from singular propositions of law that actually decide cases. *All contracts are valid if and only if bumpity-bump* is a general proposition of law. *This contract is valid* is a singular proposition of law, the kind that you need to decide a case. What judges have to do is to go from the general to the particular. This movement I would call "interpretation." We can call it application, legal reasoning, whatever you want. We do think of both of these as law, right, the singular proposition and the general? So we could call interpretations law too, but we would still have to distinguish them from the general propositions of law being interpreted.

CLARK CUNNINGHAM: Let me be really tendentious, okay? There is the word *interpret* which is the way "every man" uses it [writing on flip chart].

JUDITH LEVI: This is a conventional meaning?

CLARK CUNNINGHAM: That's a conventional meaning of *interpret*.

JUDITH LEVI: This is the conventional meaning of *interpret* for the largest possible population.

CLARK CUNNINGHAM: Right. Which *seems* to overlap with—it's an interesting question whether *interpret* (*e*) and *interpret* (*lx*) are the same, where I will let *interpret* (*e*) stand for the way "everyman" uses the verb, and *interpret* (*lx*) stand for how linguists use it. That is, the question is whether when you as linguists use *interpret*, it's more or less the way the man on the street uses the term. But let's leave that aside.

MIKE GEIS: I'd like to make the point that the man on the street doesn't use the word *interpret*.

GEORGIA GREEN: Hear, hear.

CLARK CUNNINGHAM: Let's suppose there's also *interpret (l)*, where the *(l)* means "law talk." In law talk *interpret* means Michael's one through ten, and when a judge says "The statute means X," he means one through ten. So there are two different usages. When the judge says "The statute means X" or "I have interpreted the statute to mean X," there is an ambiguity between *interpret (e)* and *interpret (l)*. Here is the tendentiousness. Judges and all of us in the law business really know *interpret* is ambiguous. We know there are two different meanings. We *want* to fool the citizenry.

We say in our community *interpret* and we know we mean *interpret (l)*, but we also know that the citizenry *thinks* we mean *interpret (e)*. And it is this mistake the citizens make that gives us our power. This is why citizens let us exercise the power that we do in society, judges and lawyers. Because the rhetoric is, "Judges don't make law, judges *interpret* the law. Legislatures make law."

MIKE GEIS: You're absolutely right.

BILL ESKRIDGE: You're absolutely wrong.

KENT GREENAWALT: You're absolutely, anyway.

MIKE GEIS: This is the point I've been trying to make about L-meaning and S-meaning; you mask what is really S-meaning as L-meaning.<sup>78</sup> There's nothing wrong with him talking about "the meaning of the law." It's like saying "The meaning of Bill Clinton's doing X was Y." That is, talking about the significance, or the political significance of Bill Clinton's doing X. "The legal meaning of this is Y" is equivalent to "The legal significance of this is Y." There is absolutely no harm in it. But Clark is absolutely right. It is masked as a comment about the language and it's not.

CLARK CUNNINGHAM: Let me just say this has some relation to Michael's comment this morning about the ethical simplicity of describing judicial decisionmaking as interpreting the meaning of a text. It would be ethically complex to be more precise and articulate about what it is judges are really doing.

BOB BENNETT: It's exactly the same point, only made in an attractive way rather than in an unattractive way.

CLARK CUNNINGHAM: Bill, descriptively am I muddled or just not providing a fair description?

BILL ESKRIDGE: I don't think it's muddled. I think it's very farsighted, brilliantly stated, articulated in a precise way, and delusional. First of all,

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78. See *supra* note 51.

I would like to retreat into a point of historical arcana. If you can be tendentious, I can be arcane. There is a very precise parallel between what Michael is saying and traditional legal theories of statutory interpretation. And the reference is to the oldest book written, in America, anyway, about statutory interpretation theory: Francis Lieber's *Hermeneutics*.<sup>79</sup>

There is a precise correlation between what Michael talks about and what Lieber talks about. Lieber calls Michael's items one through four "interpretation." Lieber calls Michael's items five through ten "construction." As to these items, Lieber says that we should just face the fact that there are a lot of issues that arise in application of statutes which the legislature never really contemplated in a very clear way.

Because the legislature didn't anticipate new situations, different values, new precedents, resolution of these issues will involve creativity. And Lieber said that you should be up front about it, that this is statutory *construction*—Georgia's idea of constructing something and not just interpreting it.

The mindset that Lieber is suggesting in his 19th century treatise resonates in the 20th century. You see it in a lot of authors, such as Reed Dickerson.<sup>80</sup> I think not as clearly as present 20th century authors, but I think you see this in the 20th century.

Now, having already taken the position that Clark is both wrong and brilliant, where I disagree with you is—

CLARK CUNNINGHAM: I suppose I would rather be brilliant and wrong than dumb and correct.

BILL ESKRIDGE: Oh, yes, I think you're definitely brilliant. You may or may not be wrong, but I think it is a brilliant statement. I do think there is a delusional quality to it, however. If you're right, it's delusional on your part and the judge's part. But I don't think you're right.

Yes, judges play this language game. I quite agree with you on that. You're not brilliant on *that* because everybody says that, so you're unbrilliant but right. Judges play this language game of discovery rather than creation, with a few celebrated exceptions.

But, to the extent that this language game is sold as, "Well, let's trick the people, otherwise they won't give us power," I think that's delusional and probably wrong.

79. FRANCIS LIEBER, *HERMENEUTICS OF LEGAL AND POLITICAL PHILOSOPHY* (1880).

80. See, e.g., F. REED DICKERSON, *THE FUNDAMENTALS OF LEGISLATIVE DRAFTING* (1965); F. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

The reason it's delusional is that the people are not fooled by this language game. The people after *Roe v. Wade*<sup>81</sup> didn't say, "Oh, well, Justice Blackmun has found this right of abortion *in* the Constitution. Well, how good for him." No. Some lawyers were fooled, but the people weren't fooled. The people who wanted abortions said, "Finally a Supreme Court that recognizes the rights of women!" which they had not recognized. And people who didn't want abortions said, "These godless Supreme Court Justices are cramming this completely made-up 'right' down our throats!"

When the people follow an issue, either because they're litigants or because they're interested in the result, they are not tricked by the Supreme Court's rhetoric that all we're doing is interpreting (e). No. They see it as interpreting (l), and in fact they see it even worse.

Give me a pen. They see it as interpreting (s), as in *squalid*. As they see it, this is *jurocracy*.

MIKE GEIS: Note that that was in red ink, too.

BILL ESKRIDGE: Yeah, that's right. Well, okay, let's not call it squalid. It's easy to change the S to J. Thus, interpret (j), as in *jurocracy*.

CLARK CUNNINGHAM: I like that. That's really brilliant and farsighted.

BILL ESKRIDGE: No, it's not.

MIKE GEIS: And delusional.

BILL ESKRIDGE: Now, the final thing I'll say, is that this is generally a mystery—I was overstating and being provocative and funny when I said you were absolutely wrong. I think it is something of a mystery that the judges do, as Clark reported, play this language game. I don't think they're fooling the people. Though they fooled the law professors for most of the century, they don't fool most of the law professors any more.

It is something of a mystery to me why the judges continue to play this language game. And indeed it's become more fetishistic in recent years. At the same time you have Critical Legal Studies pressing the envelope in the theory part, you have the Justices behaving more like the 19th century than the 19th century judges did.

MIKE GEIS: But haven't you just supported his claim that they really are engaged in at least a self-deception?

BILL ESKRIDGE: Well, I don't know. I consider it more of a mystery, than I'm sure of what the answer is. Perhaps they are.

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81. 410 U.S. 113 (1973).

KENT GREENAWALT: The fact that Reagan was appointing them has something to do with it.

BILL ESKRIDGE: But Reagan appointed smart people.

MIKE GEIS: There's a strict constructionist movement under Reagan or perhaps even sooner. The clear implication of that is that they were reading the language of the Constitution and telling us what it meant. Isn't that equivalent to what Clark was saying?

FRED SCHAUER: But arguing for so-called "strict constructionism" is a widespread form of discourse even if the terminology varies. For those of us who have political views that tilt somewhat to the left, every day we get in our mailbox something from the ACLU or the like that contains exactly the same rhetoric. "The First Amendment clearly commands X, the courts are clearly violating that clear command, and this is shocking."

The language of inevitability is a common part of American constitutional discourse without regard to political allegiance.

BILL ESKRIDGE: But I think it has become more so. See, this is the mystery. The empirical observation is unsupported and, perhaps, wrong. And the conclusion I draw from it is only mystery and befuddlement rather than certitude. I do think that the movement has been toward greater reliance on this sort of rhetoric, and I find that mysterious. And it may be self-delusional, but I think that it's something deeper than that. It's not just good old-fashioned self-delusion.

CLARK CUNNINGHAM: Fred's article in the 1990 *Supreme Court Review*,<sup>82</sup> if I understood it correctly, made an empirical claim (at least as to the immediately preceding term of the Supreme Court) that descriptively, not normatively, the Supreme Court was moving more in the direction of textualism. The weight given to the text was affecting decisions more than it used to. That claim created quite an academic flurry.

I don't know if the whole Vanderbilt issue was a compliment to Fred or not but it created a flurry along with other things.<sup>83</sup> But I think that it was. It is perhaps an empirical question which is hard to determine. Is the Supreme Court actually being influenced more by text than it used to be or is it just changing its rhetoric? Bill, you seem to be saying it's changing its rhetoric.

BILL ESKRIDGE: But I'm also open to the other claim. I recommended in print that the Solicitor General's office, which took a major beating last

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82. Schauer, *supra* note 72.

83. *Project: A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).



term, should hire a linguist. I believe that, I wrote it in the *Harvard Law Review*,<sup>84</sup> and the editors left it in.

JUDITH LEVI: We have been talking [in regard to Michael Moore's ten points] as if the set of points identified as one to four is qualitatively different from five to ten, with one to four being roughly "linguistic" and five to ten being something else. However, most, if not all, of five to ten actually characterizes what people do when they interpret language, and I would like to give you some examples.

Number five, "hypothetical intentions or imaginative reconstruction": when I talk with somebody or if they leave me a note and they're not right around for me to ask, I try to figure out why would they have said that in that way. So we do imaginative reconstruction when we try to figure out messages in a normal context.

Number six, "go and ask the legislature"—that's just what we do in conversations all the time. It's what we have been doing all day. We call it feedback or question and answer. Somebody says something and you say, "What do you mean by that?" We do that all the time. And thank God in conversation we have that available. We *don't* always have it available in an effective way in statutory interpretation, but it's a part of normal spoken discourse.

Number seven is asking the function of the statute separately from someone's motive. Well, asking the purpose of this communicative act or this language is—it's Gricean certainly in spoken language and we do that all the time anyway. What did this author mean by this? Why did this guy write this play and not some other play? Even for literature as a distinct kind of language genre, we ask those questions and we do it all the time.

Number eight was "Safety valve" in the sense of, "Gee, is it really just grossly absurd?" Well, if someone says something that strikes us as grossly absurd, that just gives us a clue that maybe some Gricean maxim has been violated and we need to go to something else to figure out the intended meaning.

MICHAEL MOORE: It's a principle of charity as some people interpret ordinary discourse. You're charitable to your speaker. He wouldn't say something that stupid.

GEORGIA GREEN: We call it the Cooperative Principle.<sup>85</sup>

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84. Eskridge & Frickey, *supra* note 54.

85. *See supra* note 12.

JUDITH LEVI: He *might* say something stupid—he may *be* stupid or he may just make stupid remarks, that's not ruled out but *this* one just doesn't add up given all the other factors we're considering. So interpreting absurdity comes into play in normal language experience also.

Nine, "prior interpretation": when I talk with the legal guys about meaning, I now have extensive experience in knowing that we're not necessarily using certain words in the same way. I'm using what you have announced as your prior usages, perhaps; it's not encoded legal precedents but it's still prior usage that has been made explicit and I can build on that for interpreting how to use it tomorrow. And ten, "tie breaker rules" might even work in the sense that if one linguist says one thing and another linguist says the other, I may allow one to take precedence because I rank that one higher or I think they're more expert and I think the other guy's a jerk, whatever.

So, in interesting ways, I think, these all have to do with pragmatics and these are all a part of the interpretive process that normal human beings use with normal language, both spoken and written.

MIKE GEIS: Nicely done.

CLARK CUNNINGHAM: Question. Number two Michael called semantics but it includes syntax: What does this sentence mean in the natural language? Some of this morning had to do with trying to figure out the linguistics. Is that different from pragmatics? Or is one through ten pragmatics in Michael's list?

JUDITH LEVI: According to Michael?

CLARK CUNNINGHAM: According to you. You have interpreted his five through ten as having a corollary in pragmatics, not identical but having a corollary.

JUDITH LEVI: Mostly.

MICHAEL MOORE: I think they are interesting analogs.

CLARK CUNNINGHAM: I'm back to his semantics. What Michael Moore meant by semantics, does it have any relation to what linguists mean by semantics?

CHUCK FILLMORE: Yes, yes. Semantics includes compositional semantics so that must mean sort of lexical semantics and then also the—

JERRY SADOCK: One slight quibble—Under three, Michael, you listed interpretation of indexicals as under pragmatics and I think a linguist would say that there's a conventional part of that that's probably semantics, not the reference itself but whatever it is that endows the indexical sign with the ability to pick up reference, that's semantics.

CHUCK FILLMORE: The afternoon has been really fascinating because I was dreading this morning because the linguists had been asked to present what to linguists is the theory of meaning. And I realized the concept “theory of meaning” that I had in mind was not at all what we were asked to talk about. So I was sort of dreading it. How are we going to talk about possible semantics and the issues about cognitive semantics and all of these things that there are? But we weren’t being asked to do that. And maybe even to talk about truth conditions and so forth didn’t really fit the question we were being asked. I’m not absolutely sure that I know what the question was. Am I right, that the theory of semantics that you were looking for in linguistics was sort of the strategies for attaining an understanding of a passage, rather than some sort of theory of the semantic component of a linguistic system, or the semantic aspect of a grammatical theory?

JUDITH LEVI: Did you guys just want to know what we thought about meaning, as opposed to the theoretical fights that people who really get into theory care about?

FRED SCHAUER: A bit more of the former.

One of the things that was interesting about this morning’s discussions, especially the first 45 minutes of it, is that it struck me as a quite interesting and enlightening debate about the philosophy of language. But that debate was not necessarily connected in a very direct way to the scientific or empirical dimension of linguistics that seemed to some of us the distinct claim of linguistics as a discipline. That doesn’t make the philosophy of language discussion, whether conducted by lawyers, philosophers, or linguists, any less interesting. But it does leave us wondering what linguistics has to contribute that philosophy of language does not.

So part of what some of us were interested in was “What is the view of language that linguists employ?” Let’s not encumber it with words like *theory*. What is the view of language that undergirds the empirical enterprise in which linguists describe themselves to be engaged? After all, one would not want to be an ornithologist if one did not believe in the existence of birds.

Therefore, when one says that my life’s work is empirical investigation into language, an appropriate question is, “Given existing social and philosophical debates, what is the conception of language that you are operating under that leads you to do what you do?” And I think we got an answer to that.

CLARK CUNNINGHAM: Well, I'm not entirely sure. What counts as a theory in linguistics? What makes linguistics a science? The answers have still not been explicitly laid out for us.

#### 4. *What Makes Linguistics a Science?*

JUDITH LEVI: Our view of language is undergirded by what we have been able to find out through rigorous theory building in the sense that Jerry is going to talk about. Or I can say something very simple along the lines of what I say to my beginning linguistics students.

One of the ways in which Chomsky transformed linguistics as a discipline, thereby making it immensely more exciting to those of us who were coming into it in the 60s or early 70s, is that he turned linguistics into a theory building enterprise where we developed rigorous expectations for what we did when we described language. We didn't just sort of write stories (*i.e.*, descriptive accounts) about language, not even stories that we thought were fairly accurate. But we created theories the way physicists and chemists create theories in the sense that we hypothesized something about a set of relevant language data.

In each case, it was a hypothesis, of course, that didn't just fall into our laps—we noticed something intriguing about language and then we thought, "Why does it work *that* way and not another way?" And we create some hypothesis. That hypothesis makes predictions which we must test and then we will find out how good the hypothesis is. When it is less good, we either fix it up or throw it out and start all over again.

But whether or not the hypothesis is good, it must be testable and objectively verifiable—in many regards. (Probably not all the sciences are as pure and perfect as scientists would like us to think.) So in that sense linguists make theories and are thereby compelled to prove them to the satisfaction of other rigorously minded linguists. It's not just, "Well, my opinion about the nature of linguistic reality is this." It's not my opinion, it is my claim about something actually much more specific. For example, I spent six years studying compound nouns, somewhat productively—because I was forced to be very explicit in my theory building. And it turned out even that itty-bitty section of English syntax and semantics was very rich for exploration.

So based a lot on just what has come out of linguistic analysis since Chomsky, say since 1965, we now have 30 years, we have a much more accurate view of how language works than we did before. But the "view" is not just like, say, my aunt's view of marital relations. This is an

understanding of language based on rigorous empirical investigations guided by inspired (or less inspired) theories that can be tested and falsified

FRED SCHAUER: But Tarski, Davidson, Wittgenstein, Searle, Grice, Austin, and innumerable other philosophers of language also did not claim that they were just making things up that their relatives thought. The claim that non-empirical philosophy of language has the same status as the unreflective prejudices of our relatives seems a bit extreme.<sup>86</sup>

JUDITH LEVI: But my understanding is that a lot of their writing was expression of their views, not reports of empirical studies.

FRED SCHAUER: What I am saying is that the contrast between empirical study and stuff that's pulled from thin air out of one's grandparents' superstitions is itself a tendentious distinction. People who claim to do serious philosophical analysis don't do empirical work. But they claim to be doing something more than waking up at 3:00 in the morning and scribbling down their inspirations.

GEORGIA GREEN: Could I have about nine words? The important thing about a theory in the linguist's sense is that it could be wrong and you could find out if it's wrong, in principle. It is not important whether you like your theory. It's not important at all whether you like its consequences in a moral and absolute sense. You might come up with a theory that you thought had absolutely terrible moral and political consequences and still be compelled to find out whether it was corroborated or disconfirmed by its predictions.

It's scary that in the sense that one of the law types used the word, that your theory amounts to almost by definition, what you like. It's what you believe in the best of all possible worlds is true. So, that is two real differences. Because if your theory is just some proposition you're attracted to, it may not be possible in some cases to know whether it's true or not because of its nature.

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86. See, e.g., J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975); J.L. AUSTIN, *PHILOSOPHICAL PAPERS* (1961); DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984); DONALD DAVIDSON, *SEMANTICS OF NATURAL LANGUAGE* (1972); H. PAUL GRICE, *CONCEPTION OF VALUE* (1991); H. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* (1979); JOHN R. SEARLE, *FOUNDATIONS OF ILLOCUTIONARY LOGIC* (1985); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969); ALFRED TARSKI, *INTRODUCTION TO LOGIC AND TO THE METHODOLOGY OF DEDUCTIVE SCIENCES* (2d rev. ed. 1946); ALFRED TARSKI, *LOGIC, SEMANTICS, METAMATHEMATICS: PAPERS FROM 1923 TO 1938* (1956); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL GRAMMAR* (1974); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1953); H. Paul Grice, *Meaning*, 66 *PHIL. REV.* 377 (1957).

JUDITH LEVI: I had a great theory of compound nouns when I wrote my first book on the subject [in 1978],<sup>87</sup> but it's all wrong now because we have learned much more about how language works. And what I described in some other way I would now admit is pragmatics, for example. But I liked that theory then, it was really neat—but it's wrong.

