

# RELATED ARTICLE

## LAW AS A SPECIES OF LANGUAGE ACQUISITION

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### I. THE WORD AND THE LAW

In the beginning was the word, and the word was with the law, and the word was law.<sup>1</sup> This symposium on law and linguistics marks the triumphant conclusion to a beginning, the completion of the “intentionally narrow undertaking”<sup>2</sup> launched by Lawrence M. Solan<sup>3</sup> and his cohorts in

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1. Cf. *John* 1:1; Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 145 (1994).

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

3. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); Lawrence M. Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50 (1993).

the Law and Linguistics Consortium.<sup>4</sup> By “using linguistics to critique judicial decisions [that] treat[] ambiguous texts as if they were plain,” these pioneers have begun to explore different ways in which “analysis of ambiguous texts by linguists could actually assist judges in identifying and choosing among possible [legal] interpretations.”<sup>5</sup> True to the tradition of Clark Cunningham,<sup>6</sup> the law and linguistics movement has dedicated itself to resolving specific, concrete legal problems. In the classic fashion of practical lawyering, it has “identif[ie]d an issue” in one or another statutory dispute, “assemble[d] the available information, [and] evaluate[d] potential responses” based on the state of the linguistic art.<sup>7</sup> Linguistic analysis of law has focused on discrete “cases and controversies,”<sup>8</sup> and the federal courts have returned the favor by citing Solan’s *The Language of Judges*<sup>9</sup> and *Plain Meaning and Hard Cases*,<sup>10</sup> the *Yale Law Journal* review of Solan’s work. As tribute to the movement’s phenomenal success, two of America’s foremost experts on statutory interpretation have advised the Office of the Solicitor General to “hire some good linguists.”<sup>11</sup>

We who have learned to sail amid the sea of indeterminate legal language<sup>12</sup> should thank linguistic analysis of law for spotting “a few more stars by which to steer.”<sup>13</sup> Perhaps the time has come for us to

4. See Brief *Amicus Curiae* of the Law and Linguistics Consortium in Support of Respondents at 1, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-723) (identifying the members of the Consortium as Clark D. Cunningham, Georgia M. Green, Jeffrey P. Kaplan, Judith N. Levi, and Lawrence B. Solan—the authors of the works cited *supra* notes 2 and 3).

5. Cunningham et al., *supra* note 2, at 1561.

6. See Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of “Use a Firearm,”* 73 WASH. U. L.Q. 1157 (1995); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) [hereinafter Cunningham, *The Lawyer as Translator*]; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) [hereinafter Cunningham, *A Tale of Two Clients*]; Clark D. Cunningham, *A Linguistic Analysis of the Meanings of “Search” in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988) [hereinafter Cunningham, *A Search for Common Sense*].

7. Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 791 (1994).

8. U.S. CONST. art. III, § 1.

9. See *Overhauser v. United States*, 45 F.3d 1085, 1087 (7th Cir. 1995) (Posner, J.).

10. See *Office of Workers’ Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994); *Staples v. United States*, 114 S. Ct. 1793, 1806 (1994) (Ginsburg, J., concurring); *United States v. Granderson*, 114 S. Ct. 1259, 1267 n.10 (1994); *United States v. Davis*, 872 F. Supp. 1475, 1479 n.7 (E.D. Va. 1995).

11. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 73 n.204 (1994).

12. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 278 (1984).

13. Cunningham et al., *supra* note 2, at 1617.

envision even grander ambitions. Let us build a tower that will reach beyond the stars; let us chance whatever consequences may befall us.<sup>14</sup> What else can the law learn from linguistics? Or, perhaps more intriguingly, what can linguistics tell us about the way we learn law? "In the inductive, constantly evolving world of law,"<sup>15</sup> in an intellectual maelstrom whose complexities approach those of economic and terrestrial ecosystems,<sup>16</sup> we know not what we might discover if we think of law, linguistics, and the connection between law and linguistics as "a continuous process of learning and experimentation."<sup>17</sup>

Law and linguistics scholarship has focused on matters of semantics, syntax, and pragmatics—the essentials of meaning, sentence structure, and noncontextual aspects of language.<sup>18</sup> Like any other science, linguistics begins from basic building blocks and works its way through the synchronic, diachronic, and comparative study of language.<sup>19</sup> This progression from specific linguistic components to more general classes gives linguistics an undeniably inductive quality.<sup>20</sup> The next wave of law and linguistics scholarship may find that its essential project lies in finding the most fruitful level of scientific specificity. If too refined, too "pure," and not sufficiently "applied," linguistics has little to offer the law. Without fanfare, *Plain Meaning and Hard Cases* relegated its discussion of phonetics, phonology, and morphology to a single footnote.<sup>21</sup> One must

14. Compare Gen. 11:1-9 (describing how God foiled the Tower of Babel by "confounding" the speech of its builders and rendering them unable to "understand one another's speech") with Acts 2:1-14 (describing how the words of the disciples at Pentecost were understood by each of the represented nationalities in its own language). See generally Berman, *supra* note 1, at 165 ("Implicit in the story of the Tower of Babel is the story of Pentecost, [which] gives hope that . . . by translation from one language to another all peoples of the world may, by the power of a higher spiritual truth, share each other's experiences vicariously and become . . . united.")

15. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEMPHIS L. REV. 1315, 1345 (1995).

16. Cf. generally RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE (1982) 23-48, 206-45 (applying the insights of evolutionary biology in a critique of neoclassical economics).

17. Farber, *supra* note 7, at 791.

18. See Cunningham et al., *supra* note 2, at 1568.

19. Compare FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GÉNÉRALE 63-95 (2d ed. 1948) (expounding basic principles of phonology) with *id.* at 141-289 (surveying synchronic, diachronic, and geographic variations in language).

20. See LOUIS HJELMSLEV, PROLOGOMENA TO A THEORY OF LANGUAGE 11-12 (Francis J. Whitfield trans. 1961) (translating LOUIS HJELMSLEV, OMKRING SPROGTERIENS GRUNDLÆGGELSE 12 (1943)).

21. See Cunningham et al., *supra* note 2, at 1568 n.25. See generally Mortèza Mahmoodian, Modern Theories of Language: The Empirical Challenge 38-40 (1993) (placing semantics, syntax,

strain to imagine how the mechanics of sound production or the sound system of the English language might affect the law.<sup>22</sup> Linguistics at too high a level of abstraction likewise seems unhelpful. American law rarely considers the nuances of foreign languages,<sup>23</sup> and *a fortiori* the entire field of comparative linguistics, especially as applied in the ongoing search for linguistic universals, seemingly lies outside the useful domain of law and linguistics.