FRED SCHAUER: But when people offer descriptive theories about how, for example, American law operates, they are doing the same thing. Sometimes it is done by controlled experimentation, as some law and social science types do. Sometimes it is done by perceptible—or so the theorist believes—reading, analysis and examination of a history of behavior. But people who purport to offer descriptive theories of the operation of a legal system or the operation of some part of the legal system are doing the same thing.

But when I hear strong empirical claims coupled with denial of normative ideas, I get suspicious. One need not be a radical post-modernist to want to press a little bit on the fact/value distinctions, and to press a little bit on the question of underdetermination of theory by data. If you believe, for example, that theory is underdetermined by data, one of the things you want to find out about another discipline is what are the standards that that discipline uses to prefer some theories to others where the theories are equally supported by a body of data. For example, we can think about predictive value or economy of theory or some number of other things that philosophers of science have thought about for some time.

We all recognize what it is to theorize or generalize from empirical observations. We all recognize as well that what makes one theory consistent with the data better than another theory consistent with the data involves things about the standards of some discipline or profession. Some of us were interested in trying to ask about that for linguistics.

KENT GREENAWALT: Can I add a little here about one of the things that I have been interested in, and which came up in the conversation with Georgia? There is “descriptive” and “prescriptive” but there's also a kind of conceptual part of thinking about things that is not very well described in either of those terms.

Take as an example Michael Geis' suggestion that there are four types of meaning. Now I'm pretty sure that one could divide matters up and find five types of meaning or six types of meaning. One might identify two

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87. JUDITH N. LEVI, *THE SYNTAX AND SEMANTICS OF COMPLEX NOMINALS* (1978).

different types of natural meaning, since the relation of caterpillars and butterflies is not quite the same as the relation of clouds and rain.

Anyway, you could divide the territory up into different ways that I think would be equally accurate empirically. On the other hand, this exercise doesn't seem to be normative in the ordinary sense of making value judgments. Yet it's part of the conceptual apparatus. To me that's a part of theorizing. But if someone tells us, as I think some of you, at least, have, that your theories are all empirically verifiable, then that conceptual element of what Michael said can't really be a theory, it would be something else.

MIKE GEIS: But it's a part of a theory. You're invited to buy my Cambridge University Press book when it comes out in November.<sup>88</sup> Each of these notions play a role in a theory of conversational structure. It has predictive value. I made a prediction, for example, that if you have interactions in which people have conceded their willingness to do something, you will not find utterances of the form, *Will you do X?* or *Would you do X?* This prediction was confirmed. These are parts of a general theory of communication in conversation.

CHUCK FILLMORE: I was just going to respond to something that came up. Yesterday we faced questions like, you say that the *if* clause is not really within the scope of *knowingly* and what if I say that it is?<sup>89</sup> Because then the answer is: Well, if you've constructed a grammar of English, if you have a theory of how English works, then that theory will show how subordinate clauses are attached and how an adverb figures in the structure of the sentence if we say *who knowingly does such and such*.

And then it just sort of turns out that there is no other place to put this, there is no other way to structure the sentence. And then someone says "Well, maybe your dialect is like that or your version of English is like that but maybe legal English is not like that." And then my answer is, "But I haven't seen such a theory." Somehow, if you want to say that the languages are different, then there has to be a theory of grammar for this alternative language that would show how that works. But that sort of claim that there are the makings of a kind of grammar of English, that seems to work in lots and lots of ways. And there are all kinds of predictions that you can make about what people can say and how people can go about interpreting those sentences, especially when they are interpreting sentences

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88. MICHAEL L. GEIS, *SPEECH ACTS AND CONVERSATIONAL INTERACTION* (forthcoming 1995).

89. *See United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

carefully. And you need an alternative theory that convincingly works for some other language if you want to say that. It isn't just a matter of *you* think it has this interpretation and *we* think that it has this one. The act of giving it an alternative interpretation is not an act that is within the theory of linguistics.

KENT GREENAWALT: But you're presupposing in what you said that the alternative thing would have consistent grammar. Whereas the very point is that maybe presumptions in the law about stretching the *knowingly* in criminal statutes are not about the structure of grammar. Perhaps the grammar would be much looser; and we wouldn't have to have a consistent grammar.

MIKE GEIS: Then you don't have a language.

KENT GREENAWALT: That's not an empirical decision.

CHUCK FILLMORE: Yes, it is.

MIKE GEIS: Yes, it absolutely is.

JUDITH LEVI: Yes. Let him finish and then we can explain why we say that.

KENT GREENAWALT: Well, suppose you had presuppositions about how things were to be construed. Let's say you gave a lot of weight to some of the things that Michael Moore mentioned. Of course, you would have to have *some* grammar but on this particular point about the application of *knowingly*, it might be almost a matter of indifference just how that word was placed.

I would say it's arbitrary to claim that this could not be a language, so long as the lawyers were capable of communicating with each other.

GEORGIA GREEN: You would have to have rules you would be able to follow.

CLARK CUNNINGHAM: There is a concurrence in *X-citement Video* in which Justice Stevens said on page ten, "In my opinion the normal common sense reading of a subsection of a criminal statute introduced by the word *knowingly* is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection."<sup>90</sup>

CHUCK FILLMORE: Okay. This is saying there is some other superimposed tradition, and I assume he's referring to the subsectioning of the paragraph. We have A and then A contains—

BOB BENNETT: No, no. He is talking about the conventions in the law, conventions of how you read these things.

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90. *Id.* at 472 (1994) (Stevens, J., concurring).



BILL ESKRIDGE: It's not clear what he is talking about. It's a one paragraph concurrence.

MICHAEL MOORE: Notice that in this criminal statute—this one is typical of criminal statutes—the same language does two things. It tells you what conduct is prohibited and then, by putting a mental state term in, it also tells you the object of the mental state that is prohibited.<sup>91</sup>

Stevens is saying that *prima facie* every element of the act that is prohibited is also within the object of the mental state that makes you culpable in doing that wrongful act. Notice the language has to do double duty here, that its second duty is opaque, but the first is not. It's already a complex formula.

CLARK CUNNINGHAM: The application of this rule would be appropriate if *knowingly* did not appear anywhere in this provision and that often happens in criminal statutes. He says there's a well established rule that we would read the statute as if *knowingly* was there and applied to every element of the crime.

JUDITH LEVI: In fact, it doesn't say it's *legal*; it says "the normal common sense reading," not the normal *legal* reading.

CLARK CUNNINGHAM: Perhaps it would have been interesting for Justice Stevens to have a chat with Chuck Fillmore while he was drafting this. What then are the consequences? Are you seriously proposing a rule about how criminal statutes are read that in effect trumps English punctuation?

JERRY SADOCK: English syntax.

KENT GREENAWALT: I think that's exactly the right way of putting it. The legal approach here wouldn't be sort of a separate, general legal grammar; the approach would be that there are some rules that trump the ordinary rules of grammar. If you would want to understand the legal communication—this is oversimplifying a lot—you have to understand that these trumps occur.

CLARK CUNNINGHAM: But I think descriptively this theory doesn't work. If we have some different rules like this one, we haven't begun to work them out in a way that meets minimum standards of coherency. Statutory canons are sort of like that. In a way, the whole point of Larry Solan's book<sup>92</sup> is Chuck's critique. That is, if lawyers and judges are claiming that they have a distinctive but coherent way of talking, let me

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91. 18 U.S.C. § 2252 (1988).

92. SOLAN, *supra* note 1.

show you how it absolutely falls apart, it's *ad hoc* and idiosyncratic. So for Justice Stevens, let me figure out what kind of rule of grammar this is and then how does it apply.

I interrupted and I apologize for that because we really did promise that Jerry was going to tell us what theory means in linguistics and I don't want us to not have that.

JERRY SADOCK: Can I tell you about science? First of all I have to tell you that *science* is a word that is both ambiguous and vague. And I think we can get rid of the ambiguity; you don't have to think about its use in *They've got that down to a science*, meaning exactly that it isn't a science. But think of *science* in the way we think of those things we're pretty sure are science, like physics and chemistry.

It's a *vague* term in that all of the characteristics that we apply to it are actually fudgeable to a certain extent. Yeah, there has to be some falsifiability or it isn't a science. But how falsifiable does it have to be? If there is a false result that is indicated, do you simply throw away the science, fire your entire physics faculty, and go on to something else? No. It's false, but well, we'll work on it. So it's a matter of how badly you feel when your theory is producing bad results. This is a scalar matter.

The second thing has to do with what it is that causes predictions. If I have a theory of butterflies that says no butterfly weighs more than three and a half pounds, and I was generally right and then someone comes up with this enormous butterfly, flops it on my desk and says "Here!" I'll say, "Well, my theory was wrong." But that prediction didn't come from anything. To count as a science—

CLARK CUNNINGHAM: If you were a lawyer, you would say "I'm sorry, that's not a butterfly."

JERRY SADOCK: Anyway, so what I'm trying to get at here is that the predictivity has to somehow involve a tight set of rules, a certain amount of rigor and reduction to some abstract principles that aren't merely observations of the event that you're attempting to describe. There has to be some mystery in the way these predictions come out of the calculus that you use to note down your theory.

Now on these grounds, well, linguistics is clearly pretty mysterious because we have these very fancy looking statements that don't directly describe the data. We don't say sentences of English start with the word *the* or with the word *a* or things like that. We have much fancier, much more abstract statements. So on the whole, linguistics gets a pretty high score as a science for me, let's say a 70 out of 100, something like that. And it's probably one of the highest if not the highest score of any social science.

But it's not as high as physics, for example. And as for the sorts of things that Chuck was alluding to about the integration of the grammar, you can't simply fudge one little part of it to get certain data right because when you do, it's going to have ramifications beyond the immediate data you are trying to describe.

This is the sort of thing that makes linguistics look rather scientific both to its practitioners and we hope, to outside funding agencies and so forth. It takes, however, a certain amount of intellectual honesty to keep this up. There is always room to fudge.

MIKE GEIS: Could I illustrate how linguistics actually makes a prediction in the *knowingly* case that shows that *knowingly* cannot possibly have scope over the whole thing? This is illustrating a linguistic prediction. Consider the sentence *I will knowingly ship that visual depiction if I'm not told that it contains a representation of a minor*.

JUDITH LEVI: Doing nasty things?

MIKE GEIS: Doing nasty things. So actually I don't know its content, but I'm still knowingly shipping.

CLARK CUNNINGHAM: And you're saying that's a well formed utterance?

MIKE GEIS: Someone needs to clean it up.

JUDITH LEVI: Well, it is. But it shows if all you have to do is throw *knowingly* in at the beginning of the sentence, and then claim that everything else falls under its scope because you have waved the flag of *knowingly* at the beginning, that's not a fact about language.

BOB BENNETT: But nobody's claimed that.

JUDITH LEVI: But you did practically.

KENT GREENAWALT: We're saying that it *might* be a fact about legal language. You could write the law differently. You could write the statute so that *knowingly* applies to there being a video and to its general nature. You could then say that as far as the element of the age of the people participating in the video, this will be a matter of strict liability, an element for which no standard of mental culpability need be shown.

Now if you wrote a statute like that, then *knowingly* would not apply to the age of participants. What we are suggesting is that there could be a standard used by the law in a consistent way, although undoubtedly such a standard is not now used by the law in this consistent way. The standard that could be used by the law in a consistent way is that if all a criminal statute has is *knowingly*, and no other specification declares that particular elements are not going to be treated by the standard of *knowingly*, then

*knowingly* applies to all elements. That *could be* legal language. How can you people say that is impossible?

MICHAEL MOORE: Notice Mike's example is just like Kent's because it supposes you are drafting a statute that says something like this: *You shall not knowingly import marijuana if you don't know it's marijuana.* Well, that doesn't make a heck of a lot of sense.

So notice the legal presumption (about applying *knowingly* to material elements of the prohibited action) is going to lose to the rule that says, "Don't make nonsense out of your statute." What's doing the work? Not the presumption. Applying *knowingly* to not knowing the content of something doesn't make any sense. Sure, if you draft particular statutes so that the legal presumption leads to nonsense, then it could be overcome for those statutes.

CLARK CUNNINGHAM: Jerry said he was done, but two things I didn't hear. First, what theory means to linguistics. Second—Fred, in particular, kept bringing this up by way of comparison to philosophers—Georgia engages in introspection and as a speaker comes up with something about English. You, Jerry, also engage in introspection. She comes up with A, you come up with B. What is the scientific method for falsifying A or B? I haven't heard that. And it would help me understand what you said if you would answer both of those.

JERRY SADOCK: The theory is that body of abstract statements which together imply things about the data that we can access directly through experiment. Or maybe "test directly through experiment."

JUDITH LEVI: Let's give an example, Jerry, of something that's disqualified because you can't test it.

JERRY SADOCK: Well, say I want to argue with the lawyers' analysis, your several analyses of the sentence containing *knowingly* and say that the *if* is actually attached to—what would it be attached to?

GEORGIA GREEN: The noun.

JERRY SADOCK: The noun. What was the noun?

GEORGIA GREEN: *Depiction.*

JERRY SADOCK: And I am just asserting that you have drawn your [sentence] diagram wrong; I want to say the *if*-clause is attached to the noun. Well, having done so, I have now predicted that *if*-clauses in English are generally attached to nouns, and I predicted that such locutions as this clause—this is going to come out as a good parenthetical.

MIKE GEIS: Try this sentence: *The boy if John leaves is tall.*

JERRY SADOCK: Yeah. *The boy if John leaves is tall.* It predicts—absolutely states—that that will be a sentence of English. But we feel there is something wrong with it.

JUDITH LEVI: It *is* wrong, if it is to refer to somebody who can be described as “the-boy-if-John-leaves.” That is the unit that’s describing something. If you can attach *if*-clauses to nouns, what gets attached to nouns forms a unit that we call a noun phrase. And those things are used to refer to things. So it’s not that you can construct a sentence where you can stick an *if* just anywhere. Because we can insert things in all kinds of parenthetical ways like this, *And I want to mention that I have to go pay my parking meter now so I’ll be right back.* We can shove things in the middle of sentences in *that* way, but Jerry’s point is that if you attach *if* to nouns systematically, then *the-boy-if-John-leaves* has some meaning by itself, and you can use that phrase in different positions, as in: *I saw the-boy-if-John-leaves* or *My son is the-boy-if-John-leaves* or *The-boy-if-John-leaves moved to Boston, last year.*

CLARK CUNNINGHAM: And that’s consistent with the theory.

FRED SCHAUER: Can I tell you why this is helpful?

JUDITH LEVI: Yes, tell us.

FRED SCHAUER: This is helpful because I now notice, but did not notice before, that a lot of what I was hearing over the last twenty-four hours was not of the variety of “Jane Smith did a study at Arizona State in 1948 that concluded such and such.” Most of what we who are not linguists have been hearing is not reports of experiments, not descriptions of scientific studies, but rather, in Georgia’s terms before, expert assertions about a body of empirical data without giving us, the listeners, very much of an indication of what it is that the expert assertions are based on. I trust that they exist.

JERRY SADOCK: This is actually Clark’s second question.

FRED SCHAUER: Right. Some of this has been coming across to me in a very black box sort of way: “We are linguists, we know this stuff, so we say X.” Now you claim you are relying on a quite well-entrenched, carefully worked out over generations body of empirical data. But sometimes when scientists talk, you only get reports of outcomes of experiments, and reports of outcomes of studies. But when I get a sense of what the expert assertions are based on, I have more confidence in the expertise than when someone says, in effect, “Trust me.” Getting some sense of what goes into the expert assertions will make it easier, not only for us, but given that you want to have more influence on the courts, will make it much more likely that courts are going to listen to you.

Indeed, we talked about this a little bit yesterday in light of your brief in the *X-Citement Video* case.<sup>93</sup> At the crucial point in that brief, the Court—none of the members of which are linguists—doesn't know why it is that you say that this is okay and that is not okay. Other than "We are linguists and we are saying it's okay."

GEORGIA GREEN: It was left on the editing room floor.

FRED SCHAUER: But it is not just a matter of that brief. It relates to the discourse more generally.

MIKE GEIS: For *if*, read Geis' paper "If and Unless," from 1973.<sup>94</sup> It doesn't address the issue whether *if* can modify nouns because that was too ludicrous even to consider. But if you read what the analysis was, you'll see how it is that *if* could not modify a noun in the intended sense.

CLARK CUNNINGHAM: I would rather go to question number two; which is "If Georgia says A and Jerry says B, then what is the scientific method to falsify either A or B?"

JUDITH LEVI: Well, if Kent says A about *knowingly* and the linguists say—

CLARK CUNNINGHAM: I would rather have two linguists disagree because that was the point about why it's science.

CHUCK FILLMORE: And A and B are incompatible, right?

GEORGIA GREEN: Is A a theory?

JERRY SADOCK: What kind of thing is A? Is A a fact?

CLARK CUNNINGHAM: Let's say it's a theory, a theory about whatever—syntax, semantics—okay, as a result of introspection using your competency as a native speaker of English. Over here Jerry engages in introspection on the same topic and comes up with a different theory. Within linguistics it appears that there is some procedure by which Jerry can run an empirical experiment and perhaps persuade Georgia that he has a better theory than A or that A is false.

GEORGIA GREEN: Or that both of them are wrong.

CLARK CUNNINGHAM: That's also possible. Which may differ a little bit from what, say, J.L. Austin does or Wittgenstein.

MICHAEL MOORE: Well, I do think Jerry would distinguish between abstract statements on which they disagree and descriptive statements on which they disagree. The empirical test would be a bunch of smaller more focused tests for the descriptive disagreements between the two of them.

93. *Amicus Brief*, *supra* note 7.

94. Michael L. Geis, "If" and "Unless", in *PAPERS IN LINGUISTICS IN HONOR OF HENRY AND RENEE KAHANE* (B. Kachru ed., 1973).

For theoretical disagreement, by contrast, he is not going to look so different from us in terms of seeing the applications of a theory. It's still empirical, but it's removed.

GEORGIA GREEN: Is one of us going to get to answer this question?

JERRY SADOCK: We would hope that her abstract statements and mine make different predictions in some areas, that they actually make different claims about facts. Then we'll go out and test those facts. We'll perform an experiment. The thing about experiments in linguistics is they're not very grand. They usually consist of just thinking, no laboratories, no white coat. You don't even have to wash your hands usually. It consists merely of thinking about a fact of the language.<sup>95</sup> For example, does this sentence mean what my theory says it should mean? Are these two sentences synonymous as my theory says they should be? Or is Georgia's theory, which makes counter-predictions in those areas, the one that accounts for the facts of the language?

BOB BENNETT: How do you know what it means?

GEORGIA GREEN: Well, we can ask: if this is what I wanted to do in this situation, could I use this sentence to do it?

BOB BENNETT: How do you know whether the answer to that is yes or no?

JERRY SADOCK: Because we speak the language.

BOB BENNETT: What happened to all these conventions?

GEORGIA GREEN: We try to discover the conventions.

BOB BENNETT: Yes, I know you try to discover the conventions, but I am astounded at your technique for doing so. You ask yourself!

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95. The king of linguistic experimentation described by Sadock reflects a scholarly approach largely based on introspection. However, numerous linguists *do* carry out experimental research which meets all of the usual mainstream scientific criteria such as control for extraneous factors, objectivity and replicability of the primary observations, and standard tests of statistical reliability. Some of the topics relevant to law which have been explored by such standard experimental methods (in laboratories) include: ways in which native speakers of a language use contextual clues to determine the meaning of an ambiguous word or phrase; the role of previous linguistic context (spoken or written) in biasing the way a person figures out the syntactic organization of a sentence (including which parts are modified by what, as in the case of *knowingly* in the *X-Citement Video* case); the contribution of grammatical structure to interpreting what pronouns in a text (such as a statute or a contract) are referring to; and the extent to which it is possible to identify individuals from recordings of their voices (relevant to speaker identification in criminal cases involving telephoned threats, for example) and other phonetic issues central to forensic phonetics. *See, e.g.*, JOHN BALDWIN & PETER FRENCH, *FORENSIC PHONETICS* (1990); HARRY HOLLIEN, *THE ACOUSTICS OF CRIME: THE NEW SCIENCE OF FORENSIC PHONETICS* (1990). Thus, experimental methods are used to conduct linguistic research in phonetics, phonology, syntax, semantics, and pragmatics, as well as in psycholinguistics.

JUDITH LEVI: That's one way of asking—

BOB BENNETT: It's a terrible way.

GEORGIA GREEN: All right, we can ask each other. It makes no difference.

BOB BENNETT: Yes, it does. You are a sub-community that—you're consulting each other for conventions and then claiming that they are the conventions of the larger community.

JERRY SADOCK: This can be a problem. But we try to guard against it.

BOB BENNETT: *Can* be a problem—!

GEORGIA GREEN: It's not typically a problem. Sometimes it's a problem. You recognize it's a problem and then you have to figure out why it's a problem. Why two people who think they understand each other do not, in fact, have the same judgments about something. It's a very interesting problem and one of the reasons—

BOB BENNETT: It's the central problem of communication that has been exemplified by the past day and a half.

GEORGIA GREEN: Exactly.

CLARK CUNNINGHAM: Hang on a second. I'm not sure I know what Bob means. Maybe the linguists do. Let's give Bob a little bit of time to explain what he means.

BOB BENNETT: Well, I, and I think some others in different ways, have been saying there is a discourse among lawyers; there are lots of problems about whether this is descriptively accurate, but let's suppose there is a discourse among lawyers in which we tend to attach certain meanings to phrases that are different from the meanings that are attached in the larger community. And I have been saying, how can you simultaneously say that meaning is conventional and refuse to recognize the conventions in the law-talk community as a possible sub-community with its own conventions?

And I had thought that—I still didn't have an answer to that question—but I thought the best answer could be that we know about the conventions in the larger community and you lawyers are communicating not only among yourselves but with the larger community. And so since you're using your language to communicate not only among yourselves but also in that larger community, it's inappropriate for you to use only your limited conventions and to ignore the conventions of the larger community. That's the best I could do with what your answer to me was.

It now turns out, if I'm hearing you correctly, that in fact the conventions that you are insisting have got to trump the lawyer talk conventions



aren't conventions of the larger community at all. They are conventions of this group that's called linguists who talk to one another. And which, I think you said not too long ago, is a much smaller group than the group of lawyers.

MIKE GEIS: This badly misunderstands what Jerry said.

BILL ESKRIDGE: A point of order, we have gone over our time for the afternoon, this might be a good place to start tomorrow morning.

CLARK CUNNINGHAM: My ruling would be I don't think it's constructive for us to not talk to each other until tomorrow morning given the possibility that there is such a fundamental misunderstanding. Either Bob has fundamentally misunderstood what the linguists have just said or they are misunderstanding what he has just said.

KENT GREENAWALT: Well, I have two points of what I hope are clarification. One, Bob, concerns what I understood when Georgia and Jerry said "You think about it when you ask yourself, 'Could you do it this way?'" Think in terms of whether there is some *general* principle that if you could do something in this way in this sentence, the principle would have implications for other sorts of similar sentences. What thinking reveals to you is that some sentence that should have meaning according to this possible principle proves to be absolutely absurd; you just are sure anybody would regard the "sentence" as ridiculous.

If you arrive at that point, you can have confidence that you're not in a position different from other speakers of English. So I think that was the main way that the introspection would work.

I also think that is essentially the tactic that the linguists who have been pressing us, keep pressing on us about the *knowingly* point. And I think it reveals a deep assumption which is really just the assumption that we lawyers are not making about that point. The deep assumption is that if you accept an approach to usage in one situation, it has to be generalizable. That if you take a particular sentence to mean one kind of thing, the approach has to be generalizable if you set up other similar sentences. And *if* the approach produces sentences that are idiotic or inconsistent or some such, it shows the approach is inapt or can't be employed.

However, the very point we lawyers are making is that maybe you could have, say, a rule of construction for criminal statutes that simply had to do with, to put it most narrowly, what happens when *knowingly* is stuck in a law without any other language of the kind that I gave about strict liability, of the kind that absolutely precludes the application of *knowingly* to some element of the crime. And so the "rule," then, for the lawyers would be, if

you have *knowingly* in a criminal statute, it applies to elements of a crime, even when that may violate general rules of grammar.

Now the claim that I think is mistaken, perhaps because I don't yet understand it, is the broad argument that if this approach to language wouldn't generally work, the approach must be mistaken. Our point is precisely that the approach is not about the general use of words.

CLARK CUNNINGHAM: My suggestion is that we not try before leaving today to work through Bob's interpretation of what the linguists have been saying to him. That maybe is worth leaving until tomorrow, that larger thing. Let's limit ourselves to Bob's understanding of your scientific method. Bob is basically saying, "Here's what you *say* you ought to be doing but then, are you really doing it?" I think maybe we haven't fully understood the role of introspection as a scientific method for linguists. So how about that one?

GEORGIA GREEN: I'll make two very brief comments. One, the use of introspection assumes that the linguist is able to distance herself as linguist from herself as native speaker. That sometimes is debatable. But let's take it for granted that we don't have a conflict of interest here and that the enterprise is legitimate. That's all I have to say about introspection.

There's a point I should make about theories that I think relates to Kent's observations and that is: for a linguist, and for any scientist, a theory has to be a universal claim or it's not a theory. It's a claim about all of the objects in some category. And we don't get the fudge factor of assuming that you're going to figure out later what the relevant and expectable objects are with no obligation to make that specific, because that's the only way we can test the theory. We can't tell if something's a vehicle unless we say the whole spiel.

So that's why we are so certain that it has to generalize to other cases. Because the assumption is—until we find a case that shows we're wrong, the theory is as general as possible. That's a strategy for forming theories. To make the grandest theory you can and only narrow it down when somebody shoves your face in the mud and shows you that it's wrong.

CLARK CUNNINGHAM: A tiny suggestion for the linguists. There are probably lots of things that would be a lot more fun to do tonight than this, but I think reading (or re-reading) Cass Sunstein's essay on analogy<sup>96</sup> might be helpful for the linguists, because Cass is talking about something

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96. Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

like this point, that lawyers are trained in law school to function in a way that is not like the reasoning process used by linguists.

JUDITH LEVI: Let me clarify what we mean by prediction in linguistics, when we make linguistic theories that make predictions. We can say anything we want about *knowingly*, but if what we say is part of a theory, it should make predictions. In order to test those predictions, we don't have to run mice through mazes.

Sometimes we might want to do, say, a survey on word meaning like what we did for our *Yale Law Journal* study of the word *enterprise* [in which we gave questionnaires testing the subjects' use of the word in different contexts to both university students and to judges].<sup>97</sup> In other words, we might want to test lots of people, but sometimes we don't have to do that. As Jerry said, sometimes we can test a prediction in our office just by thinking.

There is a precise way in which we do that. For example, I might make a claim about compound nouns (by which I mean two nouns adjoined together to make a new unit, like *apple pie*, *textbook*, *girlfriend*, *night school*, and so forth). Maybe I have only looked at six compound nouns, and let's say these six (against all odds) happen to be: *drug deaths*, *snow blindness*, *laugh wrinkles*, *birth pains*, *heat rash*, and *air pressure*. Given those six, I might well say, "Oh, they all mean that the first noun is caused by the second" (or, more precisely, that the referent of the first noun is caused by the referent of the second). Now from that description of those six, let's say I rashly assert that *all* compound nouns work that way semantically. I have now come up with a theory about the semantics of compound nouns which, because it makes a general claim about a whole grammatical category (compound nouns in English), also makes a testable prediction about data beyond the first, limited set of six.

Well, to test whether my prediction is right, *in this case* I can do it pretty well in my office; I can think up, or collect just through reading, a whole slew of other examples of compound nouns about which my claim necessarily made predictions. And I will soon be able to see that my claim is lousy—because compounds like *night school*, *tire rim*, *steam iron*, *abortion debate*, and thousands of others just don't work like my theory predicted. So even just by gathering data myself, I can test a claim to see how well its predictions are borne out.<sup>98</sup>

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97. Cunningham et al., *supra* note 2, at 1588-1613.

98. Even here, however, research tools like computer data bases (e.g., NEXIS/LEXIS) are invaluable in providing far more linguistic data to analyze than any one linguist, or group of linguists, could ever

So it turns out that in order to test predictions within certain linguistic domains (although definitely not for *all*), I don't always have to ask a hundred people, I can ask myself because I have the English language in my head. It's not that I have to ask the whole community because what I have in my head I have learned from my community. In other words, we can access knowledge ourselves about how the community uses the words.

So, to take an example from the conference, when I guess which words will be hard for the court reporter to spell,<sup>99</sup> I'm accessing my knowledge about something even beyond what I do with language myself. I'm not accessing how I spell, but what words might be difficult for other people with different backgrounds to spell—or even recognize. We have knowledge in our heads about how the community uses our language.

Still, in some domains of language we do want to ask lots of people. That's why in the *Yale Law Journal* article we didn't just say "We think *enterprise* means this." Because we know that for word meaning in particular, we are likely not to think of all the ways in which the words can be used. We know how much people differ in the ways they use words. It's different for syntax. There is much less disagreement about the way English syntax works.

So when we do "linguistic experiments" where we make predictions about facts, we're making predictions about facts that we haven't examined yet. A lot of those facts we can get out of our heads because we have this linguistic data in our heads. For other kinds of facts we can do a NEXIS search and call up a hundred and fifty examples of *enterprise* or whatever. For other kinds of facts, it's much better if we ask lots of people about them.

So there are different kinds of linguistic phenomena that our theories are trying to account for. And for each one of those there may be a different methodology.<sup>100</sup> So talking about prediction in linguistics has to be

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think of alone. And the more extensive the set of relevant data, the more reliable the generalizations made about the linguistic phenomenon in question. Moreover, basing one's theory on a large, independently gathered sample of naturally occurring language avoids having the data be chosen by an interested investigator, and thereby provides a degree of objectivity not otherwise possible. Not surprisingly, these tools have in recent years been transforming the nature, and accuracy of much linguistic research.

99. During the conference, Levi kept a running list of technical terms like *anaphoric pronouns* or *scienter*, proper names like *Wittgenstein* and *Kripke*, and other words used by conference participants that the court reporters might not be familiar with, so that they could prepare a fully accurate record after the conference.

100. To give a broader picture than that sketched by Sadock and Levi thus far, it should again be noted that there *are* linguists who do their research in laboratories, including researchers on phonology,

clarified, because it doesn't work like prediction in the physical sciences or even in psychology where you get a lot of subjects and do something with them. That was one point.

Another point which you had been getting about syntax is that if you make a claim about how the syntax of one sentence works, your claim makes predictions about how that patterning will work in other sentences. And word order *counts* in syntax. So one of the reasons we linguists may have been getting upset when you [law people] say you can put *knowingly* anywhere and it just spreads to the whole sentence is that all our experience with every language we have worked with shows that word order is a crucial component of the syntax.

A large part of syntax is: How do we arrange the words? What orders are permissible and what orders are not permissible? Plus when there are several permissible word orders, is there a difference in meaning between them? These are just two examples.

KENT GREENAWALT: Well, I understand that. What are you saying in general?

JUDITH LEVI: So our objection is not that we don't *like* the way your analysis of *knowingly* works, it's that it's counter to all our empirical experience with syntactic data in English and all the other languages.

KENT GREENAWALT: Okay. But as you've put it, then at least it is open to question whether there is some exception as it so happens for *knowingly* in the criminal law.

FRED SCHAUER: But *knowingly* in the criminal law may be a four pound butterfly.

JEFF KAPLAN: What I thought I was—referring to what you said, Kent, was that the presence of *knowingly* in a criminal statute could signal that the *law* shall be that the *mens rea* requirement exists for all elements of the crime.

KENT GREENAWALT: There is that possibility.

JEFF KAPLAN: That is not a statement about meaning or about the sentence, it's a statement about the law.

KENT GREENAWALT: It's a statement about possible legal meaning.

JEFF KAPLAN: Well, I don't think it's a statement about the meaning; it's a statement about the law. And I have no problem with that. That doesn't contradict anything I know about language. Where I run into

difficulty is if you say the presence of *knowingly* anywhere in the sentence means that *knowingly* grammatically modifies or semantically modifies anything else in the sentence.

KENT GREENAWALT: When you say “grammatically and semantically,” you’re implicitly saying “grammatically and semantically, according to ordinary English as it’s generally used.”

JEFF KAPLAN: Well, then I go back to Chuck’s point: Let me see the grammar, let me see the description of this.

KENT GREENAWALT: See, it is arbitrary to insist on a grammar. What we’re telling you—and remember I am not claiming that the law is actually this clear—is that in such a particular instance, the law does not have any different rules of grammar and semantics. Rather for this particular instance, the rules of grammar and semantics may be suspended and not important, if *knowingly* is in the criminal statute.

JEFF KAPLAN: You can say they are trumped by the rule of law that I just outlined. But I don’t think you can say there is a legal semantic rule that trumps an English semantic rule.

KENT GREENAWALT: It seems to me we are now getting down to something that is not an empirical question. If we understand each other, about the possible legal approach, what is the best way to formulate it? One might say, “The grammatical and semantic rules come from ordinary English, and this is a question of the law, or a principle of law, trumping the semantic and grammatical rules in this particular instance. That’s how we understand it.” That is one way of putting it.

Here is another way of putting it. “It just so happens that, because the law is what it is, the rules of grammar and semantics for this particular instance are extremely relaxed and flexible and you can sort of throw *knowingly* in at any point in a criminal statute, and it applies to all elements.”

If we understand this is what *could be* the legal practice, these are two ways of describing or conceptualizing the situation. I think the extremely strong preference of the linguists is that language must be generalizable, so they conceivably have a very strong feeling that the first way to describe the practice is the right way to describe it.

But if I respond that I don’t want to describe it that way, that I want to say that when we come to *knowingly* in criminal statutes, this is how “law English” works, that is not an empirical disagreement. The question is conceptual. You have to say your way is better for a conceptual understanding of what it means to talk about grammar and syntax. You might be

right about that. But the level on which the discussion takes place is not about what is empirically correct.

BOB BENNETT: Here, here!

MIKE GEIS: Two things. About intuition, I share your concern about the use of intuition. It troubles me, it's troubled me from the beginning in my research in linguistics. However, Chomsky gave an argument in support of it way back when, that has never been discredited. Suppose that we decide to create an objective test of grammaticality and create something like a lie detector machine that one straps a native speaker into. If you read the speaker a grammatical sentence, her skin won't perspire and we'll get a certain kind of reading on our machine.

Suppose on the other hand we read her an ungrammatical sentence. In that case she'll perspire; and the needle will go haywire; and we'll say, "It was ungrammatical because the objective test has proved it's not grammatical." Suppose that ungrammatical sentence happened to be, *Who did the boy who kissed die?* Suppose that sentence is uttered to our subject, but she doesn't perspire and the needle doesn't go haywire. We would have to conclude that is a grammatical English sentence.

We are clearly going to have to revise our machine. We are going to have to recalibrate our machine.

JERRY SADOCK: Or get a subject that spoke English.

MIKE GEIS: The point here is that the calibration of our machine is going to be based on the intuitions of the native speaker. It's unavoidable. You must refer to the native speaker's intuition to build your machine, to calibrate your machine.

But about *knowingly* there is a very simple response to Kent's point. It is fine, if you want to say that *knowingly* has wider scope in legal English than it does in American English, if you're willing to accept that any time *knowingly* appears in a criminal statute, then it necessarily has wide scope over all the rest of the sentence.

KENT GREENAWALT: That would be a fair test of what we have been asserting (although a legal practice might exist even if there were some aberrations).

MIKE GEIS: What would be interesting to do is a NEXIS search on statutes with *knowingly* and see if your prediction is sound.

BOB BENNETT: I don't quarrel in principle with Kent's agreeing with you, but he's giving away a little bit too much. The whole set of rules might be considerably more complex than that. But you're quite right, we would be obliged to come up with some set of rules, complex or simple,

which we are willing to live with over the set of utterances within this sub-community.

And let it be said, in case it hasn't been perfectly clear, that neither Kent nor I am saying that we can do that, or that there is such a nicely packaged set of sub-rules. All we're saying is that there are a fair number of these rules around which at least potentially could be thought to add up to such a set of, call them grammar, but rules for deriving meaning that may characterize the discourse in this subculture of lawyers.

MIKE GEIS: Suppose I went further and taped just oral discourses among lawyers who are planning a brief or preparing for trial and *knowingly* popped up here and there. I would expect also, would I not, to see *knowingly* having wide scope—

KENT GREENAWALT: No, that's not at all what we claim!

MIKE GEIS: I thought we were talking about legal English.

KENT GREENAWALT: How many times do I have to make the point that we are not talking about how the English language is used in most contexts? We are talking about how *knowingly* might be construed in a criminal statute when it's not specifically negated by other language, and the question is just whether, given the clause that *knowingly* is in, it applies to all the elements or only some.

This concerns a very limited use of *knowingly* in the criminal law. It's *not* about how lawyers generally might use *knowingly* if they're talking in ordinary conversation about going to the movies.

MIKE GEIS: I'm talking about legal conversation.

FRED SCHAUER: It is at least *possible* that legal conversation need not be subdivided in the same way as ordinary English. Kent's claim is that it is perfectly understandable and intelligible that there *might* be a rule of legal English that draws a distinction between the use of a certain kind of word in a certain kind of law, the criminal law, and the use of similar words even elsewhere in legal English. That's a perfectly comprehensible claim. It might be right, it might be wrong, and Kent recognizes this. But I don't see why it is impossible.

CHUCK FILLMORE: I'd like to make a point to add to what Mike Geis said about the value of the importance of introspection. Once in a while you find somebody who says that everything we say about language should be a generalization from corpus evidence. And so then I would say—

CLARK CUNNINGHAM: Explain corpus evidence.

CHUCK FILLMORE: Corpus evidence is, you get umpteen zillion words of naturally occurring spoken language or written language and examine this very carefully, and you draw generalizations from that. And I say to



them, "But here is this 17 million word corpus that you have given me and I have searched for a particular expression and it isn't there, but I know it's a part of English." And then they say "This corpus isn't large enough. If we had a hundred million word corpus it would be okay." But then I say, "The only reason you know this corpus isn't large enough is that you happen to know that some expression really is a part of the language and you just haven't found it there."

But I would like to find out: Is my perception correct that the reason for all of this discussion is simply that statutes *stand*? A statute is a piece of language that stands. And if we find that by ordinary language it doesn't cover just the cases we want, we can't rewrite it, we have to have some auxiliary interpretation principle for interpreting it. Whereas if it was really cheap and easy to change it so that it matched more readily what we would like it to cover, then we wouldn't be having these discussions at all?

KENT GREENAWALT: I think this is an important point because if the language were in a case precedent (this ties in with what I was saying about precedents) and the language seemed awkwardly contrary to English, a judge in a later case could say, "This was the formulation for an earlier case, but it was imprecise and not well thought out. The better formulation would be this and I now state it that way."

Chuck, you're right that the language of the statute is considered authoritative in a way that doesn't quite allow that kind of revision as openly as would be true even for precedents.