This assumption is demonstrably wrong. To the extent that we legal writers might believe otherwise, we have only ourselves to blame. We have been misunderstanding the relation between law and linguistics all along.<sup>24</sup>

## II. THE REMEMBRANCE OF THINGS PAST: OF THE DREAMER AND THE SCHEMER

Thanks to the Law and Linguistics Consortium, we are witnessing the emergence of a scholarship that subjects law to explicitly linguistic analysis. But the law has already been trying to reconcile itself with linguistic teachings for some time. Legal thinkers have constantly sought the elusive balance between the priest and the practitioner, between the dreamer and the schemer. It should come as no surprise that Clark Cunningham began his teaching career as a clinical instructor and continues to dramatize real legal stories in his scholarship.<sup>25</sup> What is surprising is the gap between the linguistic analysis that the legal academy hypothetically prefers and the linguistic analysis that the judiciary actually performs. Especially in the fields of statutory interpretation and constitutional law,

morphology and phonology on a "continuum of complexity" that ranges from the more complex and less structured to the less complex and more structured).

22. *But see* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (arguing, in effect, that antidiscrimination law should protect individuals whose cultural backgrounds impair their phonological performance).

23. *But see, e.g.*, *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-42 (1991) (interpreting the French "authentic text" of the Warsaw Convention); *Air France v. Saks*, 470 U.S. 392, 397-400 (1985) (same); Cunningham, *A Tale of Two Clients*, *supra* note 6, at 2463-65 (discussing the problems raised when the English word *guilty* is translated as *culpable* in Spanish); *cf. Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (Scalia, J.) (analyzing the Latin etymology of the word *confront* in support of a "literal" interpretation of the constitutional right of "the accused . . . to be confronted with the witnesses against him."

24. *See generally* RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 209-68 (1988) (documenting objections to the use of literary criticism in the interpretation of legal texts).

25. *See* Cunningham, *The Lawyer as Translator*, *supra* note 6, at 1298 ("This is a true story."); Cunningham, *A Tale of Two Clients*, *supra* note 6, at 2459 (same).

legal scholars have plunged headlong into the linguistic subdiscipline of pragmatics.<sup>26</sup> Much of this scholarship is overtly embarrassed by the law's tepid intellectual reputation; its authors seem subconsciously motivated by Ph.D. envy. Many a post-collegiate path to a legal professorship covers less than half the time between the Graduate Record Exam and the dissertation defense. Only in law do the professors teach the classes and the students edit the journals;<sup>27</sup> the opposite is true throughout the rest of the academy.<sup>28</sup> At the other extreme, the "new textualism" of the Rehnquist Court has cloaked itself in a shroud of quasi-scientific linguistic analysis, seeking semantic shelter among lexicographic islands in a sea of uncertainty.<sup>29</sup> Armed with *ad hoc* linguistic reasoning and its choice of dictionaries,<sup>30</sup> the new textualism suggests that exclusive reliance on "the ordinary meaning of [statutory] language in its textual context" and the "established canons of construction" will shield judges from the pernicious influences of pragmatism and contextually contingent interpretation.<sup>31</sup>

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26. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523 (1988); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988).

27. See Christopher Shea, *Students v. Professors: Law-Review Debate Heats Up as Student Editors Clash with Faculty Authors*, CHRON. HIGHER EDUC., June 2, 1995, at A33. See generally *Symposium on Law Review Editing: The Struggle Between Author and Editor Over Control of the Text*, 70 CHI.-KENT L. REV. 69 (1994); *Special Issue: Law Review Conference*, 47 STAN. L. REV. 1117 (1995).

28. Cf., e.g., JANE SMILEY, MOO 245 (1995) ("As usual, his exams would be given out by his graduate assistants and graded by the university computer. Those grades would then be . . . tallied according to a statistical curve, and reported to the students. By then, Dr. Lionel Gift would have been in Costa Rica for over a week. Let it snow let it snow let it snow: He would not be here to see it, and that suited him perfectly.").

29. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

30. Compare *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2230 n.3 (1994) (Scalia, J.) (snubbing the definition of "modify" in WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1452 (1976) because of that dictionary's "portrayal of common error as proper usage") with, e.g., *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2453, 2455 (1992) (Scalia, J.) (citing *Webster's Third* without fanfare); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (Scalia, J.) (same). See also *National Organization for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 804 (1994) (citing *Webster's Third* before *MCI*); *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2245 (1994) (citing *Webster's Third* after *MCI*). See generally Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.12 (1994) (stating that the Supreme Court cited *Webster's Third* more often than any other general-use dictionary between October Terms 1988 and 1992).

31. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

With so wide a gap, no wonder legal scholarship can neither satisfy the needs of practicing lawyers nor generate novel ideas for their own sake.<sup>32</sup> Granted, it is no small task to reconcile the contradictory tendencies of the hermeneutical hermit and the tome-thumping textualist. Solon of Athens gave wise laws;<sup>33</sup> Solan of America has given wise advice. Neither a minstrel nor a scrivener be.<sup>34</sup> Though also stricken by Ph.D. envy, I write in hopes of finding an alternative to the two dreary extremes presented by prevalent legal treatments of linguistic concepts. The inherent unreliability of dictionaries<sup>35</sup> and the Supreme Court's shameless dictionary-shopping<sup>36</sup> undermine the new textualism's claim to coherence. On the other hand, the academic response to the new textualism has often assumed the posture of the deconstructionist, arrogant in her belief that she can dismantle any text. But if "[t]he Justices have not been reading their Derrida,"<sup>37</sup> why should we?<sup>38</sup> Why must we speak as though a quest for meaning will surely fail, as though the application of linguistics to law will necessarily obliterate any hope of finding an interpretive anchor?<sup>39</sup> "Ay, there's the rub."<sup>40</sup> Deconstructionist hermeneutics notwithstanding, modern linguistics offers scant support to critical theories so corrosive that they consume themselves.<sup>41</sup> What would happen if we described the legal

32. See Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 147-48 (1994).

33. See generally PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 97-117 (John Dryden trans., Arthur Hugh Clough rev. ed. 1979) (describing the life of Solon, a celebrated Athenian legislator).