CLARK CUNNINGHAM: When Michael Moore said that his points one through four are interpretation, and points five through ten are construction, it would be interesting to find out what *construction* means. But what if one phrase was *statutory interpretation* and the other was *statutory revision*? Sometimes the court is interpreting the statute but sometimes it's revising the statute, which is sort of a Calabresi approach, I suppose. Thus in *X-citement Video* what's really going on is what the Third Circuit opinion does literally: Revise the statute. Repunctuating it and so on so that it *says* what the law *is*. But I think as a descriptive matter, lawyers and judges do not talk as if that's a permissible practice for judges. Is that a fair statement, colleagues?

FRED SCHAUER: Lawyers and judges do not talk that way. People—scientists, if you will—seeking to examine and generalize about what they see in the legal system, people like us maybe, do just that. External observers, such as legal theorists, often say what the primary actors may not in their self-justifying mode be willing to say.

CLARK CUNNINGHAM: That sounds like a good place to stop, for today.

C. *Sunday, April 2*

CLARK CUNNINGHAM: I suggest we begin with the following procedure. For the next ten minutes we talk in groups of two. At the end of the ten minutes the group of two would propose four things to talk about today. And then my suggestion is everybody gets three votes. We get a rough idea of what a significant number of people would all like to talk about today. I think that is the most efficient way to try to see that today meets as much of people's interest as possible. Okay, let's start. (Recess taken.)

BOB BENNETT: What I would love to hear is the linguists talk about this problem that Bill has defined with his soupmeat hypothetical. This is the gut problem of lawyers, or a gut problem of lawyers: how to think about intervening developments and what we're to do with the language after these.

JUDITH LEVI: It's also a problem that most linguists working today haven't struggled with. Because we want to find out well, if I'm talking with Fred, what goes on in *our* conversation. There is something so unique to the legal system about this problem—that it's consequential, that it has third party effects and so forth. And the change over time for these different dimensions is not something we have wrestled with. So we might be able to say things off the top of our heads but you should know ahead of time that we're not experienced in this kind of analysis.

FRED SCHAUER: That might be the most useful thing to talk about. If what you've just said is right about what linguists do, then it turns out, intriguingly, that most of what linguists have been concerned about is what I've called in previous writings the "conversational model," a mode of communication susceptible to continuous adaptation, contextual cues, and all of that.

Yet most of what lawyers are concerned about is language that is in very interesting and important ways *entrenched*. And that distinction between the conversational and the entrenched implicated the whole problem of change. I hope we can talk about that, because if we presuppose a conversational model at the outset, we *may* miss what is most important about law.

KENT GREENAWALT: I'm interested in what you said because this comes back to what I asked about literary criticism and religious hermeneutics. A religious text in this sense is quite similar. And I take it that what

you're saying is that the linguists have not paid much attention to how religious texts should be understood.

JUDITH LEVI: Well, there are missionary linguists. In fact the missionaries in this country have done enormous amounts of linguistics starting in, say, the '30s and '40s and '50s, but descriptive linguistics more than theoretical linguistics. So *they* have struggled with that.

We six linguists here don't represent that group and that expertise. There is a set of linguists who continue, as long as missionaries will continue, who do struggle with that. That would be a relevant community to talk to, actually.

Fred, we linguists don't talk just about spoken language. There are also linguists who are very interested in written language: cohesion and what goes on in referring and in the pragmatics of written text. So it's not that we haven't dealt with written text that stayed put. But written texts that have an effect on other people's lives beyond an aesthetic one, and even a spiritual one for that matter, and that have lives of their own that change when a statute gets interpreted—that's in the legal world *and* in the world of the people who are governed by it—that's a very different kind of text.

FRED SCHAUER: Then that is what we should be talking about.

CLARK CUNNINGHAM: Let's not talk about the topic yet. It sounds to me like there is a reasonably good consensus that maybe we should spend from 10:00 to 11:00 talking about incompetent texts, beginning with Chuck's handout. And then we'll stop talking about that at 11:00 and move to the topic of interpreting statutes over time, and talk about that until our lunch break at 12:00.

### *1. The Case of the Befuddled Bride*

CHUCK FILLMORE: Actually you have two handouts. One of them I'm not going to talk about; that's the handout with all the indented stuff just to show interesting kinds of bracketing ambiguities, because this sentence has four possible interpretations depending on where you attach certain things. It has more interpretations than that, a dozen or so, but those are the ones that seem interesting.<sup>101</sup>

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101. The sentence, from a legal case Fillmore has worked on, concerned a party X who had agreed that the other party had agreed:

not to execute against any personal assets of X  
 separate and apart from insurance  
 other than the Allstate policy  
 which may cover X for the claims made by the  
 undersigned.

What was interesting about that sentence to me is that something that contributes to its difficulty of comprehension is the fact that it is a negative statement that has an exception which itself has an exception. And so a negative statement that has an exception which itself has an exception—it's like saying if you have a restaurant that is open only on Sundays, the way you express it is "We are not open except on weekends, excepting Saturday." Which is sort of a cognitive challenge.

In the other case that interests me, there was this young Swedish girl whose parents were divorced and she was sort of a school dropout. She lived with her mother in Sweden and her father had moved to Canada. Then she left her mother and went to live with her father. She didn't get along with her father so she ended up in Montreal as a bartender. While she was working one evening, the bar was visited by a very wealthy, handsome American. And they had a relationship. And he took her telephone number and he went back home. Then he called her up a couple of weeks later and said, "Would you like to come visit me?" and she said yes. And so she packed up her earthly belongings into two suitcases and flew to his home in the American southwest. They lived together for several months and he said, "Let's get married" and she said, "Great." Well, I don't know what she said, but anyway, they agreed to get married.

They made an appointment for a wedding in Las Vegas. And on the way to the airport to fly from Phoenix to Las Vegas on their wedding day, he drove over to the home or office of his agent. And she met his agent and two lawyers and was presented with a document which she signed.

Her story is that—well, the situation is she had only been living in an English speaking world for a few years. She had only been in America for a few months. She didn't speak English very well. She was in love. She was presented with this document, she assumed that this was something that husband and wife do before they get married in this country.

The story from the other side is that they sat down, went over this document paragraph by paragraph, she knew exactly what she was signing. Anyway, she signed it, they got married. They have two children.

Seven years later the marriage broke up. And she saw a lawyer and then she found out that what she had signed was a prenuptial agreement in which she had agreed that she would receive nothing from him. Actually, if he had died, she would receive three percent of his estate but living, she

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The indentations are intended to indicate that "separate and apart from insurance" is an exception to the first part of the agreement, but then the "other than the Allstate policy" is an exception to that exception.

was to receive her own clothing, cosmetics, jewelry and car. And of course the children have child support, but nothing of his property.

So the lawyer called me up two weeks before the trial and said, "I've got this agreement; I wonder if you could look it over and see if you can figure out with me what's wrong with it." And I said "Sure, come on over" and he came to my office and brought the document.

He said, "I would like you to read this and if possible to testify" on such a such a date. And I said, "I can't really do that because that's the day I'm going to be flying to Evanston, Illinois for a conference on law and linguistics, but my colleague Paul Kay, whom I work with frequently might be willing to do this." And he said "Okay, two heads are better than one," so he asked both of us to look at this document.

So I made a copy of the document. Paul and I looked at it, we met the next day, we saw exactly the same things in it, each of us saw exactly the same things in it. Then we met the lawyer and I said, "It seems to us that this document is so sloppily done that the case you should make is that nobody should be bound by a document that is this sloppy."

Forget about the fact that she wasn't a native speaker of English. It seems to me that it is just a really sloppy document. And then a week ago yesterday, the judge said that she didn't need to be told by a linguist what the English language meant and so this testimony was rejected.

KENT GREENAWALT: So he wasn't allowed to testify?

CHUCK FILLMORE: Right. But I proposed three kinds of arguments about this being an incompetent text.<sup>102</sup>

102. The document being discussed is an antenuptial agreement, the relevant provisions of which are as follows:

*Article 1*

After this marriage, in the absence of any agreement to the contrary, the legal relations and powers as regards to property might, by reason of some change in our domicile or otherwise, be other than those of our present domiciles, or other than those which we desire to apply to our relationship, powers and capacities.

*Article 2*

As consideration for the promise of marriage one to the other and for other valuable consideration we enter into this Pre-Marriage Agreement in accordance with the terms hereinafter set forth.

*Article 9*

All properties by name or nature—real or personal or mixed, All property, whether realty or personalty

*Article 9*

We recognize that community property law generally specifies that appreciation from separate property shall remain separate property except for that appreciation which comes about from the direct efforts of a spouse during marriage.

*Article 15*

KENT GREENAWALT: Excuse me, was it a jury trial or a bench?

CHUCK FILLMORE: A bench.

GEORGIA GREEN: How long was the document?

CHUCK FILLMORE: 13 pages.

JUDITH LEVI: Small type, yes?

CHUCK FILLMORE: No.

BILL ESKRIDGE: But single spaced. Was it single spaced?

CHUCK FILLMORE: Space and a half. It's not a huge, big document.

I wanted to make three kinds of arguments. One, there is all kinds of evidence that this document was put together in a big hurry. And we give a page and a half of evidence of that.

The husband's name is misspelled in the document. Several words are misspelled. One paragraph is entirely repeated. There are some dead ends; for example, there are some provisions that say, *Under the following conditions* and there is nothing there.

The word *respectfully* is used instead of *respectively* in a place where you would clearly expect *respectively*. The abbreviation *i.e.g.* is used which I think is a blend of *i.e.* and *e.g.*—it just seems sort of illiterate.

"The children 18 or under will be given support until age 18." And this sort of means that an 18 year old child will be supported until age 18 and that just seems to have been not very well thought through. The phrase *including but not exclusive of [such and such]* is followed by a list. Somehow "including but not excluding" is sort of a needless redundancy. And I think it meant 'including but not limited to.'

But it just seemed to me that it wasn't very thoughtful. *In the vent of* [sic] occurs three times which I assume is *in the event of*. So it just seems to be sloppily done.

GEORGIA GREEN: Monkeys wrote it, right?

CHUCK FILLMORE: This is the result of that experiment. Then another argument we wanted to make is that in a document of this sort there are some concepts that are very important to be clear about, in particular the distinction between what belongs to a collectivity and what belongs to individuals. And it seemed to us that precisely the grammatical resources

All debts shall be divided in such a way that each spouse with his/her share of the community/joint property valued at present market values shall, after subtracting the debt assumed by each, have equal equities remaining.

*Article 27*

This Agreement may be executed in one or more counterparts all of which taken together shall constitute the instrument.

of English that are dedicated to that function were repeatedly misused, words like *each* and *either* and *both* and *together* and *separate* and so on. And we have 11 instances of strange language. They're not so much confusing as strange. These aren't in the handout: *each of us has disclosed to the other the full extent of the property owned by each*. That seemed to me to be—*each of us disclosed the property owned by each*.

BOB BENNETT: What's wrong with that? Should it be *by him*?

CHUCK FILLMORE: I interpret the *each* each time and that means I disclose to you my property and I also disclose to you your property.

GEORGIA GREEN: And vice versa.

BOB BENNETT: Oh, I see.

CHUCK FILLMORE: *We agree that the earnings and accumulations resulting from the other's personal service shall be the separate property of that spouse*. It just seems to be a little bit confusing. *The earnings from husband and wife during marriage shall be the separate property of that spouse. Husband and wife with regard to that spouse. The parties shall execute wills, trusts or other estate planning documents which shall dispose of their community joint property as follows, his interest in all the household goods*.

Where it has *the parties* and then *his interest*, if it had said *each party* and then *his or her interest* it would have been clearer. *The spouses shall maintain on each other life insurance payable to the other spouse on death*. It seems to me that that was kind of incompetent. *Each spouse shall forever disclaim any right to the funds in any separate account*—

BOB BENNETT: Can we stop on the life insurance? It seems to be quite inelegant but perfectly clear about what is meant.

FROM THE TABLE: I'm not having any trouble understanding what they mean.

FRED SCHAUER: But that may be the central question. Bob had not reacted before and then Bob reacts to the life insurance one. I have similar reactions. Both of these seem to be confusing, cumbersome, bad grammar, and bad in a whole lot of other ways. They are really awful, yet I have a pretty good idea of what they mean and I think the parties had a pretty good idea of what they meant. So part of the question is, what are the criteria for incompetence? I think that's the interesting theoretical question here.

We could say it's incompetent if it presents the possibility of ambiguity in some cases. We could also say it is only incompetent if it presents an ambiguity in the cases that in fact arise. So my guess is that one of the reasons that Bob bridled a little bit is that he thinks that in many cases this

is sufficiently determinate to get down what the parties wanted to do and that they understood it. And that unless an aberrational case arises, the case of incompetence may not arise. That's one possibility.

KENT GREENAWALT: I think that Bob and Fred are raising a significant question, and I had reactions similar to theirs. Take the "each one," etc. Well, obviously each can't disclose the assets *of* the other person *to* the other person. Thus, the language means each person is going to disclose his or her own assets, however inelegantly the language is phrased.

So, the question is how does his material come into the analysis at all? Why is that language at all relevant to whether this document is incompetent in any significant way? If we shift to stuff that's unclear, and I think all of us would agree there is stuff that is unclear, really unclear, that's very important. But the three of us wonder why something whose significance would be clear is relevant at all.

GEORGIA GREEN: Why don't we go to the best case and take the bottom line?

JUDITH LEVI: Or the worst case. I would agree that elegance is not something we need to spend time on.

FRED SCHAUER: How about non-manifested ambiguity? That's the real question.

CLARK CUNNINGHAM: What's the best evidence that this is an incompetent document, Chuck? Let's go right to that.

CHUCK FILLMORE: Okay. My point was that English grammar is set up to talk about individuals with cross references and so on by correctly using pronouns and words like *each* and *both* and so on. Nothing is unclear about the passages that I've just read if you know what kind of a document this is. But it just seems to be unnecessarily confusing since it's easy to do it right.

Then there are some sentences that it seemed to me she would have difficulty with even if she were a completely competent and educated speaker of English. And one of them is this thing from Article One that you see in the handout that I gave. The first sentence in the text is, *We intend to marry*. That is the only one that's sort of straightforward.

The second sentence is, *After this marriage,—and I think it means 'after the wedding,'—in the absence of any agreement to the contrary the legal relations and powers as regards to property might, by reason of some change in our domicile or otherwise, be other than those of our present domiciles or other than those which we desire to apply to our relationship, powers and capacities.*



MIKE GEIS: I heard *after this marriage*, Chuck, and I read it as ‘after our divorce.’

CHUCK FILLMORE: I wasn’t actually sure about that and neither was the lawyer. It must mean ‘after the wedding.’

CHUCK FILLMORE: But then you look at the word *those* in the next to the last line, *other than those*; this has to have an antecedent. And the antecedent has got to be *the legal relations and powers as regards to property*. And then you have got this word *apply* and what applies to what? And so the sentence says something about applying legal relations and powers to relationships, powers and capacities. I don’t know what that means. What does it mean?

JEFF KAPLAN: Is this a clear and understandable sentence to you legal guys? I cannot understand it.

KENT GREENAWALT: I didn’t think so the first three times I read it, but now it does seem clear to me.

BILL ESKRIDGE: It can be figured out by a lawyer. I think it’s incomprehensible to a normal person.

GEORGIA GREEN: If a lawyer has to read it three times—

JEFF KAPLAN: You understand it though?

BILL ESKRIDGE: Yes.

JEFF KAPLAN: Can one of you paraphrase it so I might understand?

BILL ESKRIDGE: Here’s what it says: After the wedding, the law governing property relations and powers might be something different than the law governing these things in the couple’s present domicile.

GEORGIA GREEN: The law might change after we get married?

KENT GREENAWALT: If you move from California, which is a community property state, to some other state, then you might shift from California law applying to your property to, say, Ohio law applying to your property.

BILL ESKRIDGE: They’re not referring to legal relations and powers, I think. I think what this probably should refer to is the choice of law which will govern the relations and powers. “After the wedding, the law governing property relations and powers might be different from the property law of our present domicile or different from the property law we desire to apply to our property relations and powers.”

GEORGIA GREEN: You can’t always get what you want.

KENT GREENAWALT: To me, this article probably makes sense only in terms of what else the document is going to provide. I suppose what else the document is going to provide is some way to avoid this new other law

applying that might otherwise apply. Probably this article in itself doesn't seem to be very significant.

CLARK CUNNINGHAM: Let me stop for a second because this is a useful exercise. Fred, Kent, Bob do you agree with the interpretation?

FRED SCHAUER: I agree with the interpretation. For two days we have been talking about the background knowledge necessary in order to make sense out of our statements. Now, you have to have at least a passing knowledge of the field of law called conflicts of law in order to understand what this is trying to do. It does it badly, but once you recognize that there is a field called conflicts of law and that law varies among states and contractual provisions commonly deal with what laws to apply, then this looks straightforward. We now have a category for this. It is still badly worded, but by putting it into a category that we know pretty well, it appears a little less bad. It's a preamble to something else that follows.

JUDITH LEVI: However, this was a contract between a baseball player or some athlete, and his intended spouse. And it was in a contract between the guy and the woman who were going to marry each other. It did not say, "This contract applies when you have a background in the conflict of laws."

So, my question would be, "Gee, are contracts like that considered a meeting of minds and enforceable, or is this unconscionable in some way that the law would recognize?"

FRED SCHAUER: That is a very important *normative* question that relates to the jury instructions too.

JEFF KAPLAN: This is the same question we have been considering all along. Is the meaning of this sentence what you understand it to be, Fred? Or is the meaning of the sentence something that a speaker of English would understand? Here, of course, the question comes up whether we have a sublanguage; would a speaker of the language of property, contracts, and conflicts of law understand it?

So is the interpretation that you legal guys get from this something which doesn't come from the language but rather from the law? That is, you see what this is about, and that triggers or evokes a rule of law. That is the question. It's the same question we have talked about all along.

FRED SCHAUER: It's two questions. First, what if this had referred to something like the rule against perpetuities, where the reference clearly would have triggered that we were now in a technical domain? So part of the question is, do you have to make a semantic reference to a particular area of law, like the rule against perpetuities or *assumpsit* or *habeas corpus*, in order to move into an area in which the contextual presuppositions of a

certain area of law are relevant? Or might those contextual presuppositions of knowing about a certain area of law arise even when there is not a very specific reference to a technical concept like the rule against perpetuities.

Second, as Judith correctly says, this implicates the question of who is the addressee of a contract. But Judith appears to take it as an answer, while for me it's a question. All I mean by that is that it is not self evident to me that, as a descriptive matter, contracts are understandable with any frequency by the people who are bound to them.

Now this might be a morally bad state of affairs that we ought to do something about. But, as a descriptive matter, contracts, wills, trusts, disclaimers, and numerous other legal documents are not understandable by the parties bound to them. That has been the case for a long time. I would join with you in trying to change that in some way. But this is a quite well entrenched, even if unfortunate, feature of law. But this begins to implicate not only descriptive questions but very complex theoretical questions like the ones we were talking about yesterday. Who are contracts (and laws) addressed to? They might be addressed to lawyers, they might be addressed to judges, they might be addressed to a large number of people other than the people who actually affixed their signatures at the bottom.

BOB BENNETT: Two points. One is just to make Fred's last point in a slightly different way. The same problem would arise that you were pointing to if this was entirely well-formed English, could arise if it was entirely well-formed English. It still could be quite impenetrable to the parties to the contract. It happens all the time. So it's not a problem that is necessarily created by awkward or incompetent English.

The second point is with regard to Jeff's saying that this is the same problem we have been encountering. Maybe it's the same problem that we have been encountering over the course of the workshop. I'm not entirely sure.

You might go into a black subcommunity of America and find expressions that are awkward by the standards of ordinary English, but also find that people understand each other quite well when they use those expressions. I assumed, right along, that you all would pretty comfortably say those people are speaking a language, and I don't have any problem with that being described as a language.