34. Cf. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3, l. 75 (Riverside ed., 1974) ("Neither a borrower nor a lender be") [hereinafter HAMLET]; cf. also Cunningham et al., *supra* note 2, at 1565 (declining to "address the[] difficult jurisprudential issues" raised by "the scholarly attention devoted to new textualism").

35. See *id.* at 1614-16; Solan, *When Judges Use the Dictionary*, *supra* note 3.

36. See Note, *supra* note 30.

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

38. Ignore, e.g., JACQUES DERRIDA, LA VOIX ET LE PHÉNOMÈNE: INTRODUCTION AU PROBLÈME DU SIGNE DANS LA PHÉNOMÉNOLOGIE DE HUSSERL (1993).

39. Cf. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 882 (1995) (statement of William N. Eskridge, Jr.) (acknowledging that none of the participants in the Law and Linguistics Conference writes in the deconstructive style of critical theory); *id.* at 884 (statement of Michael Moore) ("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 . . .").

40. HAMLET, *supra* note 34, act 3, sc. 1, l. 64.

41. Cf. Chen & Gifford, *supra* note 15, at 1317 (suggesting that law and economics in its most rabid manifestations exhibits this tendency); Jim Chen, *The Constitutional Law Songbook*, 11 CONST. COMMENTARY 263, 264 (1994) (offering "The Coasean Creed" as an anthem for the Critical Legal Studies version of law and economics).

process and the legal academy in more honest linguistic terms? We might discover that law *without* linguistics is but a naked abstraction, like the painting of a sorrow, a face without a heart.<sup>42</sup>

### III. LOST IN TRANSLATION

#### A. *Innocents Abroad*

James Boyd White<sup>43</sup> and Clark Cunningham<sup>44</sup> have offered a felicitous metaphor that helps us begin to clarify the proper relationship between law and linguistics. They describe law as *translation*, as the rendering of ordinary, nonlegal language into the patois of the legal system. For Cunningham, effective legal representation presents the ultimate challenge to the lawyer as translator: "The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own . . . and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker's original utterance."<sup>45</sup> The good lawyer speaks both the language of the law and the language of the people.

Translation in the sense of traversing linguistic barriers fits the representational setting well enough. As fewer legally trained professionals represent actual clients, however, the translation metaphor may prove too narrow to capture the fuller senses in which we "learn" or "do" law. Lawrence Lessig's sense of "translation" extends the metaphor to the interpretive setting,<sup>46</sup> albeit at the price of implicitly taking sides in the debate over whether judges are properly seen as agents of the legislature.<sup>47</sup> Furthermore, although White, Cunningham, and Lessig properly envision translation as a rich, complete experience, the term "translation" carries with it the baggage of generations of bad foreign language instruction. As

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42. HAMLET, *supra* note 34, act 4, sc. 7, ll. 108-09.

43. See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990); James Boyd White, *Translation as a Mode of Thought*, 77 CORNELL L. REV. 1388 (1992); cf. James Boyd White, Book Review, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2023 (1989) (arguing that a literary awareness helps law and lawyers imagine other worlds, much as a translator exposes one culture's literature to another).

44. See Cunningham, *The Lawyer as Translator*, *supra* note 6; Cunningham, *A Tale of Two Clients*, *supra* note 6, at 2482-85.

45. Cunningham, *The Lawyer as Translator*, *supra* note 6, at 1300.

46. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

47. See generally Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415-41 (1989).

any student of foreign language has discovered, transplanting native semantics or syntax into a foreign setting will almost surely cause trouble.<sup>48</sup> Indeed, “translation” in the rigid sense of textual manipulation comes perilously close to the constitutional catechism that animates the new textualism and its formalist cousins.<sup>49</sup> At its most extreme, formalist dogma posits that identifying all of the “established” canons of interpretation and subjecting them to brute Euclidean logic will yield one and only one answer to every legal problem.<sup>50</sup> Learning or “doing” law in this fashion is as likely to succeed as painstaking analysis of the Gallic Commentaries, the Iliad, or *Hrafnkels saga freysgóða* is likely to prepare the “translator” for daily life in modern Italy, Greece, or Iceland.<sup>51</sup> The living law does not and should not resemble the paleolinguistic exercise of excavating ancient texts so that today’s scholars can project modern readings onto them.<sup>52</sup>

48. Inquire, for instance, about *préservatifs* in a French pastry shop, and you will probably communicate an interest in something besides French baking secrets. The “translation” problem exists even between the United States and the United Kingdom, two nations separated by a common language. Thus, a Briton who asks her American host to “knock me up” at a chosen hour in the morning might be getting more than she bargained for.

49. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1320 (1990) (describing this formula, “In the beginning was the Word, and the Word was with the Law, and the Word was Law”—which is a blasphemous transformation of John 1:1—as “the short and simple recipe for a catechetical Constitution”).

50. Cf. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 226 (1994) (framing the quest for legal truth as one powered solely by the force of “Euclidean” logic); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 368, 371 (1994) (criticizing Paulsen’s geometric technique); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 378 (1994) (same).

51. Which is not to say that lawyers have nothing to learn from these classics. Compare, e.g., JULIUS CAESAR, COMMENTARII CUM A. HIRTI ALIORUMQUE SUPPLEMENTIS RECOGNOVIT BERNARDUS DINTER 1 (1890) (“*Gallia est omnia divisa en partes tres.*”) with Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 691 (1954) (Clark, J., dissenting) (“The natural gas industry, like ancient Gaul, is divided into three parts. These parts are production and gathering, interstate transmission by pipeline, and distribution to consumers by local distribution companies.”). See also, e.g., THEODORE M. ANDERSSON & WILLIAM IAN MILLER, LAW AND LITERATURE IN MEDIEVAL ICELAND: LJÓSVETNINGA SAGA AND VALLA-LJÓTS SAGA (1989); DAVID COHEN, LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS (1991); WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990); Henry Ordower, *Exploring the Literary Function of Law and Litigation in Njal’s Saga*, 3 CARDOZO STUD. L. & LIT. 41 (1991); cf. Richard A. Posner, Book Review, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1506-07 (1992) (comparing saga Iceland as a legal society with classical Athens and Homeric Greece).