The problems we talked about the last couple of days seemed to arise because in the law there are policies that are being served by the language, and that fact affects meaning. There are policies that affect the way people talking the language of the law understand each other.

This [contract language] seems to be a purer problem of direct communication. It's awkward, it's terrible English, but it's not as if we're trying to superimpose some other policies that can become interpretive rules.

So while I think the problems are quite closely related, I'm not sure they're the identical problem.

MIKE GEIS: I agree with Bob. I think this presents a very different kind of case than the *knowingly* case.<sup>103</sup> But I would like to say here, as a linguist, that this isn't about syntax but it is about communication. She did not have a lawyer representing her. Therefore, this was a communication from a lawyer to a [lay]person.

And it seems to me that that should be the decisive legal fact. Had she had a lawyer and had this document, however barbarous, been accepted by that lawyer, she would be bound by the contract but would be entitled to sue her lawyer for inadequate representation, I would think.

So the issue is could she understand this? She's not in the legal community. There should be an obligation on the part of the groom's lawyers to communicate the content of the contract correctly. I sort of share the view of the lawyers that I get the gist of this too. And were I to have read this, I would have understood what was happening. But then maybe my circumstances are different from hers.

So I could share the view of you lawyers that though this is grammatically incompetent and perhaps in some other ways semantically incompetent, it isn't as if its provisions are totally obscure.

BOB BENNETT: That's a problem of contract law. In a course in contracts we talk about that problem all the time.

FRED SCHAUER: And courses in ethics, too.

KENT GREENAWALT: Considering the language of this document, if one understood what *domicile* was, and there were some add-ons, which are not what we have, such as, *All property relations shall be governed by the terms of this agreement and if those terms do not cover them by the law of California*, then I believe the force of this section would be quite clear.

One of the problems is that this is sort of detached, because you don't know where it's going when you look at Article One alone. So I think if the full document was as I imagine it was, some reasonably competent speaker of English, or rather, some highly educated, reasonably competent speaker of English, could figure out what was going on.

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103. *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

JUDITH LEVI: In response to Bob who said something like “If this were written in well-formed English, there wouldn’t be a problem,” is that correct?

BOB BENNETT: No, it would be the same problem.

JUDITH LEVI: Oh, the same problem. The same legal problem: could she understand it?

BOB BENNETT: Yes.

JUDITH LEVI: Okay. I’m not sure what you mean—do you mean by “well-formed English,” that the syntax would be okay? Because one of the things Chuck was pointing out is “his relations and powers will apply to relationships and powers,” and that was basically a meaning that seemed to be empty or it didn’t work. Because relationships—we can’t desire to apply our relationship to our relationship. Or we can’t desire to apply our powers to our powers. We apply our powers to something else.

FRED SCHAUER: I think Bob means that the world’s best jurisdiction-designating clause is still likely to be incomprehensible to a normal layperson.

JUDITH LEVI: There are questions of structure or syntax in any contract or any written communication. There are questions of vocabulary; for example, *domicile* is not only a word that normal people don’t use regularly, it’s also very vague. Moreover, you don’t know if it means the house you live in or the town you live in or the jurisdiction and so forth. To you guys it may not be vague, but this is an example of vocabulary that, like *action*, may have a specific legal sense, but you don’t give notice to the person that it’s being used in another way that she hasn’t understood.

Let me make a more general point. Had we known, we could have had a contest and had the linguists bring in the most incomprehensible contract clause; I have one that is a hundred times worse than this one. It’s in an automobile financing contract that didn’t injure just one person but could potentially injure the thousands of people who use these standard contracts. And I spent three hours with the biggest blackboards I could find just to figure out the syntax before I was able to begin answering the question, “What does this sentence [which was about two hundred and fifty words long] mean?”

So even if you guys can figure this one out, I can trump it; I can get you one that is far worse but not unusual either.

And in all cases there are several dimensions that will confuse people. One is syntax, one is vocabulary, and one is pragmatics, which in this case means attaching enough context to it. You guys can attach enough context to this one; non-lawyers can’t. We just need to understand that.

But beyond the bad language, complicating matters even further is the acceptance by the legal community of the fact that people in many cases will be bound, according to Fred, by language that is incomprehensible. And yet which is presented to them as if—maybe it's just a ritual. It's presented to them as if, "Okay, read this and then sign to show that you understand and accept." And in fact all they're doing is participating in a ritual because it's impossible for them to understand. That is an ethical question which linguists cannot address *as linguists*.

The last question I want to put out comes from cases I have worked on involving incomprehensible contracts or government notices. Three of the cases I have worked on involved recipients of AFDC benefits, coal miners who had applied for Black Lung benefits, recipients of unemployment benefits—which are large categories. They were all class action suits.<sup>104</sup>

I was told that a relevant question in that context is, "Is this the best practicable document?" It's a little bit different there because the government agencies have a legal obligation to communicate certain pieces of information. So, in some cases at least, when you deal with incomprehensible documents, a relevant question to ask is, "Is this the best practicable document?" If that is never applicable in contracts, including insurance policies, which have some of the worst language I have ever seen, then it's a great pity. But I just wondered if that applies to contracts, for example, in asking whether they are conscionable.

BILL ESKRIDGE: There is a similarity among the insurance contracting example and the discussion we had yesterday, in particular about the vehicles in the park and *X-citement*. Law is interested in semantics and linguistics, but it's also interested in customary terms of art and their specialized legal background. The mediation between those two different and sometimes competing interests often involves power relationships.

The law inevitably at some level involves power—in *X-citement*, power of the government to invade people's liberty or, in this contract case, the power of government to favor one set of interests (the wife's) or another set of interests (the husband's) in this brief marriage. I think this is a general phenomenon we have now seen for three days.

Now here's the way I see this working in this particular prenuptial agreement. It seems to me there are three reasons why the wife probably doesn't understand this document. The first reason is that she doesn't

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104. See Judith N. Levi, *Language as Evidence: The Linguist as Expert Witness in North American Courts*, 1 FORENSIC LINGUISTICS 1, 7-9, 16-18 (1994) (reporting on syntactic and comprehensibility analysis of legal document in an AFDC benefit case).

understand English. A more important reason is that the document uses legal and technical jargon that would be comprehensible to Kent but not to the woman who actually signed this document. Thirdly, the document is unclear because the wife not only doesn't understand the legal jargon, she doesn't understand the legal background. She doesn't know how to think like a lawyer. She has not been to law school either in Sweden or the United States.

This is simply to pose the problem and not to answer it. The role of the interpreter at this stage is to mediate between her lack of functional understanding and these legal traditions. And that is a power relationship. Typically the way these things work, as I understand it, is that the prenuptial agreement becomes a bargaining chip which will reduce what she ultimately gets, and maybe very substantially. But it doesn't mean she gets what she agreed to in the prenuptial agreement. She might get a straight settlement as a way of settling the case, or maybe even conceivably one imposed by the judge.

Finally, I want to retrieve a point that Chuck had made on the very first day and that is extremely important. When the documents become so encrusted with jargon and you must understand complex legal backgrounds then, in a real sense, even if not a legally recognized sense, the agreement becomes the oral explanations that were given to this person.

I'm very attracted as a lawyer, and Chuck is attracted as a linguist or maybe just as a human being, to the idea that in a real sense the agreement that has been reached is very little instantiated by the words on the page, and either is or should be much more established according to the explanation that was actually given to her.

JEFF KAPLAN: Now that I understand this, I want to ask the legal guys what makes them think that it might be a sentence in some other language than ordinary English. I now understand it and I don't think I understand it by virtue of any meager legal background. I think I understand it as a sentence of ordinary English.

What's the jargon? *Domicile*? If you know what that word means in ordinary English, your home or the location of your home, then you can process this perfectly well. So I want to know what might make this an example of a sentence in some language other than ordinary English.

CLARK CUNNINGHAM: I'll offer this as a hypothetical, although I expect it's probably factual in this particular case. Hypothetically there is a string, ABCDEF all tied together.

JUDITH LEVI: String of?

CLARK CUNNINGHAM: Words, expressions, whatever. It's Article One, it's a long bunch of words or a bunch of sentences. And a lawyer would say *ABCDEF* means 'Wife gets no alimony.' And they might think what they're saying is *X* is synonymous with *ABCDEF* or *ABCDEF* entails *X* or *X* is within the meaning of *ABCDEF*.

A factual issue for the judge is, at the time of signing the contract, did wife understand "ABCDEF means X"? As a matter of fact, Wife will get on the stand and say "No, I didn't." The Judge says, okay, how do you evaluate the credibility of her testimony? Her lawyer wants to bring Chuck Fillmore in to say that her statement "I did not understand this to mean X" is credible because in his expert opinion no nonlawyer could possibly have interpreted *ABCDEF* to mean *X*. Now even if the judge believes Chuck, that doesn't dictate the result of the case. Even if the wife *didn't* understand that string of words to mean *X*, other things may flow from it. However, it sounds like what happened in the case is that the judge said, in effect,

Professor Fillmore, you are irrelevant to this factual determination. It is relevant in determining whether wife is telling the truth, whether a nonlawyer is likely to understand *ABCDEF* to mean *X*. But in making that factual judgment it is sufficient for me as judge, and native speaker of English, to make that decision. I don't need anybody else to tell me whether the wife is credible on this point.

Is there any aspect of judicial decision making where the judge ought to turn to a linguist and say, "You have better information on this point than I do?" And this case would have seemed to be a reasonably good example where a judge might do that. So, point one: Is there really anything in the field of legal decisionmaking where a linguist has better information than the judge?

Point two, we asked four lawyers to read this paragraph and they reported within a period of just a few minutes total consensus about what it meant. So I ask the linguists, what competence enabled them to do that? Is this evidence that these four people speak a different language than the linguists do and that their special linguistic competence is what produced that result, which is a kind of interpretation? Or does this consensus indicate that they have common values about this subject matter, and the commonality of value is what produced the same result and not some linguistic competence?

As a member of the legal academy I don't know what that competence is, even though I possess it. And it seems to be intriguingly like the native



speaker's competence. But maybe that's a metaphor. But I would love to explore that.

JERRY SADOCK: I hear the legal folk saying in one way or another that the words, their arrangement, the marks on the page sometimes don't really count for very much. There is a legal tradition, we have to understand that the document is embedded in that. We have to know why these words are put there, et cetera, et cetera.

And I wonder at what point you will stop and say, well, some verbiage matters in some case. Otherwise why not write a law that says "A Statute Concerning the Transportation of Child Pornography" which simply reads, ". . . ya know!" [shrugging] Why not? Because you *will* know and you will know that the scienter requirement applies.

BILL ESKRIDGE: As a footnote, there are statutes that are exactly like that. The early 19th century sodomy laws say: You shall not commit the detestable crime against nature.<sup>105</sup> Period. Those were always held to be not vague, but easily comprehensible; everybody knew what their obligations were.

JERRY SADOCK: Yeah, but it didn't say "You know . . . heh, heh, heh!"

BILL ESKRIDGE: It came very close.

JEFF KAPLAN: That's a matter of reference, not sense, that's what Michael Moore would say. It successfully refers.

JERRY SADOCK: I thought that Chuck was going to present us with an example of an incompetent text that was going to be really incompetent, in that it would say according to us linguists something opposite of what it was intended to say. And I know of a real example. This was a jury instruction in a capital case that I was asked to consult on and the judge had departed somewhat from the Illinois pattern instructions. And he had put together both the aggravating and mitigating phases.

There were two defendants at the same time so he constructed this monster jury instruction. And I read it and I read it and I read it and I parsed it and I went to my blackboard and drew logical formulae. And I finally figured out that it had one too many negatives in it and it said the opposite of what it should have said. And I brought that to the attention of the attorney who had contacted me and he said, "Well, that's very interesting but I can't use that fact because the only thing we are complain-

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105. See, e.g., MASS. GEN. L. ch. 272, § 34 (1995); MICH. COMP. LAWS § 750.158 (1993); R.I. GEN. LAWS § 11-10-1 (1994).

ing about here is that it's confusing. What you've shown is not necessarily that it's confusing. What you've shown is that it's wrong." But the fact that it says the opposite of what a jury instruction in the case of a capital crime is supposed to say was irrelevant. Now *that* I thought was really amazing.

GEORGIA GREEN: That's astounding.

KENT GREENAWALT: Two very short points. One is about Jerry's illustrations about mitigating and aggravating circumstances. With an extra *not* in there, it would be as if mitigating circumstances made it more likely that you should sentence somebody to death.

Now, in a context where extreme brutality would be an aggravating circumstance and the mitigating circumstance would be that this person has been a saint all his life, I think a jury would not be confused by the extra negative, because it would be so obvious that the one would be aggravating and the other mitigating. It is an open question whether an instruction that linguistically turns out to be just the opposite of what it should be will be confusing in context. That is an open question.

On Bill's point, I wanted to say that it does seem appealing, and I agree, that the oral understanding should count for a lot. So if somebody had said to her, "Well, this is a very complicated technical document but what it boils down to is that if you get divorced from Mr. X, you are not going to get any of the money he made before he married you. And, what's more, you're not going to get any of the money he makes while you are married to him. You are going to be right back where you were before you met." If they had said that to her, that would have been clear enough.

I want to say, the legal problem shouldn't *just* be a question about the point of the oral understanding. Four different people might be told the same thing and yet the technical documents might be somewhat different in the four instances. I think that once it appears that people have been adequately apprised of what the gist of the documents is, a court could appropriately say it is then going to go over the technical documents to see exactly what's provided for in the case.

One would probably conclude that a fair result would be one that counts the oral understanding for a lot in the first instance, but a court wouldn't have reverted solely and totally to the oral understanding.

CHUCK FILLMORE: Well, when Bill gave us his interpretation, he said, "Well, what this article says is . . ." and the word *says* sort of threw me off because it seemed that wasn't what the thing says in the preferred way of using the word *say*. And then when Clark said that four legal folks could read this and they knew what it meant, I think that's also misleading. Because it seems to me that what you figure out is that you know that this

is a preamble of a prenuptial agreement. You know about the difference in community property laws across states and this reminds you when you look at these words. And there are a couple of words in there that remind you that that must be what this is about and then you reconstruct it and you paraphrase it using as many words of the sentence as you can in your paraphrase. But that isn't the same as understanding the meaning of this text.

Bill's example of sodomy law reminds of an old Chamber's Dictionary definition of *horse* as "the well known quadruped." You simply have to know already what it is in order to understand this. We're not going to have much more time but at some point I would like people to see if they could figure out what the sentence from Article 15 means.<sup>106</sup> And if we get four-way agreement on that, that would be interesting too.

FRED SCHAUER: I think we have successfully identified several quite distinct issues. First, what is the range of moral, political and legal doctrinal issues involved in whether a document should be understandable to those who are bound by it? That is a deeply important moral issue. It is a deeply important issue of legal doctrine.

Second is the question of incompetence. There is the possibility that a document becomes incompetent because it is ambiguous in this case, where I mean to refer to some controversy that has now arisen as to which the document all of sudden becomes indeterminate, as to which the document does not give us an answer. That is different from a document that is so vague or ambiguous as to so many potential controversies that we want to consider it legally inoperative. To distinguish these two, it might be that a document is non-ambiguous or non-vague as to a large number of possible controversies. But it can turn out, especially by operation of the selection effect, that it has become ambiguous or vague in some particular case. That is a very different question than whether something is so *ex ante* ambiguous as to so many potential cases that we want to say it is legally inoperative.

Third, and this relates to the first, is the range of questions surrounding the so called plain meaning or plain English movement. This movement flourished to its greatest extent in the late '70s and early '80s. Most people think that interest in it and the attraction of it has peaked and is now on the decline. An empirical question is why is that the case? One explanation

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106. The sentence from Article 15 reads, "All debts shall be divided in such a way that each spouse with his/her share of the community/joint property valued at present market values shall, after subtracting the debt assumed by each, have equal equities remaining."

might be lawyers' hegemony, lawyers protecting their own turf. The fact that legal complexity and legal inaccessibility benefits the people who actually write the laws, who are traditionally lawyers. That's a quite plausible explanation. I think it may be true.

There may be other explanations that relate to terms of art, to whom legal documents are supposed to be addressed to, and the like. But an important empirical question is what caused the decline of the plain English movement. Continuing to make the case for the plain English movement without trying to understand the jurisprudential, legal, political, economic, and sociological reasons why it basically failed is not going to get us a handle on the question. It is too easy to say that plain English is the way to go and there is no excuse other than crass self interest for not doing it. It may turn out that a number of goals of the legal system help us to understand why it was not as successful as perhaps it should have been.

MIKE GEIS: I'll be very brief. Your point that the judge should be able to decide for himself/herself what this document meant suffers from the defect that the judge knows the legal register and may not be fully aware of how it differs from ordinary English. What I have seen happening here over and over again for three days is lawyers imputing to the language properties it does not have.

I mean to be endorsing Chuck's view that these texts may not mean to an ordinary person what lawyers say they mean.

GEORGIA GREEN: I just wanted to get back to the question that Clark posed which was the question of when does a linguist have better information than a judge. And what I'd like to say to that is that it's not so much automatically having better information as it is having abilities to access information about, in particular, what it's rational to suppose ordinary people would understand by something. The judge can have an intuition about that. It might or might not be right. A linguist can collect empirical evidence about whether it's right or not. And in addition to that, by virtue of being a linguist and having terminology, categories and so on, a linguist can explicate that information and sort out what a person who doesn't have this vocabulary (and hasn't thought about these categories and how they might relate) might treat as just intuition or prejudice or who knows what.

CHUCK FILLMORE: I guess one of the things that struck me about working on this was that the lawyers for the wife did not see the points of unclarity that I was pointing out to them. They would say, "I don't see what's wrong with this" and I would have to say, "But look at the word

*apply.*” Or in the case of Article 15, what does it say people should actually do? It was not transparent to these folks that this was a problem.

They saw other problems in the document but this didn’t really stand out and you needed charts and diagrams and so forth to explain it to them. I found that very interesting. My feeling is that if something that an ordinary person has to sign requires a conversation with a lawyer to know what it is, then, as Bill repeated a while ago, what’s important is their memory of what they said to each other rather than what’s written on the page. So it should be treated in the same way as an oral agreement. The only way you could make that argument in court is if you could demonstrate that there are so many incompetencies in the document itself that even lawyers would recognize that it is incompetent in a number of ways. That’s what it would take to begin to make this kind of argument about situations in which people have to sign the thing, they’re under great pressure to sign the thing, but they can’t possibly understand it so they have to depend on what somebody explains to them. I guess that’s why she should have had her lawyer.

## 2. *The Case of the Faithful Servant (Or Dynamic Statutory Interpretation Meets the Regulatory Variable)*

CLARK CUNNINGHAM: It makes sense for Bill to introduce the next topic.

BILL ESKRIDGE: I would like to introduce it in a stylized way by using a hypothetical that’s famous in hermeneutics. It suggests this is probably an area where the lawyers’ concept of interpretation might vary in many respects from the linguists’ perception of meaning.

The proposition of dynamic statutory interpretation is the following: the interpretation of a statute on Day X might, and perhaps will often, be different from the meaning of the same statute on Day X plus one hundred. X can be the date of enactment of a statute. And “one hundred” can be one hundred hours, one hundred years, one hundred days, one hundred months, whatever.

Here’s the hypothetical I want to set forth. It’s based upon Francis Lieber’s book and it’s been reprinted in lots of other books.<sup>107</sup> Georgia is the head of a household. Kent is her housekeeper, basically. Georgia makes all the money and has several children. Among the many directives

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107. LIEBER, *supra* note 79, at 17-20 (1880), reprinted in HART & SACKS, *supra* note 42, at 1114-15.

she says to Kent is this: "Kent, I'm going away for a while. Here is a laundry list of things you have to do. First and foremost, I want you to fetch soupmeat every Monday from Store X."

The directive to Kent might require some degree of interpretation. But perhaps very little, because there might have been much fetching of soupmeat before Georgia's departure. Kent knows from earlier interactions with Georgia that this soupmeat has a fairly narrow range of connotations. Store X is a store that's about five or six blocks down the street, has a name and so forth. So for the first several Mondays, what Kent does is precisely what Georgia expected him to do. Kent trots on down on his legal legs—

KENT GREENAWALT: That's how I like it, not having to think.

BILL ESKRIDGE: That's it, trots on down, Store X is open, trots into Store X, and there is a counter that says "Soupmeat." It's where he's always bought it, and he buys the soupmeat. Some kind of beef, let's say.

Now, for lawyers, this hypothetical directive is likely to change over time. The longer Georgia is gone away, the more likely it is that the directive's interpretation will change. Several weeks later, Kent trots down to the area, and Store X has burned down. So, he goes to Store Y. Now he in some ways has violated the literal terms of the directive, because he is fetching soupmeat from Store Y. But he can not get ahold of Georgia right in the middle of his errand, and it's not cost beneficial for him to do so. He almost reflexively goes to Store Y. A change of physical circumstance has changed the interpretation he's placing on the directive.

Several months later, Kent now goes down to Store Y, because Store X has burned down (you can forget about Store X from now on). He goes down to Store Y, having received another directive from Georgia in a letter saying Georgia has read that children with high cholesterol rates have health difficulties later in life. She says, "I'm very worried about this. From now on I want you to buy lots of apples, bran and oranges, things that this article says are low in cholesterol because I think this will be good for the children."

Kent goes to Store Y. In casual conversation with Judith, the butcher of Store Y, he learns from Judith that soupmeat is extremely high in cholesterol. "Indeed," Judith says, "my Lord, this is the highest cholesterol rate in the entire store. You might just as well be mainlining cholesterol into these children by feeding them soupmeat!" Kent decides that he will now buy chicken for soup rather than cholesterol-filled soupmeat.

Some months later Kent trots down to Store Y intending to buy chicken. Posted on the door of Store Y is a new rationing system that the city has

adopted because of exigent circumstances entailed by war or famine or something like that. Under the rationing system, each family (and Kent is now the surrogate head of Georgia's family), gets only so many rationing tickets, only so many economic units to buy food. Based upon this rationing system, Kent decides to forego buying meat at all, because he believes that meat is an extravagance under this system and decides to buy other things that will fill up the children's little stomachs. They can buy more food for fewer coupons if Kent forgoes meat entirely.

Now dynamic statutory interpretation as a normative proposition maintains that Kent has done well in each of these situations. He has adapted the original directive, and to some extent the original speaker's intention, to new circumstances. Note the new circumstances. These are changed physical, economic and social circumstances. Number one, the building disappears. Number two is a changed legal circumstance, legal being defined as Georgia's directive to Kent. You can almost call the third, "changed constitutional circumstances." I'm using *constitutional* to identify an authority greater than the household, an authority that has some kind of greater jurisdiction than the household.

Any and all of these changed circumstances have impelled Kent to adopt new interpretations of the original directive. You have changed the "meaning." Now it might be permissible that you changed the meaning. In the *X-Citement* case you linguists seemed to be accusing us lawyers of something horrible by changing the meaning of the statute. It's not necessarily horrible. Changing the meaning might be highly desirable.

One way you might look at this is to invoke the Levi and Eskridge idea of a regulatory variable.<sup>108</sup> The idea of a regulatory variable is not nearly as attractive in the short term as it is in the long term, because in the long term the possibility of something unexpected becomes a virtual certainty. And when unexpected circumstances occur, meaning will change.

That doesn't mean the meaning of the interpretation will always change but there will be unexpected things that will happen. Unexpected social and economic things, unexpected legal things and unexpected constitutional things. Particularly if, as I'm assuming in this directive and you must assume with statutes, the directive is a long term directive having an indefinite or at least a lengthy lifetime. And I would suggest there that the idea be developed as a regulatory variable.

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108. See Eskridge & Levi, *supra* note 33.

With reference to my conversations with Kent, when we say *regulatory variable*, we are not just meaning one word. Sometimes it's an entire phrase or clause, maybe the entire sentence. So you can say *soupmeat* is a regulatory variable, *Store X* is a regulatory variable, or maybe just the entire directive is a regulatory variable.

Most of the people in this room would find attractive what Kent has done in each of these circumstances that I've laid forward. That is, in a homely nutshell, a way you can think about dynamic interpretation of directives.

CLARK CUNNINGHAM: Is what you're saying: if you think that in "Fetch soupmeat every Monday from store X," *store X* is a regulatory variable, that you could put a bracket around *store X* and it means 'store X or the most conveniently located, inexpensive store that sells high quality produce?' So that's the variable? And [*soupmeat*] means, when interpreted, 'the most nutritional food for my children that is reasonably priced.' That's another variable. Is that what you mean by *regulatory variable*?

BILL ESKRIDGE: Yes, except I think it's very difficult to specify in advance all of the things—

CLARK CUNNINGHAM: That's what makes it a variable.

BILL ESKRIDGE: Even though Judith and I use the phrase *regulatory variable*, the actual words *soupmeat* and *Store X* still count for a whole lot. The brackets do not wholly replace the nouns that we had in there originally.

MIKE GEIS: I think the notion of a regulatory variable is an excellent device for getting at the gist of an utterance. And I accept, in fact, your characterization of the gist of that directive. It seems to me we wouldn't want to say that *soupmeat* has now come to mean oranges and apples as matter of language because that certainly hasn't happened. But that the gist has changed because the circumstances have changed.

It seems to me that's perfectly credible and I think the notion of regulatory variable is a very nice way of characterizing how we go about characterizing the gist.

FRED SCHAUER: I agree with everything Bill said except I just want to point out his use of what is at times a very dangerous word—*is*. Bill says this *is* is a regulatory variable. One of the dangers of the word *is* is that at times it suggests a necessity, whether conceptual or empirical, rather than a choice by some identifiable human actor or set of human actors.

This is a regulatory variable if and because someone *makes* it such, because of a decision to empower certain people to make certain kinds of decisions. If we dealt with a different situation, a four year old child, we



might tell the four year old child never to cross the street except in the company of an adult. The four year old child says "What if I'm in a hurry?" The answer is "Never." The four year old child says "What if there's not an adult near by?" The response is "Never." "Never" means never, never, never, never.

Now we can all understand circumstances in which we wish we had given an instruction other than "Never." Still, we might believe that over an array of future cases, the likelihood of the child misinterpreting the exceptions is so much greater than the likelihood of a child refusing to cross the street when she should that we will decide, for this child, not to instruct her in regulatory variable terms.

All I want to suggest is that I don't see the regulatory variable as the property of laws, the property of language, or the property of instructions. It is not descriptive but ascriptive. And we ascribe regulatory variability based on a decision—political, moral, and social—that we want a certain class of actors to do a certain class of things. And it is hardly necessarily the case that we always want to do that.

JUDITH LEVI: I love this example. It's manageable. In looking at what Kent has done over time as the interpreter in question, it wouldn't be unreasonable to say, well, Kent, in the face of changing circumstances, tossed out the language. He guessed at what Georgia wanted. Georgia wanted her kids well fed. Perhaps at a reasonable price; or perhaps she's extravagant but she wants him not to waste time.

So, in other words, you can't tell without knowing Georgia whether she wanted the best price or the fanciest food or the closest store or whatever. But still this scenario could be seen as tossing out the language once store X burns down or soupmeat gets rationed or whatever. And going for the intent and then acting reasonably.

And what we like about what Kent did is that he acted reasonably, he didn't substitute peacock tongues for soupmeat and he didn't go to the Bahamas instead of store Y. And I think in some legal cases it may be that the language is in essence tossed out, in the interest of a reasonable assessment of intent and a reasonable response to that. Alternatively we can view that scenario that Bill has given us as hanging on to as much of the language as you can. For example, he did fetch something and he did it every Monday, because that was still possible; but store X was not possible, soupmeat was not advisable—that's already a judgement, an independent judgement.

So you can try to preserve as much of the language as possible, say, if you were committed to textualism, but then look at which terms *have to*

change and then shift to a perspective where you treat them as regulatory variables. But that involves judgement because it involves judgement about what has to change, for example. Soupmeat didn't have to change, he could still give them soupmeat.

There are subjective judgements that have to come into play. He is not forced to stop buying soupmeat but he is forced to stop buying from store X. So you can see the terms that have to change. You can start treating them as regulatory variables and then behave reasonably in deciding what is reasonable variation. If they are variables, they can vary. So going to store Y would be seen as more reasonable than going to the Bahamas. I think all of those involve subjective judgement which, fortuitously, is Fred's point also.

One more question I can throw in is "Is it possible or advisable to specify at the outset which terms are susceptible of being treated as regulatory variables and which aren't?" For example, in Fred's case of the four-year-old, is *never* an untouchable term? Or is everything up for grabs?

It's an interesting question legally and linguistically and it's something that needs much more time to think about. Is it possible or is this what lawyers do anyway? For example, is throwing in terms like *reasonable*, *with all deliberate speed*, *with reasonable care*, is that sort of the equivalent of saying, "Here's a regulatory variable for the future because we don't want to, or we can't, fix it more precisely"?

And a related question is "Should drafters of legislation be thinking about this more consciously ahead of time—about what is likely to be a regulatory variable?" Or is it what they're doing anyway without calling it that? I think this term gives us a handle for asking a lot of additional interesting questions.

BOB BENNETT: I would like to pull us back to what is only one part of this problem, but what I hope is sort of a purer language problem. I'll use the soupmeat example. Let us assume that in Georgia and Kent's dealings for the several years that Kent has been working in Georgia's household, *soupmeat* has been used to refer to beef exclusively. That's what *soupmeat* means to them. And then Georgia goes away leaving the instructions that she did.

Now the price of beef goes through the roof. And there is a special on fish. This is on the seventh Monday. And Georgia, I'm sorry, Kent is faced with the question of whether to buy fish and make soup of it. That's scenario one.

Scenario two, the price of beef goes through the roof on the third Monday and there is a special on chicken, and Kent decides that chicken

is close enough to beef in the category of soupmeat possibilities that he is going to conclude it's soupmeat and buy it. He is still following the instructions as best he can. And then on the seventh Monday the price of chicken goes up with the price of beef and there is a special on fish.

I want to ask whether the fact of the chicken decision changes how one thinks about the fish decision. A somewhat analogous question which arises for a constitutional interpreter is, if you started out talking about equal protection of the laws with people understanding that this is protection for the newly freed slaves, and then 10 years, 20 years, 50 years later it becomes clear that it's protection for the children of the former slaves. And then 50 years after that it becomes clear that it's protection for aliens as well. And then 50 years after that the question arises of whether it's protection for women.

My question is whether the fact of the intermediate decisions affects how one—as a matter of applying language, talking about language meaning—thinks about the question of protection for women.

GEORGIA GREEN: I just wanted to point out that in Bill's example potentially anything is a regulatory variable depending on what might change, which suggests that the answer to Judy's question is: no, you can not predict.

So if fetching became inconvenient and instead you sent for something, that's different from fetching. Or if circumstances change so that you can get fresher food by having it delivered every day rather than every Monday. Or preservatives change so you don't need to do it every Monday; you can do it once a month. Those would all be possible and I would suspect that in principle anything that could change would lead to those kind of circumstances. That's all.

KENT GREENAWALT: There might come a time in which so much has changed that we would say the directive is no longer applicable, that one is using reasonable judgment but not following the directive any longer. But I think that it would be sort of arbitrary where along the spectrum we would say someone has shifted from *following* the directive with some kind of changed understanding or application to *not following* the directive.

The example is very interesting in showing that the exact line at which one would put the shift is rather arbitrary.

I want to respond to Bob's example. I think he's right about law, but I don't think this is a particularly good illustration of the point. If I have just made a decision by myself to get the chicken in the meantime, psychologically that *would* make it easier for me to move to the fish decision. But if I reflected about what I should do, what I probably should say to myself

is, “Now I’ve got the choice between expensive beef and inexpensive fish. (We can put the chicken out because the chicken is now as expensive as the beef and we know the beef is preferable to chicken, if they’re equally expensive.) So I’ve got a choice between expensive beef and cheaper fish, and that would be exactly the same decision whether I’d previously made a decision about chicken.

So, in the situation where it’s just an individual trying to make a judgment and nobody else is relying on a principle, it shouldn’t make a difference that the chicken decision was made in the meantime. But, of course, in the legal system, when the chicken decision was made, then the whole apparatus is brought to bear to say chicken is now regarded as a kind of soupmeat, and so on. And that affects the whole understanding. It matters then that fish isn’t as different from chicken as it was from beef, and so on.

In the actual legal context, the point that Bob is making is absolutely right.

CHUCK FILLMORE: I was going to bring up the point that Georgia brought up, that the concept of regulatory variable is still kind of unclear to me because it sounded as if the terms of the command stand as regulatory variables. And Georgia extended that to all of the terms like *every* and *Monday* and so on.

But other things could change too. The kids could grow up—this is a *long* business trip—the kids grew up and got married and moved away and so on and that isn’t a regulatory variable. That isn’t a term of the original command.

And yesterday, if the park thing had been *vehicles* then somehow the word *vehicle* was treated as a regulatory variable, but if it was *all vehicles* then the word *all* becomes the variable.

So somehow the concept of regulatory variables shouldn’t be associated with individual terms but rather with the whole thing. I don’t know how to think about that yet. But it seems to me that it’s not a completely clear concept.

BILL ESKRIDGE: Let me talk about Chuck’s and Georgia’s idea first. Kent and I were talking about the very same topic yesterday. We agreed that we didn’t intend, or retroactively we are going to deny that we intended, that *regulatory variable* be inevitably defined as just one term, one word. I certainly had in mind phrases as well as words. Indeed, when you press the idea you might consider the whole sentence to be a regulatory variable, yes? I agree with that invitation but admit that it might

strip the idea of regulatory variable of whatever power that noun originally had. That's thing number one.

The second thing that I would say is that part of the lesson of this hypothetical (or any of hundreds of others that one could conceive of) is that utterances over time are going to exemplify properties that are going to be different. Not completely different but different at least in quality or quantity from utterances that are part of an immediate conversation. And at least the main quality that Judith and I could think of was this idea of interpretive variability.

Now the regulatory feature of it applies to any directive that is instrumental. It doesn't have to be statutes, it can be directives like in a household. The two qualities put together, the temporal quality and the instrumental quality, it seems to me, inevitably generate dynamism in interpretation. When you add in the hierarchical quality (the hierarchy embedded in my hypothetical is not just Georgia and Kent but it's the city and Georgia and Kent), the dynamic potential multiplies.

CLARK CUNNINGHAM: If three or four years from now Kent decides that Jeff is old enough to go shopping, so Jeff now fetches.

JUDITH LEVI: He's delegating to Jeff.

CLARK CUNNINGHAM: Now is that still dynamic interpretation or has the directive just disappeared? It doesn't seem to have anything to do with changing the interpretation of words within the sentence.

BILL ESKRIDGE: At a certain point in my hypothetical what we're calling regulatory variables become completely divorced from the original meaning. The linguistic meaning disappears.

Now here's my larger point, a challenge to the linguists. This returns to the themes that we had in talking about the vehicle in the park hypothetical and the *X-Citement* case. In all those cases you had the linguists lined up like a phalanx in a Spartan army. The linguists lined up saying "This is not the meaning of the statute when you say *vehicle* does not mean ambulances, when you say that *knowingly* modifies all these other terms."

The phenomenon that is revealed by those cases, and I think now more transparently revealed by the conversation about my hypothetical, is that as circumstances change and what the speaker was not focused on comes to pass, then the importance of semantic meaning is reduced and maybe even evaporates.

MIKE GEIS: No.

BILL ESKRIDGE: It's a challenge.

JEFF KAPLAN: Three comments or questions about regulatory variables:

First, if regulatory variables actually exist, then statutes have almost no meaning. If they're present in a statute from the start, the directive has no more content than to do something. If they're discovered later, read in, then the content of the directive is changed, and the original directive, perhaps memorialized in a writing, is now just an arbitrary and idiosyncratic symbol, without predictive value. What counts is the new abstract directive which contains the regulatory variable.

Second, if they exist, how do you recognize them? On what grounds can an interpreter find a regulatory variable?

Third, what constraints are there on the interpretation of a regulatory variable?

FRED SCHAUER: A lot of this relates more closely than we may think to what Clark said yesterday. The language of "regulatory variables," as much of this recent discussion has brought out, is like the language that judges use. It is language that tries to deny the degrees of freedom and suggests a degree of necessity or constraint where none or less in fact exists.

So there is the concern from Jeff, from Georgia, and others that the idea is "do whatever you want," or however Georgia put it.

GEORGIA GREEN: Do what you think I want.

JEFF KAPLAN: It can even be vaguer than that.

FRED SCHAUER: I think the pull to give it a name, *regulatory variable*, looks like what Clark was saying yesterday. I was thinking about your discussion yesterday about the frequent use in American law of the language of determinacy and the language of constraint and the language of inexorability when what is going on is far more open-ended.

I think that part of what's going on here is a usually appropriate desire to give a large amount of freedom to a certain class of interpreters, but because we may not want to say it in just those words, it is tempting to give it a label that suggests more inevitability, like "regulatory variable."

Now Jeff and others then say once we are giving that degree of freedom, all bets are off. I think it is a little bit more complicated than that. Let me use a metaphor and it is only a metaphor and it is not mine. It comes from the legal theorist Hans Kelsen.<sup>109</sup> He asks us to think of a frame without a picture. It is possible that we can imagine that there is a fair amount of interpretive or decisional freedom within some bounds. Just as we can, as

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109. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1945); HANS KELSEN, *PURE THEORY OF LAW* (2d rev. ed. 1960)(Max Knight trans., 1967).

the metaphor suggests, imagine that judges or other legal interpreters have some degree of discretion within certain bounds, but not unlimited.

Then the task is to try to think about two things. One, are there forms of legal language that can be used to have larger or broader frames? Two, what happens when some compelling social, moral, pragmatic, practical, whatever leads us to want to go outside of the frame. I think both of those questions are at work here but they are not the same ones.

CLARK CUNNINGHAM: The Hart and Sacks quote that says figure out what the purpose of the legislature was, interpret it, accomplish the purpose, but do not give the words a meaning they will not bear—that seems to be the frame without a picture.<sup>110</sup>

FRED SCHAUER: I think what I am saying, and one of the things that has come out over two days, is that the statement, “Do not give the words a meaning that they will not bear” is an inaccurate description of American legal practice in light of *Riggs v. Palmer*<sup>111</sup> and numerous other cases.

We could argue that “Do not give the words an interpretation they will not bear” is appropriate. I would want to say that that probably is an inaccurate description of American legal practice, where creative models of statutory interpretation allow judges, without fear of impeachment and permanent humiliation, to arrive at reasonable interpretations that the words will not bear.

CLARK CUNNINGHAM: So the Hart and Sacks statement could be interpreted as: “the words the statute will not bear” is the outer frame of the statutory interpretation project. What Fred said, that may be empirically inaccurate, the frame is larger or differently shaped than this. The other thing we were talking about is, is that even a possible frame? In other words, that frame, “Do not give the words of the statute a meaning they will not bear,” may not be a workable frame.

BILL ESKRIDGE: And the way Kent behaved in my hypothetical, it might not be normatively desirable either.