52. Cf., e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985) (urging judges interpreting statutes to engage in “imaginative reconstruction” of the enacting legislature’s intent); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907)



In the end, “translation” is an incomplete metaphor for the law as a system of language, for it presupposes not only the existence of multiple languages in law, but also the process by which lawyers attain their talent as polyglots. Neither premise is necessarily wrong—in fact, I shall defend them both in due time—but one cannot assess the artistry of an American translation of Molière’s *Le Misanthrope* without an underlying understanding of both French and English. Moreover, the bad image of translation compounds the law’s archaeological perception of language, the law’s stupefying obsession with *la langue littéraire* at the expense of *la parole* as the dynamic engine of linguistic evolution.<sup>53</sup>

Most errors by lawyers as amateur linguists can be traced to the assumption that language is a static mechanism rather than a living organism. The law looks to plain language techniques as though linguistic analysis were prescriptive rather than descriptive. In criticizing *Webster’s Third New International Dictionary* for “its portrayal of common error as proper usage,”<sup>54</sup> Justice Antonin Scalia expressed the classic lawyerly misperception of linguistics. To a linguist, “common error” is “proper usage.” By contrast, verbal etiquette is the domain of lawyers, literary critics, and various other self-appointed guardians of manners and customs. The instinctive legal reaction to linguists and linguistics—“What have you guys got against dictionaries?”—shows how far the legal world is from understanding how linguists “can give us more reliable information about the meanings of words.”<sup>55</sup> Dictionaries offer at best an imperfect measure of an “individual *état de langue*,” of language “as a closed totality” to be analyzed solely for the “functions between its parts.”<sup>56</sup> And a minute portion of the *état de langue* at that: dictionaries rarely, if ever, provide useful information on syntax. The shortcoming is often critical; even when everyone agrees over the definition of *knowingly*, there may be sharp disagreement over whether the word modifies specific statutory terms.<sup>57</sup>

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(defending an approach essentially identical to Posner’s technique of imaginative reconstruction by identifying the pitfalls of the “spurious” alternative).

53. Compare SAUSSURE, *supra* note 19, at 45-47 (discussing the illusory prestige of written language over spoken language) with *id.* at 36-39 (discussing the way in which daily speech modifies linguistic conventions over time).

54. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2230 n.3 (1994).

55. *Law and Linguistics Conference*, *supra* note 39, at 823 (statement of Charles Fillmore).

56. LOUIS HJELMSLEV, *LANGUAGE: AN INTRODUCTION* 8 (Francis J. Whitfield trans., 1970).

57. See generally SOLAN, *supra* note 3, at 95-98 (distinguishing between “structural ambiguity” and “problems of categorization” as major causes of statutory ambiguity); Cunningham et al., *supra* note 2, at 1573-77 (discussing *United States v. Staples*, 972 F.2d 608 (10th Cir. 1992), *rev’d*, 114 S. Ct.

Let us modify rather than abandon the translation metaphor.<sup>58</sup> Perhaps it is more fruitful to ask how one masters any language, much less the language of the law. For the professional linguist, “the chief problem . . . will always be, not the individual *état de langue*, but the relationship between different stages of a single language and between different languages, their similarities and their differences.”<sup>59</sup> Given enough information, the comparative linguist might begin to identify “typological relationships” between languages, relationships “based on an agreement in structural features that is conditioned by the general possibilities of language.”<sup>60</sup> Stated at this most general level, the search for linguistic universals—nothing less than a quest for the universal grammar that makes language possible<sup>61</sup>—parallels what Lon Fuller described as the ultimate goal of jurisprudence, the search for “the morality that makes law possible.”<sup>62</sup>

### B. *The Origin of Speech*

The judicial obsession with lexicographic snapshots of language grows out of an uninformed or at best obsolete view of linguistics. So does the overwhelming academic preference for language philosophy over a more scientific approach to linguistics. As we stand on the brink of a century whose principal intellectual project may consist of overthrowing the Standard Social Science Model,<sup>63</sup> we should acknowledge the brooding omnipresence of B.F. Skinner. For Skinner, language was just another expression of behaviorialist psychology: environmental stimuli in,

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1793 (1994)). See also, e.g., *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (analyzing the range of the statutory adverb *knowingly*); cf. *Ratzlaf v. United States*, 114 S. Ct. 655 (1994) (analyzing the range of the statutory adverb *willfully*).

58. Cf. *MCI Telecommunications*, 114 S. Ct. at 2229 (holding that *modify* means “to change moderately or in minor fashion”).

59. HJELMSLEV, *supra* note 56, at 9.

60. *Id.*

61. See, e.g., NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 28 (1965) (“The study of linguistic universals is the study of the properties of *any* generative grammar for a natural language.”); HELEN GOODLUCK, LANGUAGE ACQUISITION: A LINGUISTIC INTRODUCTION §§ 1.4, 4.1-4.1.5, at 3-4, 61-74 (1991).

62. LON FULLER, THE MORALITY OF LAW 33 (rev. ed. 1969).

63. See generally THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE (Jerome H. Barkow et al. eds., 1992) [hereinafter THE ADAPTED MIND]; D.E. BROWN, HUMAN UNIVERSALS (1991); CARL N. DEGNER, IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT (1991). The incipient, largely Darwinian uprising against social science dogma may eventually rival the scope of the battle that Western science has waged against Aristotle since the Renaissance.

conditioned responses out.<sup>64</sup> At its most extreme, Skinner's theory claimed that experimental work on nonhuman psychology could "be extended to human [verbal] behavior without serious modification."<sup>65</sup> Two of the preeminent language philosophers of Skinner's time, W.V.O. Quine and Ludwig Wittgenstein, depicted language acquisition in terms that were essentially indistinguishable from Skinner's theory. Quine explicitly adopted Skinner's behaviorialist model, arguing that some societal reward, even as modest as "corroborative usage" of language bearing some "resemblance to the child's effort," provided the needed stimulus and reinforcement to help a child attain language competency.<sup>66</sup> Wittgenstein credited explicit drill-and-repetition linguistic instruction,<sup>67</sup> even though this training technique has created no fluency in Latin in the modern era.

The American legal academy might justify its predilection for language philosophers such as Quine and Wittgenstein as a part of a grander effort to understand pragmatic constraints on legal language. As shown by William Eskridge's explanation<sup>68</sup> of Francis Lieber's "fetch some soupmeat" hypothetical,<sup>69</sup> hermeneutics has enhanced the law's understanding of the myriad ways in which context might affect the legal interpretation. Generational differences in intellectual tastes offer a less charitable but nevertheless inoffensive explanation for the contemporary focus on Quine and Wittgenstein. Between 1956 and 1966, there was at least one future Supreme Court Justice among Harvard Law School students. Those students—Ruth Bader Ginsburg (class of 1959, transferred to Columbia before the 1958-59 school year), Antonin Scalia ('60), Anthony Kennedy ('61), Stephen Breyer ('64), and David Souter

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64. See B.F. SKINNER, *VERBAL BEHAVIOR* (1957).