CLARK CUNNINGHAM: Which is number three.

JERRY SADOCK: I would like to expand on what I think Georgia was getting at—mainly the idea that a regulatory variable is really just a special case of this general ability that all people have in all uses of language to impute significance to an utterance that is different from the significance that derives solely in virtue of the words. These are just ordinary pragmatic

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110. See HART & SACKS, *supra* note 42, at 1374.

111. 22 N.E. 188 (N.Y. 1889).

concepts. They become regulatory variables if the words are bound in a regulation.

CLARK CUNNINGHAM: Well, Jerry, for me about 60 percent of the weekend turns on what you said after the word *different*. To impute significance to the utterance different from something—

JERRY SADOCK: Different from that which is carried solely by the—

MIKE GEIS: Conventional meanings of the language used.

CLARK CUNNINGHAM: Is that what you mean?

JERRY SADOCK: Let me go with Mike's version, it's a little lighter. So let me just point out a couple of the pragmatic principles that have not actually come up that suggest at least a little bit of narrowing of this ability of ours to change things. We aren't allowed to change just anything in any direction whatsoever.

One—the principles are such that they predict that extremely weak statements will be given more content than the words alone would bear. And extremely strong statements will be relaxed. These are “Q & R principles” technically for those of us who know Larry Horn's work.<sup>112</sup> I wish he were here, he could explain it. If the instructions that Georgia left were to feed her children three times every day and one meal was missed in six months, let's say on a day when they had a gigantic lunch that lasted four hours, nobody would care.

However, if the instructions were merely “Feed my children” and Kent fed the children once in three months and they starved to death, that's clearly wrong though it meets completely the letter of the instruction. The instruction said “Feed my children” and he did. That's because the weak statement is interpreted as much stronger but the strong statement is relaxed.

So I think we missed talking about what the very principles are that allow us to impute different or greater or lesser significance.

BILL ESKRIDGE: We want more. Give us more examples.

JERRY SADOCK: See, we should have invited Larry Horn. He is massively up on this subject. One tiny final point, same idea: the variability in time is only a special case of the variability in context. What's changing in your example is that the context is changing in time. And so, of course,

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112. Laurence Horn, *Toward a New Taxonomy for Pragmatic Inference: Q-Based and R-Based Implicature*, in *MEANING, FORM, AND USE IN CONTEXT* [GEORGETOWN UNIVERSITY ROUND TABLE 1984] 11-42 (D. Schiffrin ed., 1984). See also Laurence R. Horn, *Vehicles of Meaning: Unconventional Semantics and Unbearable Interpretation*, 73 *WASH. U. L.Q.* 1145 (1995).



the interpretive process of this standing request changes every time it's interpreted.

KENT GREENAWALT: What I want to say actually ties in a little to what Jerry said at the very end. And it is partly that, in this kind of example, variability of time is *not* just an aspect of variability of context. There is an element that we really haven't talked about in this example.

In the example, we have been assuming that my responsibility straight through is to do the best I can to do what Georgia would want me to do in the circumstances. But if we think about the example in some realistic way, I may see things differently. I know I am only a servant, so if she gives me clear instructions, I definitely have to do what she wants me to do. But suppose she's been away for three years and I say to myself, "I really know the children now a lot better than she does." If the problem, let's say, is not a matter of physical health, which is fairly straightforward, I may begin to feel that *unless* she has told me definitely not to do something or definitely to do something, I have some range of choice. In some situations, I might think Georgia *probably* would want me to do one thing, but I believe the opposite is really the much better thing to do. And if she hasn't definitely said I can't do that, I'm going to go ahead and use my own judgment.

And let's say—I'm going to indicate why I'm using this as a possibility—she has actually died. Then this way of looking at matters might be even stronger.

So, as time goes by, it's going to become more and more likely that in some range of situations, I'm going to think I really should be exercising my own judgement, rather than guessing at what Georgia would want me to do—if she hasn't been totally clear.

It turns out this is very much the legal situation, obviously, or at least arguably, because the legislature that adopted the legislation is no longer around. That is one circumstance. And judges are likely to say to themselves, even if they do not say so publicly, "This statute was adopted a hundred years ago; why should what those people thought about this kind of problem really be governing us now in this society? Unless we're totally constrained from doing this, maybe we should be using our own judgment."

This is a very important element in terms of arguments about how legal interpretation should go forward. And going back to something that Bob said earlier this morning—it just does not fit the conversational context very well. It is no longer just a question of trying to figure out what Georgia meant or what Georgia would want me to do. We're now talking about some allocation of power or authority between Georgia and myself as to who should make the decisions if she hasn't been perfectly clear.

MIKE GEIS: I would like to save language from Bill's statement by supposing that Bob has been hired by Georgia to oversee all of this. Suppose Kent has had a brain storm that has impaired his judgment, and he's now feeding them Snickers bars. Suppose further that Bob observes him buy 50 Snickers bars at the store and decides to look into the matter, and goes back to the house to look at the original instructions. Bob reads them and says, "I'm sorry this is not an interpretation that the words will bear. There is no construal of *soupmeat* consistent with feeding the children Snickers bars." Bob could argue that *soupmeat* is in the set of nutritional things but Snickers is not, and therefore, Kent has been derelict in his duties. He would be absolutely right, with language ultimately being the basis for dismissing Kent.

CLARK CUNNINGHAM: Whether or not he's fired, he's not interpreting the direction; he's ignoring it or violating it.

MIKE GEIS: But he has diminished capacity because of the brain storm.

### 3. *Doubt About Reasonable Doubt*

JUDITH LEVI: We have really not said very much about jury instructions, so I would propose that one of the things we can do in our remaining hour is talk about *reasonable doubt* partly because that enters into all criminal jury instructions. And partly because it's a very weird phrase and also brings in the question of dynamic interpretation because of a *moral certainty* phrase that came up in the *Victor* case,<sup>113</sup> which dates back to the 19th century and definitely has changed meaning since it was originally used.

BOB BENNETT: Oh, is that right?

JUDITH LEVI: Yes. What I understand, and Clark may have to correct me or confirm what I say, is that it was used to mean something like 'empirical,' wasn't it? It does not relate to morality. It was used in a contrasting pair.

BOB BENNETT: Well, I use it today to mean virtual certainty.

JUDITH LEVI: Maybe it was absolute versus probabilistic.

GEORGIA GREEN: You know *moral* has an etymology that relates to custom, so I wonder if it relates to that.

CLARK CUNNINGHAM: I'll read what it says.

By the beginning of the Republic, lawyers had borrowed the concept 'moral evidence' from philosophers and historians of the 17th and 18th centuries.

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113. *Victor v. Nebraska*, 114 S. Ct. 1239 (1994).

James Wilson, who was instrumental in framing the Constitution . . . explained in a 1790 lecture on law, that evidence is divided into two species, demonstrative and moral. Wilson went on to explain the distinction thus: “The demonstrative evidence has for its subject abstract and necessary truths, or the unchangeable relations of ideas. Moral evidence has for its subject the real but contingent truths and connections which take place among things actually existing. . . . In moral evidence, there not only may be but there generally is contrariety to proofs. In demonstrative evidence, no contrariety can take place . . . With regard to moral evidence, there is, for the most part, real evidence on both sides.” . . . The phrase “moral certainty” shares epistemological pedigrees with moral evidence. Moral certainty was the highest degree of certitude based on such evidence. [Quoting Wilson, again] “In moral evidence, we rise by an insensible gradation, from possibility to probability and from probability to the highest degree of moral certainty.”<sup>114</sup>

I’m not telling you I understand that, but it seems to be coming from a different world than I grew up in.

BOB BENNETT: That’s exactly the way I use the phrase now.

JUDITH LEVI: Which phrase?

BOB BENNETT: The highest degree of certainty: “to a moral certainty.”

GEORGIA GREEN: But I think the point of this passage is that *moral* is not a degree of certainty, it’s certainty about a certain kind of evidence.

JERRY SADOCK: Yes, that’s what I seem to get out of it.

JUDITH LEVI: The reason I introduced this is to say one of the things we could do is talk about jury instructions with regard to the “reasonable doubt” instructions, although we cannot discuss it as carefully as we could if we had just reviewed the *Victor* case and had that text in front of us. So we shouldn’t try to just guess at what the *Victor* case said about it. but we could discuss this, at least to identify the problems that it embodies, and then address the more general questions that some of the linguists have, including “What is it in the legal system that seems to reject any empirical evidence as well as common sense evidence about the comprehensibility of jury instructions?”

The jurors don’t understand instructions. This is a descriptive question that we have. So that’s one of things we can spend our time on.

CLARK CUNNINGHAM: For me, *Victor v. Nebraska* is relevant to the weekend in at least two ways. One, as another example of a component of judicial decision making where it seems that linguistic, scientific expertise ought to have weight but in fact does not—not as the system now operates.

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114. *Id.* at 1245 (quoting 1 WORKS OF JAMES WILSON 519 (J. Andrews ed., 1896)).

The standard according to Justice O'Connor who wrote the *Victor* decision is: "[The] proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."<sup>115</sup> That is the legal issue. Justice O'Connor concluded that there was not a reasonable likelihood that the jury could have applied this instruction in an unconstitutional manner.<sup>116</sup>

As far as I can tell, the sole evidence for that conclusion is her own introspection about the instruction. She read it and in her own mind decided that in this case there was not a reasonable likelihood that the jury misapplied it as compared to the question of an expert linguist giving information about that. Now, point two, also raised in *Victor*, is this question: is it possible to define *reasonable doubt* in a jury instruction so as to improve the jury's understanding of the meaning of that term? Justice Ginsburg in concurrence raises the question whether it's a mistake to have jury instructions which try to explain *reasonable doubt* to jurors, because they may increase the probability of confusion.<sup>117</sup>

GEORGIA GREEN: It's hard to know where to begin. Clark, would you repeat the last question for me, please? Let's start with that one first.

CLARK CUNNINGHAM: Is it possible to define *reasonable doubt* in a jury instruction to improve the jury's understanding? Is that an empirical question and how would linguists go about answering it? What might be a theory that could explain if it turned out that you couldn't improve it by definition?

GEORGIA GREEN: If it's possible to *know* what *reasonable doubt* means, it is truly possible to *explain* what *reasonable doubt* means. So that is an empirical question but it's a contingent question. And if Justice Ginsburg thinks it's not possible to explain it, it must be because it's not possible to know what it means. If you can't explain it to them, and still expect them to make judgments according to it anyway, we are in Wonderland.

BOB BENNETT: Is your premise so obviously right?

GEORGIA GREEN: Which premise? That if you can know what it means, you can say what it means?

BOB BENNETT: Yes.

GEORGIA GREEN: I don't mean that *any* individual can, but if there is a thing that it means, it has to be possible to explain what it means.

115. 114 S. Ct. at 1243 (citing *Estelle v. McGuire*, 112 S. Ct. 475, 482 & n.4 (1991)).

116. *Id.* at 1251.

117. *Id.* at 1252-53 (Ginsburg, J., concurring).

Otherwise, you have absolutely no basis for assuming that you all knew what it meant and knew the same thing—

CHUCK FILLMORE: Clark spoke about the alternative to Justice O'Connor's introspection being an expert's judgment interviewing the members of the jury who participate? Would there be an empirical way of doing that?

CLARK CUNNINGHAM: My understanding of the law is that if you interview jurors after they enter a verdict, nothing they tell you can be used as evidence to upset the verdict. The verdict conclusively states what the jury did, point 1. Point 2 as a practical matter, it has been difficult for social scientists to talk to juries after verdicts, which is why methods are used like in the *Free* case.<sup>118</sup> However, a student in my class last semester got permission from the judge in two jury trials to interview jurors after the verdict to find out how well they understood instructions. It seems to be possible to do it, but, of course, the promise was that that information would not be used. That raises terrible moral questions because you're a social scientist, you find out that the jury that sent Mr. Free to death misunderstood the instructions, how is it possible to allow the state to kill that person when you have empirical evidence that the jury made mistakes? Which is why judges don't want to let you get in there in the first place.

CHUCK FILLMORE: If the question is that we need empirical evidence as to how this jury allowed their understanding of *reasonable doubt* to affect their decision, you couldn't necessarily find out by interviewing them.

CLARK CUNNINGHAM: That's not the test. The test is whether there is a reasonable likelihood that the jury could have applied it in an unconstitutional way.

GEORGIA GREEN: So that's all contingent and hypothetical.

JUDITH LEVI: But one can also do something like that in the *Free* case and take 150 or 350 comparable jurors, give them an instruction, ask questions that are well designed, and then find out what a representative sample of the jury pool does with the questions.

I think we have to keep in mind that appeals on the basis of incomprehensible jury instructions will virtually always or always fail. You can't do it with the system as it is now, but jury instructions are one of the few

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118. *Free v. Peters*, 778 F. Supp. 431, 818 F. Supp. 1098 (N.D. Ill. 1992), *rev'd*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994); Judith N. Levi, *Evaluating Jury Comprehension of Illinois Capital Sentencing Instructions*, 68 AM. SPEECH 20 (1993) (reporting on *Free* case generally and on linguistic analysis introduced at evidentiary hearing in the case).

places in the legal system where the legal system itself makes it possible to change them proactively if there are pattern instructions—or at least to have an impact on them.

That is, there are entry points for linguistic or language expertise because there are jury commissions that write pattern instructions. And if you would work with those, as some linguists have, you can change the pattern instruction that would be at least the basis for the actual instructions used in many cases in that category.

So empirical research could be carried out and then brought to these commissions and hopefully have an influence. That was one of the questions I had broadly: What are good entry points for linguistic experts?

KENT GREENAWALT: What Clark said is accurate. I suppose if a juror said afterwards that one of the jurors was sitting with a shotgun and threatening to shoot the rest of us, that would be a basis for invalidating a verdict, but basically you can't go behind what the jury decided.

I think the problem with reasonable doubt, and this is semi-responsive to Georgia, isn't that it's totally incomprehensible, but that there's a big area of vagueness, and it's hard to articulate that. Now, what is clear? Clearly, it's more probable than "more probable than not." "More probable than not" is the simple civil standard and I think jurors are usually instructed that the reasonable doubt standard is more rigorous than that. It is also clear that it's not absolute certainty, that you might have some glimmering of a possibility that the person might not be guilty. That's not enough to vote for an acquittal.

So, what we have is something that's a high standard of probability but less than absolutely certain; and if you were trying to think about this in quantifiable terms, I would suppose it's in the range of something like 95 to 98 percent. Nobody in the law would want to speak in quantifiable terms, and if you did speak in quantifiable terms, that might be quite confusing to most people, because they're not used to thinking that way. If you said, "It must be 19 out of 20 that this person is guilty," that would be a confusing way to speak. However, I think that's the only way to give more precision.

There is the question whether *reasonable doubt* in itself may convey this idea of a very high degree of certainty, better than anything else you can say about it. That is a possibility. One of the things that has, I think, often been said is that this is the kind of a certainty that you would need for important matters in your own affairs or something like that. Is that right? Now to me, that is less than moral certainty. Something might be 85

percent certain and I'd be willing to act on it. And, of course, the percentage depends on what affairs we're talking about.

JUDITH LEVI: Yes.

GEORGIA GREEN: And from person to person.

KENT GREENAWALT: Yes. Moral certainty sounds very high. I agree with what Bob just interjected, that although the origin of the word may be different, *moral* actually turns out to convey pretty much the same idea as what we would think now, a very high degree of probability but not absolute certainty. But anyway, I think that's the basic problem; it's doubtful whether given the domain of the problem, there is a more precise phraseology that's going to be much better.

JUDITH LEVI: I'd like to ask for Kent's help in a minute. First, I want to make a point about the meaning of the phrase *moral certainty* to me, who has a layperson's, not a legal person's, background. I am not a person with background in the law of the previous two centuries, much less this one.

When you use the word *moral* unconnected to morality, it thereby confuses the notion of certainty for me, which is "How reliable is a piece of information?" It confuses that notion with the issue of morality so that my prediction is that jurors would combine those two notions, (1) how certain am I, say, about a particular fact with (2) this notion of morality. They would combine it in unpredictable and dissimilar ways. And using the word *moral* with this esoteric meaning is dangerous because, (a), the jurors won't know the esoteric meaning, and, (b), they will assign the common meaning which is that *moral* is related to *morality*. So that's one danger at least that is not recognized in using that phrase.

But secondly, I want to point out that I once tried to figure out—I think when I was reading the case *Victor v. Nebraska*—I tried to align the various standards of proof that lawyers are very familiar with, are very comfortable talking about. And I had a terrible time, both in terms of seeing which came in what order and also in understanding their phrases like *beyond a reasonable doubt* which suggests a direction of motion and I wasn't always certain whether it was up the line or down the line.

KENT GREENAWALT: Isn't that phrase obviously up the line?

JUDITH LEVI: I can't remember.

KENT GREENAWALT: Should we declare someone "guilty beyond a reasonable doubt"?

JUDITH LEVI: It should be up towards absolute.

KENT GREENAWALT: Well, I think it's the slightest standard above having a reasonable doubt. If you don't have a reasonable doubt, then the defendant is guilty.

JUDITH LEVI: So "beyond a reasonable doubt" is close to absolute certainty? That's what you said?

KENT GREENAWALT: Well, wherever you put reasonable doubt, whatever it would be to have a reasonable doubt, "beyond a reasonable doubt" would be the next thing up above that. I mean the slightest degree above that.

JUDITH LEVI: So below a reasonable doubt is "preponderance of the evidence," is that right?

BOB BENNETT: No.

JUDITH LEVI: Where is that?

KENT GREENAWALT: Well, "preponderance of the evidence" is basically the same as more probable than not.

GEORGIA GREEN: You're talking about intervals on a scale, not points on a scale.

KENT GREENAWALT: "Beyond a reasonable doubt" is something between absolute certainty and reasonable doubt. Then there is the territory between that and "more probable than not" or "the preponderance of the evidence." Then there is "less likely than not" and there are some things below that. Some standards go below that.

JUDITH LEVI: Below 50/50?

KENT GREENAWALT: Yes, the standard for stop and frisk, for instance, is a "reasonable suspicion." That is something less than "more probable than not," but it's a substantial likelihood.

JUDITH LEVI: Actually not something that jurors have to deal with.

KENT GREENAWALT: It's not something that jurors have to deal with.

JUDITH LEVI: So let's say we have "more probable than not," it's technically 51 percent.

KENT GREENAWALT: Right. That's right.

JUDITH LEVI: Then "preponderance of the evidence" is more than that.

KENT GREENAWALT: No, I'd say that's the same. There are some intermediate standards. There are some other things in between here. "Clear and convincing evidence," that's some place below "reasonable doubt" but above "preponderance of the evidence." For some legal issues, such as proving civil fraud, that's the standard.

JUDITH LEVI: Now, you say beyond a reasonable doubt. You could have a reasonable doubt and be lower on the scale, I think. You could have a reasonable doubt when—let's talk about a fact.



KENT GREENAWALT: If you absolutely didn't think it was true, of course, you would have a reasonable doubt *and* you would actually think it was untrue. That's true. Everything below the reasonable doubt standard could be having a reasonable doubt.

BOB BENNETT: Isn't the phrase "*beyond* all reasonable doubt"?

JUDITH LEVI: I'm trying to explain—and perhaps to exemplify—the confusion of a nonlawyer when asked to address just this phrase—to understand this phrase without even trying to apply it to a particular case.

Let's say it's a particular fact that I have to decide. I have to decide whether it's been proven beyond a reasonable doubt. Let's say the fact is whether the guy ran a stoplight, so *beyond a reasonable doubt* is not a phrase that fits in this pattern because it talks about doubt and the other one seems to talk about evidence.