65. *Id.* at 5.

66. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 82-83 (1960).

67. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 9, at 5-6 (G.E.M. Anscombe trans 1953); *cf. id.* § 23, at 11-12 (describing speech as "*Sprachspiel*," a "language-game" that can be learned and mastered like any other form of entertainment (emphasis in original)). See generally W.F. Day, *On Certain Similarities between the Philosophical Investigations of Ludwig Wittgenstein and the Operatonism of B.F. Skinner*, 12 *J. EXPERIMENTAL ANALYSIS BEHAVIOR* 489 (1969).

68. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 40, 53 56-57, 125-28, 246-47 (1994); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 604-06 (2d ed. 1995); *Law and Linguistics Conference*, *supra* note 39, at 940-53.

69. See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 17-20 (2d ed. 1880), *reprinted in* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1114-15 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

('66)—constitute a majority on today's Court.<sup>70</sup> These future Justices attended Harvard during the golden age of the "legal process" school; all five took Henry Hart and Albert Sacks's legal process class.<sup>71</sup> These Justices' law school contemporaries enjoy a commanding grip on today's judiciary and legal academy. It is altogether understandable that today's legal leaders might favor the language philosophers who dominated the intellectual scene during their formative educational years.

This period, however, happened to be a tumultuous one for linguistics. Two generations earlier, in 1921, Edward Sapir's *Language*<sup>72</sup> had inspired young Louis Hjelmslev to envision "the possibility of establishing a *comparative general linguistics* destined to supersede the subjective and sentimental *philosophy of language* of the past."<sup>73</sup> In the crucial decade between 1956 and 1966, Noam Chomsky fulfilled Hjelmslev's prophecy. As Consortium member Judith Levi has acknowledged, Chomsky "transformed linguistics as a discipline" by "turn[ing] linguistics into a theory[-]building enterprise [with] rigorous expectations."<sup>74</sup> In 1957, the same year in which Skinner's *Verbal Behavior* appeared, Chomsky published *Syntactic Structures*, his earliest effort at sketching the outline of a generative grammar.<sup>75</sup> This event marked a scientific "turning point" in linguistics.<sup>76</sup> When Chomsky published his devastating 1959 review of Skinner's book,<sup>77</sup> contemporary linguistics witnessed a cosmic collision,

70. See Nancy Waring, *Stephen Breyer: A Look Back at Law School*, 46 HARV. L. BULL. 4, 8 (1995) (a list of Supreme Court Justices who studied at Harvard Law School). This period's influence thus rivals and may eventually eclipse the influence exerted by the Harvard Law School of the 1930s, when Harry Blackmun (class of '32), William Brennan ('31), and Lewis Powell (LL.M. '32) studied there, Felix Frankfurter taught there, and Erwin Griswold lobbied forcefully against President Roosevelt's Court-packing plan.

71. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2047 (1994).

72. See EDWARD SAPIR, *LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH* (1921).

73. Louis Hjelmslev, *Edward Sapir*, 1 ACTA LINGUISTICA 76, 77 (1939).

74. *Law and Linguistics Conference*, *supra* note 39, at 899. This intellectual revolution apparently took hold among linguists during the 1960s and 1970s, *see id.*, and thus may have postdated the height of the legal process era in legal education. By now, the nonlegal intellectual consensus is clear: the Arts and Humanities Citation Index ranks Chomsky as the most cited living person and the eighth of all time. See Carlos P. Otero, *Foreword*, in 1 NOAM CHOMSKY: CRITICAL ASSESSMENTS xxi, xxii (Carlos P. Otero ed. 1994); Kim Vandiver, *MIT Tech Talk* (April 15, 1992) (university newsletter).

75. See NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957).

76. DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE* § 65, at 409 (1987).

77. See Noam Chomsky, Book Review, *A Review of B. F. Skinner's Verbal Behavior*, 35 LANGUAGE 26 (1959), *reprinted in* THE STRUCTURE OF LANGUAGE 547 (Jerry A. Fodor & Jerrold J. Katz ed., 1964).

perhaps one of paradigmatic dimensions.<sup>78</sup> Skinner had portrayed language as a two-pronged, stimulus-response machine; if linguists could identify all of the admittedly large number of relevant social stimuli, they could explain and predict speech as a conditioned response. Far from satisfying what Chomsky would later clarify as “explanatory adequacy” in linguistic theory,<sup>79</sup> Skinner’s model represented for Chomsky “a kind of measure of the importance of the factors omitted from consideration,” “an indication of how little is really known about [the] remarkably complex phenomenon” of language.<sup>80</sup> The fault lay, according to Chomsky, in Skinner’s apparent belief “that the contribution of the *speaker* is quite trivial and elementary.”<sup>81</sup>

Whereas Skinner had emphasized the predictability of language as a psychological phenomenon, Chomsky’s opposing view stressed linguistic creativity, “the capacity that all native speakers of a language have to produce and understand an indefinitely large number of sentences that they have never heard before and that may indeed never have been uttered before.”<sup>82</sup> The distinction is crucial. How speakers respond to social conditioning explains precious little; what speakers actually do despite the absence of rigorous training comprises the mystery and the magic of language at their fullest. The authors of *Plain Meaning and Hard Cases* restated this proposition quite ably: “The very flexibility of language . . . is possible precisely because the range of meaning of a word or sentence cannot be limited in advance by prescription but rather is realized in the creativity of actual use.”<sup>83</sup>

From the Chomskyan perspective, the child’s “remarkable capacity for learning typifies this creative aspect of language.”<sup>84</sup> “[W]ithout any explicit instruction,” the young child gains “perfect mastery of a language with incomparably greater ease” than even the most rigorously trained

78. See Robert Freidin, *Conceptual Shifts in the Science of Grammar: 1951-92*, in 1 NOAM CHOMSKY: CRITICAL ASSESSMENTS, *supra* note 74, at 653; Jerrold J. Katz & Thomas G. Bever, *The Fall and Rise of Empiricism*, in AN INTEGRATED THEORY OF LINGUISTIC ABILITY 11 (Thomas G. Bever et al. eds., 1976), reprinted in 1 NOAM CHOMSKY: CRITICAL ASSESSMENTS, *supra* note 74, at 286. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

79. See CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 61, at 25-26; Noam Chomsky, *Current Issues in Linguistic Theory*, in *THE STRUCTURE OF LANGUAGE*, *supra* note 77, at 50, 63.

80. Chomsky, *supra* note 77, at 28.

81. *Id.* (emphasis added).

82. JOHN LYONS, NOAM CHOMSKY 21 (1970).

83. Cunningham et al., *supra* note 2, at 1616.

84. Chomsky, *Book Review*, *supra* note 77, at 43.

adults.<sup>85</sup> "Mere exposure to . . . language[] for a remarkably short period"<sup>86</sup> permits the child to acquire the entire "system of *linguistic competence* that underlies behavior."<sup>87</sup> Universal grammar, or UG, is intrinsic to the speaker. By contrast, the much-vaunted environmental influences of Skinner's behaviorism merely channel the child's linguistic instincts toward a single, underlying set of phonological, semantic, and syntactic rules.<sup>88</sup> The nature of UG points to a biological and uniquely human wellspring for the gift of language: the likely absence of any "structure similar to UG in nonhuman organisms" means that "the capacity for free, appropriate, and creative use of language as an expression of thought" is almost surely "a distinctive feature of the human species."<sup>89</sup>

Even a cursory survey reveals some of the broader implications of the Chomskyan revolution<sup>90</sup> for linguistic analysis of law. As an initial matter, an acknowledgement of Chomsky's contributions should cool off the legal academy's torrid love affair with Quine and Wittgenstein. These language philosophers have provided useful word games,<sup>91</sup> but their views on the origins of language are suspect. Wittgenstein's "examples and remarks, often brilliant and perceptive, lead right to the border of the deepest problems, at which point he stops short and insists that the philosopher can

85. Noam Chomsky, *Explanatory Models in Linguistics*, in LOGIC, METHODOLOGY AND PHILOSOPHY OF SCIENCE 528, 529 (Ernst Nagel et al. eds., 1962).

86. *Id.*

87. NOAM CHOMSKY, LANGUAGE AND MIND 4 (enlarged ed. 1972).

88. Studies of how children acquire different languages suggest that children rapidly adjust to the dominant syntax of the language they are learning. *See, e.g.*, Barbara Lust, *Conjunction Reduction in Child Language*, 4 J. CHILD LANGUAGE 257 (1977) (English); Barbara Lust & Yu-Chen Chien, *The Structure of Coordination in First-Language Acquisition of Mandarin Chinese: Evidence for a Universal*, 17 COGNITION 49 (1984); Barbara Lust & Tatsuko Wakayama, *The Structure of Coordination in Children's First-Language Acquisition of Japanese*, in STUDIES IN FIRST- AND SECOND-LANGUAGE ACQUISITION (F. Eckman & A. Hastings eds., 1979); *cf.* H. Clahsen & Pieter Muysken, *The Availability of Universal Grammar to Adult and Child Learners: A Study of the Acquisition of German Word Order*, 2 SECOND LANGUAGE RES. 93 (1986).

89. NOAM CHOMSKY, REFLECTIONS ON LANGUAGE 40 (1975); *see also* NOAM CHOMSKY, CARTESIAN LINGUISTICS: A CHAPTER IN THE HISTORY OF RATIONALIST THOUGHT 4-5 (1966) ("[M]an has a species-specific capacity, a unique type of intellectual organization which cannot be attributed to peripheral organs or related to general intelligence and which manifests itself in what we may refer to as the 'creative aspect' of ordinary language use . . .").

90. *See generally* Frederick J. Newmeyer, *Has There Been a 'Chomskyan Revolution' in Linguistics?*, 62 LANGUAGE 1 (1986), *reprinted in* 2 NOAM CHOMSKY: CRITICAL ASSESSMENTS, *supra* note 74, at 919.

91. *See* SOLAN, THE LANGUAGE OF JUDGES, *supra* note 3, at 96 (identifying Wittgenstein's problem of a "game" that should be taught to children, *see* WITTGENSTEIN, *supra* note 67, §§ 66-75, at 31-35, and Quine's discussion of the appropriate definition of a "mountain," *see* QUINE, *supra* note 66, at 126).

go no further."<sup>92</sup> For his part, Quine rejected transformational grammar and other efforts to find a universal grammar as "folly," bound to be "stifle[d]" by "[t]imely reflection on method and evidence."<sup>93</sup> Adhering to his view that the "indeterminacy of translation" imposes insurmountable pragmatic constraints on language,<sup>94</sup> Quine insisted as late as 1974 that "the child learns most of language by hearing the adults and emulating them,"<sup>95</sup> even as his scientific contemporaries continued to document the extraordinary extent of the human child's linguistic instincts.<sup>96</sup>

Quine's empiricism appeals to legal scholars' overwhelming preference for the Standard Social Science Model, for the view that human beings are strictly the products of social conditioning.<sup>97</sup> But ever since nineteenth-century pioneers such as Rasmus Rask and Franz Bopp began identifying genetic relationships among Indo-European languages,<sup>98</sup> it has been possible to think of language in biological terms and to study language acquisition and linguistic change as biological processes. Today's linguists are unearthing even more dramatic linkages between reproductive

92. Noam Chomsky, *Some Empirical Assumptions in the Modern Philosophy of Language*, in *PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNST NAGEL* 260, 280 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969).

93. W.V. Quine, *Methodological Reflections on Current Linguistic Theory*, in *SEMANTICS OF NATURAL LANGUAGE* 442, 447 (Gilbert Harman & Donald Davidson eds., 1972).

94. See W.V. QUINE, *THE ROOTS OF REFERENCE* 82-84 (1974); QUINE, *supra* note 66, at 27, 54, 72-79, 206, 221.

95. QUINE, *THE ROOTS OF REFERENCE*, *supra* note 94, at 46.

96. See, e.g., ROMAN JAKOBSON, *STUDIES ON CHILD LANGUAGE AND APHASIA* 7-29 (1971); cf. CAROL CHOMSKY, *THE ACQUISITION OF SYNTAX IN CHILDREN FROM 5 TO 10*, at 121 (1969) (concluding that "active syntactic acquisition" takes place in children up to the age of 9). Roman Jakobson had been arguing for three decades that cross-linguistically common sounds, such as front voiceless stops and nasals were the first sounds acquired by infants and the last sounds lost by aphasics. See ROMAN JAKOBSON, *CHILD LANGUAGE, APHASIA, AND PHONOLOGICAL UNIVERSALS* 13-45 (1941); Roman Jakobson, *Two Aspects of Language and Two Types of Aphasic Disturbances*, in *FUNDAMENTALS OF LANGUAGE* 53 (Roman Jakobson & Morris Halle ed., 1956). See generally ANTOINE GRÉGOIRE, *L'APPRENTISSAGE DU LANGUAGE* (1937).