I'm trying to explain that it's very difficult for me—and I'm bright—to process this instruction because for me, I have to create this scale and having a reasonable doubt, I think, could fit in a number of places, so that therefore something being *beyond* a reasonable doubt doesn't decide a clear place for me.

CLARK CUNNINGHAM: The first two sentences of the opinion read, "The government must prove beyond a reasonable doubt every element of a charged offense." Kent, this is the next sentence. "Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication."

JUDITH LEVI: However, Justice Ginsburg, I think, quoted the Federal Judicial Center<sup>119</sup> who worked out a really nice wording that I thought was an admirable attempt at doing a decent job of explaining, which would suggest that it *is* doable.

I certainly concur with Georgia that if there is a concept that somebody has clearly in mind, the only evidence we have that there *is* a clear concept is its expression in language.

CLARK CUNNINGHAM: Here is what the Federal Judicial Center has proposed as the definition.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime

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119. *Victor*, 114 S. Ct. at 1252-53.

charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.<sup>120</sup>

Ginsburg describes this as “clear, straightforward, and accurate.”

JUDITH LEVI: I would like to know if the lawyers here think that definition corresponds to what they thought reasonable doubt was, and if they don't, I would say this concept is not clear in the law because so many lawyers disagree about what it is.

BOB BENNETT: Let me first say a minor word of criticism on one of your recent comments. It seems to me that doubt and certainty are notions in the same realm and so it's not a fair criticism of the use of the word *doubt* that you have some other expression here that uses the word *certainty*, and I'm not—I'm less clear but inclined also to say that that's also true of the word *convincing*.

So with regard to at least *absolute certainty* and I probably would also say for *preponderance of the evidence*, they exist in the same realm in ordinary English as *doubt* and *certainty*, so that those are—

JUDITH LEVI: I'm telling you that as a speaker of ordinary English, I'm confused.

BOB BENNETT: Well, but I'm challenging you as a speaker of ordinary English about whether that aspect of it is confusing.

KENT GREENAWALT: We had times in our lives before we went to law school and we can remember what we thought then as speakers of ordinary English unaffected by the legal terminology.

BOB BENNETT: I do think that the more confusing term is not *doubt* but *reasonable*. And I think it's confusing because in fact it is almost intentionally ambiguous as between two kinds of meanings that are in different realms. One is the one that Kent was ascribing to it, it's trying to say something a little vaguely about something that in principle is reducible to percentages or quantification. That's one possible meaning of *reasonable*.

The other possible meaning of *reasonable* is that it has a normative element in it and that it invites the jury to say “Under the circumstances of this case, how important do I think it would be to give the defendant the benefit of this amount of doubt that I feel?” And that ambiguity about the word *reasonable* also enters into the law in other areas, most importantly, tort law where the jury is instructed that the defendant is obliged to behave

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120. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 17-18 (1987).

as a reasonable person would behave. There's all this discussion in the tort literature about the extent to which that invites the jury to employ community norms of behavior as opposed to some more objective standard of behavior.

All of which is to say I think there is a real problem with *reasonable doubt* but I think it's more in the realm of the word *reasonable* than it is of the word *doubt*.

JUDITH LEVI: I would propose that both are problematic.

JERRY SADOCK: I started out thinking that Georgia was right that anything that can be thought can be said.

GEORGIA GREEN: I like Judy's formulation better.

JUDITH LEVI: I use this on my students all the time. They tell me "Well, my language in the term paper may not be very clear but I know what I wanted to say." And I'll say, "Well, I have no evidence of that, and in fact, neither do you."

I need to have evidence (from the language itself) in order to know whether what you said you meant was coherent, clear, accurate or whatever, and I think it's a fair working test.

JERRY SADOCK: I would have more problems with that formulation than I did with Fred's.

And I think that much of my problem is, as Jeff said, there's a genuine sense in which you can know perfectly well what something means and not be able to paraphrase it exactly. And in fact, some attempt to paraphrase it might really remove from it an aspect of its meaning that was originally there and important—namely, a vagueness. So for example, if a term that is used in the law is purposely vague, it's vague because that's the way it's supposed to be. Any attempt to make it more precise in paraphrasing in fact doesn't paraphrase at all, but changes.

Let me give you a real example, a warning label that says *Do not use this product near fire, flame or source of ignition*. It's got the word *near* in it, okay? And that's maybe not sufficiently informative; you'd like to know exactly: Should it be 5 feet? Should it be 10 feet? 15? Well, the answer is you cannot make that more precise because of the physics and chemistry of flammable gases; there is absolutely no distance at which it is completely safe to use this product away from some source of ignition. And if you attempt to make more precise this intrinsically vague idea, you are making a mistake. And the word *reasonable* here I'm quite convinced is vague in this way—and vague on purpose.

KENT GREENAWALT: Isn't it also true that if you're near to a fire, a blazing fire, 5 feet might be near, but we wouldn't think 5 feet from a cigarette lighter would be near the flame, is that right?

JERRY SADOCK: That's right. But even still, it is the case that vapors that are heavier in the air can travel a long distance along a floor and be ignited by a very small source of ignition at a considerable remove.

KENT GREENAWALT: So one aspect here is the uncertainty because there is *some* danger anyway, and the other is that nearness does depend on the strength of the flame.

JERRY SADOCK: Yeah, it would depend on the amount of the stuff that you're using too. If you got a waterfall of this solvent—

KENT GREENAWALT: Yes. Right.

JERRY SADOCK:—and a flame some distance away, then it better be farther away from that flame because just a little trickle, you know—My point is that the vagueness involved might be actually operative and important to the definition. Any attempt to paraphrase that might change that and change the meaning.

JUDITH LEVI: My question then would be “What goes on in criminal cases if it turns out that this phrase is deliberately left so vague that no group of lawyers in this country, including all the best and the brightest, can paraphrase it in any consistent way?” Why not just leave it out because there can be no expectation of a uniform or even coherent set of juror interpretations—

KENT GREENAWALT: Well, you've got to say something that indicates that the standard is not “more probable than not.” You've got to say something that indicates that to convict a criminal, you've got to believe that it's a lot more certain that the person is guilty than innocent. Not just that it's “more likely than not” that the person is guilty. You don't want to say that it's absolutely certain.

JUDITH LEVI: But rewording that paragraph certainly doesn't have to say, “100 percent certain.” On the other hand, it has to be significantly more than a toss up. To me that would say, okay, I'm at liberty—because it's a vague word—to choose how far up or down in this range between 51 and 100 percent I can move. And whether or not you use numbers or equivalent expressions or words that would be clearer to me than *beyond a reasonable doubt*, it certainly wouldn't introduce the confusion that the word *moral* does.

CHUCK FILLMORE: This scale is very mysterious. Is this scale thought of as ranging over states of mind so that at one place, you are completely at rest with some proposition?

JUDITH LEVI: In certainty or in indifference?

CHUCK FILLMORE: No, no. With some proposition, I'm completely confident that I have no doubt in this case, so this is how the scale ranges. At the bottom end is "Gee, I don't know, I have no idea." Or it could range to a place where you could be weighing the evidence that is for and the evidence against. You say, this bit of evidence is important evidence. I look at these and I weigh 73 for this and 35 for that.

JUDITH LEVI: But that influences what you just stated about what happened.

CHUCK FILLMORE: Well, yes, because I just started counting these up, and as I'm counting them, I'm not even making my mind up, I'm just sort of weighing them and I'm counting them, and saying "Oh, my gosh, I see the weight I'm giving to these pieces of evidence sort of compels me to make this choice rather than that because I committed myself to this interpretation."

Then the other is probability. You talk about probability of events that would occur—that has its own little weirdnesses—but I guess then the probability would be for those events that have those properties that we're sure of from the evidence that we got. Or that are more likely to have certain other properties as well. I don't know how to think about that. But anyway, this scale can be seen in so many different ways. I don't know what the natural way of viewing it is.

I agree that the word *moral* is confusing. Somebody who read the instruction here would be alerted to something weird about the word *moral* by noticing the phrase *moral evidence*. But furthermore, the person could be puzzled by *a mere possible doubt*. *Possible doubt*, what does that phrase mean?

GEORGIA GREEN: A doubt that you might have, but you don't have.

CHUCK FILLMORE: Does it mean: "Is it possible that there's a doubt?" Or does it mean: "There's a doubt that something is possible?" The relationship between the doubting state of mind and the judgment of possibility, it seems—

KENT GREENAWALT: Well, *possible doubt* is an odd phrase, but it's sort of when you say to yourself, "Gee, if I thought really hard about this, I might be able to come up with a doubt." I'd say if you're thinking like that, you've got a possible doubt.

CHUCK FILLMORE: So I possibly doubted something?

BOB BENNETT: Let me make two very different comments. One, I don't know that I can speak for all the lawyers, but I am prepared to stipulate that the use of the word *moral* here is very likely to create a

degree of confusion in the minds of jurors. It's a bad idea. And I view that as a very different problem than all the others that are being raised here.

Now, with regard to the other problems that are being raised, let me introduce a degree of complexity that may make the problem even less tractable. A colleague of mine has been carrying on a crusade of sorts about the ambiguity in instructions like these about *reasonable doubt*. You notice that it's supposed to be reasonable doubt about each essential element of the crime.

And let's suppose just for sake of discussion that we take 80 percent as eliminating all reasonable doubt. If you have four elements of a crime and you find that element one is present to an 80 percent of certainty, element two is present to an 80 percent certainty, element 3 is present, et cetera. All 4 of them. The combination of 1, 2, 3 and 4 being present is a good deal less than an 80 percent certainty. Just 1 and 2 would be a .64 percent of certainty. Yet most people in the legal community, if asked whether given the assumption that reasonable doubt means 80 percent certainty, a jury is supposed to convict someone when they conclude that he is guilty to .64 percent, would say "No" despite the fact that the words of the instruction appear to say "Yes."

KENT GREENAWALT: Well, I thought the words of this instruction were about the truth of the charge, so in normal instructions, or in at least one of the formulas, what is crucial is a reasonable doubt about the guilt of the defendant or something like that. Now, in that formulation, the point that Bob has made is very important.

In that formulation, the certainty of each element has got to be high enough so the probability you're left with altogether would not leave you with a reasonable doubt. That is quite different from saying that each element has got to be proven beyond a reasonable doubt, because, exactly as Bob says, there might be 10 necessary elements, about each you might be just short of having a reasonable doubt; altogether you might conclude it's less probable than not that the person is guilty.

So those two are actually very different instructions. My guess would be that sometimes they're combined. Do you know about that, Clark? Didn't you read us something that was about each element proved by reasonable doubt?<sup>121</sup> That is different, that's definitely different from what this tells

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121. The sentence read was, "The government must prove beyond a reasonable doubt every element of a charged offense." *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 960 (1995).

us. And I would bet that in that jury charge, there's something that says the defendant's guilt has to be proven beyond a reasonable doubt.

Anyway, just for myself, *firmly convinced* may be a bit unclear. It sounds to me about right on the probabilities. It doesn't seem to include the element that Bob thinks is included with a reasonable doubt, and that is that you wouldn't have to be as firmly convinced for some crimes as for others. I'm wondering which way that would cut if I were a juror. With a murderer, should I have to be less convinced, because this is a horrible crime and I'd hate to see a murderer out on the street, or more convinced, because it's a horrible penalty and he might be innocent? I don't quite know how the flexibility would work, but anyway the *firmly convinced* would eliminate that element.

JUDITH LEVI: I'm going to use this chance to move to our concluding topic which is "What next?" We won't let you go without a few minutes on this topic. What would be a good research project for any subset of the people in the legal world and people in the linguistic world who might want to work together on something?

It seems to me that it would be profitable to organize a year long commission, for example, in the Chicago area, of linguists, lawyers who sit on the jury commission and psychologists to ask general questions about how do jury instructions get written and how *should* they get written. And to address a whole lot of questions such as "Why are they written without testing them in some totally reasonable and doable and affordable way on people who are supposed to understand them?" It seems to me these are very complex issues which we're really just nibbling at a little bit.

There are complex issues about whether the system, loosely speaking, cares whether the jurors are in fact an attentive audience, and whether that is the audience that matters or whether it's some appellate judges, or some combination. So there are linguistic questions, there are ethical questions, there are procedural questions. I don't think that would be handled very quickly but it might be valuable to have these questions addressed in an ongoing study group that is interdisciplinary, that might include linguistic scholars and psychologists and practicing lawyers and maybe some judges.

Now I'd like to hear from any of you some proposals for research projects or writing projects or what I'm calling educational projects like this weekend, that would further the goal of exploring the question, "How can linguists and legal professionals work together to the benefit and the edification of both groups?"

CLARK CUNNINGHAM: I have two specific research proposals arising from the discussion. First hypothesis to test: "Linguists will be better

predictors than judges as to whether jurors will be confused by jury instructions." There are at least two reasons why I think this hypothesis is likely to be true. One, by the nature of their training and discipline, linguists are particularly good at this. Second, lawyers are particularly bad at this, because it is difficult for us to move from one register to another, to move out of the law register back into the lay register. Descriptively, very few members of the legal profession agree with this hypothesis, particularly judges. I would think one could do a research project which took an instruction and asked a group of various kinds of law folks—law professors, law students, judges and practicing attorneys, "What is the probability that jurors will be confused in the application of this instruction?" Zero to 100 percent, or somewhere in between. If you think there's any probability, what do you think they would find confusing about the instruction? Then you ask the same questions of linguists. Finally you give the instructions to sample jurors and find out what the error rate is and then proceed to analyze what the sources of error are. This experiment would thus compare lawyers and linguists with the results of the sample juror.

KENT GREENAWALT: That's a very good idea. I think you want to be clear about whether somebody was confused by parts of an instruction, or at the end of the day lacked the basic idea that what she was supposed to do was figure out whether there was a very high amount of probability. Somebody *might* be quite confused along the way, and say, "I didn't understand what that phrase means, but I somehow came out with the conclusion that I had to be almost certain." If that's what happened, maybe that's okay.

BOB BENNETT: That's what we lawyers did with some of Chuck's examples this morning: we acknowledged that there was terrible English in them, but basically, we understood what the point was.

JUDITH LEVI: But in my article about the *Free* case that I gave you,<sup>122</sup> you can see that there are very specific points of law identified as separate points and then you can ask questions in order to test whether they understand those specific points.

I would hesitate to do a study on *reasonable doubt* because it's such a complex mess to begin with; we wouldn't know what the right answer was! But there are some points of law which are easier to express and to get agreement on what is a good expression of them.

KENT GREENAWALT: I agree completely with that.

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122. Levi, *supra* note 116.



CLARK CUNNINGHAM: I now want to put out my second research project. Hypothesis two, jury instructions drafted with the assistance of linguists will produce less jury confusion than jury instructions drafted only by lawyers.

KENT GREENAWALT: Can I have the odds on that one?

CLARK CUNNINGHAM: Well, I'm not a scientist. How is this a verifiable or falsifiable hypothesis? This might not be a good one.

KENT GREENAWALT: A bad one.

CLARK CUNNINGHAM: Okay. But, you set up a series of hypotheticals. Jury Panel One decides whether there's reasonable doubt, no detailed jury instructions, just say "reasonable doubt." Group 2 reads what Ginsburg says is the "clear, straightforward and accurate" instruction. Find out what happens with that group. Third, get folks like you linguists to look at the effect of this instruction, improve it, give it to jurors, find out what happens.

CHUCK FILLMORE: Let me just slip in something. To avoid the problem that Jerry brought up about vagueness, make sure that the drafters do not know what cases are going to be presented to these experimental jurors. Because otherwise you could say, well, I know what decisions they want to make and I can clarify things by—

CLARK CUNNINGHAM: Exactly the right direction.

CHUCK FILLMORE:—the right direction.

KENT GREENAWALT: Then, if you give them a case, how do you know if they got the standard right but were really stupid in evaluating the case, or were evaluating the case right, but didn't understand the standard correctly?

JUDITH LEVI: Most of us linguists are not experts in designing such experiments but there are psychologists, like Shari Diamond,<sup>123</sup> who are. So designing this whole thing should be an interdisciplinary collaboration among methodological experts, people who have thought a lot about how to ask questions that test what you really want to test; and everybody involved including the linguists and legal people must agree that these are good questions and that they meet all the relevant criteria—linguistic and legal—from all the various angles.

So this is one set of proposals. I would like to hear other proposals.

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123. Professor of Psychology and Criminal Justice at the University of Illinois at Chicago and Senior Research Fellow of American Bar Foundation; author of *Instructing on Death: Psychologists, Jurors, and Judges*, 43 AM. PSYCHOL. 423 (1993), and *Reference Guide on Survey Research, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (1994).

BOB BENNETT: No one picked up on my suggestion this morning that linguists might investigate lawyers' language as a way to see—

JUDITH LEVI: There are people who work on analyzing different genres of legal language, whether it's spoken, like jury summations, or written language, like legislative texts and so forth. I can show you the pages from my bibliography for some of those.<sup>124</sup>

Any other proposals?

KENT GREENAWALT: Well, I think if a sympathetic linguist and a sympathetic law person got together and struggled with some of the theoretical problems we're discussing now, that would be interesting. But on the basis of this group discussion so far, I would not feel optimistic about two people actually managing to combine to say something that was illuminating.

JUDITH LEVI: Could you be more specific? That is, granted that collaboration on a project requires great chemistry between the two people and hard work. But actually, sometimes those preconditions are met. Then can you be more specific about which theoretical issues?

KENT GREENAWALT: I mean all the ones that we were going over last night.

JUDITH LEVI: Like meaning and language and interpretation.

KENT GREENAWALT: Yes, and whether if lawyers have particular practices, these should be understood as the trumping of language or as a language of lawyers. The reason that I'm not optimistic is that my own conclusion is that it's a disciplinary matter. My perspective now is that a fundamental assumption of the linguistic discipline is that language has got to be general and have general rules. Therefore, there is a strong disposition to reject the idea that these kinds of things can possibly be looked at as a legal language, whereas the lawyers, I think, believe that's at least one way such a practice could be regarded.

So at present, I am dubious about how useful collaboration would be, but I think that would be an interesting article.

CLARK CUNNINGHAM: It might demarcate boundaries between the disciplines.

JUDITH LEVI: Describing irreconcilable differences could be a contribution also.

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124. See JUDITH N. LEVI, *LANGUAGE AND LAW: A BIBLIOGRAPHIC GUIDE TO SOCIAL SCIENCE RESEARCH IN THE U.S.A.* 9-11, 31-33 (1994).

KENT GREENAWALT: Yes, you could have an article in the form that, “Well, this is how we see it.” “This is why this is stupid.” “This is why it’s not so stupid.” “This is why it’s still stupid,” and so on.

JUDITH LEVI: We have other avenues. For example, Chuck once testified before the FTC about advertising language, and it seemed to me that they wanted to know whether companies like the ones that make things like Alka-Seltzer could be permitted to add synonyms or putative synonyms to the terms that you can advertise Alka-Seltzer for, such as *sour stomach*, *acid indigestion* and *heartburn*. Were there other synonyms that could be added to the list that the FTC should authorize these companies to use or could they be invented?

It’s a long story, but I remember using Chuck’s testimony to argue that sometimes the function of linguists is to say, “There is no answer to that question” or “Linguistics doesn’t know the answer to that question.” That’s a contribution even if we don’t bring people to a single set of beliefs. Sometimes answering “We don’t know” is more accurate than letting, for example, two parties in an adversarial case argue that X must be true or Y must be true, when in fact, linguists know that question cannot be decided in a reliable way.

It’s just about 2:30 by my watch so I will conclude by thanking everybody who made this one of the most exciting and one of the most exhausting weekends I have ever been through.

But I think we have not seen the end of this conference. I think it will flourish in visible and invisible ways for a long time.