97. See, e.g., QUINE, *THE ROOTS OF REFERENCE*, *supra* note 94, at 84:

The child learns [native syntax] by somehow getting a tentative and faulty command of a couple of its component devices, through imitation or analogy perhaps, and then correcting one against the other, and both against the continuing barrage of adult precept and example, and going on in this way until he has a working system meeting social standards.

98. See RASMUS RASK, *VEILEDNING TIL DET ISLANDSKE ELLER GAMLE NORDISKE SPROG* (1818) ("Investigation into the Origin of the Icelandic or Old Norse Language"); FRANZ BOPP, *ON THE CONJUGATION SYSTEM OF THE SANSKRIT LANGUAGE, IN COMPARISON WITH THOSE OF THE GREEK, LATIN, PERSIAN AND GERMANIC LANGUAGES* (1816).

communities and speech communities.<sup>99</sup> Chomsky's work confirmed what the ideology of modern social science had resisted for more than a century: linguistic dynamics are biologically driven. The "fragmentary evidence" of language that adults give to children, that all humans amass throughout their lifetimes, "hopelessly underdetermines" the "rich and complex construction" of each speaker's language capacity.<sup>100</sup> Something innate is at work.<sup>101</sup>

Let there be no doubt. After Chomsky, linguistic science portrays human language as "a true species property," an element of the "biological endowment" unique to *Homo sapiens*.<sup>102</sup> Steven Pinker has flatly articulated the Darwinian implications that Chomsky himself denies:<sup>103</sup> the power of speech is "an evolutionary adaptation," and "human language is a part of human biology."<sup>104</sup> Arguably, "the ability to use a natural language belongs more to the study of human biology than human culture; it is a topic like echolocation in bats or stereopsis in monkeys, not like writing or the wheel."<sup>105</sup> For an intellectual community that prefers a sharp division between nature and culture<sup>106</sup> and unflinchingly assigns law to the latter realm, linguistics casts a long, profoundly disturbing Darwinian shadow across the law. The Fourteenth Amendment may not have enacted Herbert Spencer's *Social Statics*,<sup>107</sup> but the structure of the language by which we make and debate law is "sharply limited" by the

99. See, e.g., Luigi L. Cavalli-Szofra, *Genes, Peoples and Languages*, 265 SCI. AM. 104 (1991); Luigi L. Cavalli-Szofra et al., *Reconstruction of Human Evolution: Bringing Together Genetic, Archaeological, and Linguistic Data*, 85 PROC. NAT'L ACAD. SCI. 6002 (1988). So it turns out that people who talk together sleep together. How shocking. In a Darwinian world, there are two and only two forces that matter. One of them is food. The other is sex. Language is how most of us get both.

100. CHOMSKY, REFLECTIONS ON LANGUAGE, *supra* note 89, at 10. For Chomsky's full response to Quine's "indeterminacy of translation" hypothesis, see *id.* at 179-204.

101. See NOAM CHOMSKY, LECTURES ON GOVERNMENT AND BINDING: THE PISA LECTURES 3 (5th ed. 1988) [hereinafter CHOMSKY, LECTURES ON GOVERNMENT AND BINDING] ("[I]t is a near certainty that fundamental properties of . . . attained grammars are radically underdetermined by evidence available to the language learner and must therefore be attributed to UG itself.").

102. NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN, AND USE xxvi (1986) [hereinafter CHOMSKY, KNOWLEDGE OF LANGUAGE].

103. See CHOMSKY, LANGUAGE AND MIND, *supra* note 87, at 97-98; NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 167 (1988).

104. STEVEN PINKER, THE LANGUAGE INSTINCT 24 (1994).

105. Steven Pinker & Paul Bloom, *Natural Language and Natural Selection*, in THE ADAPTED MIND, *supra* note 63, at 451.

106. See generally, e.g., ALAIN, L'HOMME ET L'ANIMAL (1962) (distinguishing sharply between bestial "nature" and human "culture").

107. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).



biological constraints of universal grammar.<sup>108</sup>

#### IV. LAW, LANGUAGE, AND LEARNING

So it appears that our linguistic ship atop the sea of legal indeterminacy is the *Beagle*.<sup>109</sup> But where will it take us? If not to new lands, then toward new ways of seeing familiar terrain. The existence of universal grammar reinforces the discovery of universals in other language-based disciplines. For instance, Joseph Campbell's classic study, *The Hero with a Thousand Faces*, showed how heroic myths from diverse cultural and religious traditions nevertheless converged.<sup>110</sup> So it may be with law. If there is a "universal grammar" that binds the law, however, we are unlikely to find it through the crude methodology of the new textualism. Law is a language, but not a natural one. Law has its audiences, but not necessarily the same ones as the "speech communities" known to linguists. There may be a universal legal grammar; if so, it probably incorporates nonlinguistic constraints on judicial decisionmaking. Such are the peculiarities of law as a species of language acquisition.

##### A. *The Unholy Trinity of the Interpretive World*

The unthinking observer may assume that a search for legal universals will redound to the benefit of the new textualism. True, there is a sense in which "the empirical investigation of testable hypotheses" by linguists may lend greater credibility to the textualist search "for some 'objective' word meaning that cannot be circumvented by willful judges."<sup>111</sup> But there is something primitive, something pre-Chomskyan about the architecture of an unsophisticated "plain meaning" approach to statutory interpretation. To the extent that plain meaning approaches are attempting to follow the intellectual path blazed by the pioneers of linguistic universals, the new textualists sound a wee bit aphasic.

In the spirit of an eclectic but integrative jurisprudence that binds together all approaches toward understanding language,<sup>112</sup> I shall enlist

108. CHOMSKY, REFLECTIONS ON LANGUAGE, *supra* note 89, at 10.

109. Cf. generally CHARLES DARWIN, JOURNAL OF RESEARCHES INTO THE NATURAL HISTORY AND GEOLOGY OF THE COUNTRIES VISITED DURING THE VOYAGE OF H.M.S. BEAGLE ROUND THE WORLD (1839).

110. See JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (2d ed. 1968).

111. Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1085-86 (1995).

112. See generally Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988). In "religion, literature, and law" alike, a canonical text "takes on

the help of the late Walker Percy. In addition to being a novelist and a Christian existentialist, Percy cultivated a lifelong interest in linguistics. In 1975, he published *The Message in the Bottle*,<sup>113</sup> a collection of essays on linguistics. Published before Chomsky delivered his landmark lectures on government and binding,<sup>114</sup> Percy's essays provide the insights of an informed but nonexpert observer of linguistics in the crucial period between 1954 and 1975. Although "descriptively inadequate" as a theory of language acquisition, Percy's philosophy had the inadvertent virtue of being "empirically indistinguishable from Chomsky's."<sup>115</sup> Finally, his status as an outsider emulates that of the lawyer interested in linguistics or, indeed, that of the linguist interested in explaining her craft to a nonlinguist. Just as Consortium member Georgia Green explains pragmatics from the perspective of an Australian aborigine who is trying to learn English,<sup>116</sup>

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a perpetual quality" and leaves its interpreters "no easy . . . recourse to further instructions." Frickey, *supra* note 111, at 1093; cf. CRYSTAL, *supra* note 76, § 63, at 384-87 (discussing the special characteristics of religious and legal language). In light of the links between these language-based enterprises, it is a damn shame that "most legal scholars are not very interested in" "biblical interpretation." *Law and Linguistics Conference*, *supra* note 39, at 831 (statement of Kent Greenawalt); cf. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION ix (1993) (arguing that "the legal order of a society . . . is intrinsically connected . . . with religious faith" in spite of a hostile "academic world" that "see[s] only a remote connection between legal institutions and religious beliefs").

113. WALKER PERCY, *THE MESSAGE IN THE BOTTLE: HOW QUEER MAN IS, HOW QUEER LANGUAGE IS, AND WHAT ONE HAS TO DO WITH THE OTHER* (1975) [hereinafter PERCY, *THE MESSAGE IN THE BOTTLE*].

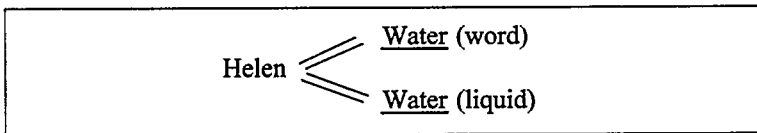
114. See CHOMSKY, *LECTURES ON GOVERNMENT AND BINDING*, *supra* note 101; Noam Chomsky, *Some Notes on Economy of Derivation and Representation*, in PRINCIPLES AND PARAMETERS IN COMPARATIVE GRAMMAR 417 (Robert Freidin ed., 1991). See generally Edwin Williams, *Review Article*, 60 LANGUAGE 400 (1984) (reviewing, *inter alia*, the first edition of CHOMSKY, *LECTURES ON GOVERNMENT AND BINDING*, *supra* note 101), reprinted in 1 NOAM CHOMSKY: CRITICAL ASSESSMENTS, *supra* note 74, at 453.

115. Frank Parker, *Walker Percy's Theory of Language: A Linguist's Assessment*, 13 DELTA 145, 146 (1981). On adequacy in linguistic theory, see generally CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, *supra* note 61, at 24-27; Chomsky, *Current Issues in Linguistic Theory*, *supra* note 79, at 62-63. Curiously, Percy's literary critics characterized his view of language as a rejection of Chomskyan theory. See Panthea Reid Broughton, *A Bottle Unopened, A Message Unread*, 52 VA. Q. REV. 155, 156-57 (1976) (arguing that Percy's essays "go a long way . . . toward refuting (or at least undermining) both Skinner and Chomsky"); William H. Poteat, *Reflections on Walker Percy's Theory of Language: Or, Is it Better to Stay with Helen Keller at the Well-House in Tuscomb, Alabama, Than to Venture to Mars and Be Devoured by the Ravening Particles*, in THE ART OF WALKER PERCY: STRATAGEMS FOR BEING 192, 215 (Panthea Reid Broughton ed., 1979) (describing Percy's work as "a potent dialectical weapon against Chomsky, the transformationalists, the semioticists, and skinner").

116. See *Law and Linguistics Conference*, *supra* note 39, at 840-41 (statement of Clark Cunningham). See generally GEORGIA M. GREEN, *PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING* (1989).

Percy adopted the point of view of a “Martian making his first visit to earth,” amazed by the phenomenon of human speech.<sup>117</sup>

For our purposes, Percy’s greatest contribution lies in his description of speech as symbol manipulation. Like Susanne Langer before him, Percy stressed “the universal symbolific function of the human mind.”<sup>118</sup> Inspired by the story of Helen Keller’s remarkable breakthrough into linguistic awareness, when the deaf and blind girl linked “the wonderful cool something that was flowing over [one] hand” with the letters “w-a-t-e-r” being formed in her other hand,<sup>119</sup> Percy asserted that “an inkling of what happened in [that] well-house in Alabama” would teach us “more about the *phenomenon* of language . . . than is contained in all the works of behaviorists, linguists, and German philosophers.”<sup>120</sup> Linking both the object “water” and the symbol *water* with Helen, he portrayed the event as an example of the “Delta phenomenon”:



Helen Keller and the Delta Phenomenon

Symbol, object, and interpreter: behold, the unholy trinity of the interpre-

117. WALKER PERCY, *The Delta Factor: How I Discovered the Delta Factor Sitting at My Desk One Summer Day in Louisiana in the 1950s Thinking About an Event in the Life of Helen Keller on Another Summer Day in Alabama in 1887*, in *THE MESSAGE IN THE BOTTLE*, *supra* note 113, at 3, 11 [hereinafter PERCY, *The Delta Factor*]; see also WALKER PERCY, *A Theory of Language: A Martian View of Linguistic Theory. Plus the Discovery That an Explanatory Theory Does Not Presently Exist, Plus the Offering of a Crude Explanatory Model on the Theory That Something Is Better Than Nothing*, in *THE MESSAGE IN THE BOTTLE*, *supra* note 113, at 298-302 [hereinafter PERCY, *A Theory of Language*]; cf. Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 *GEO. WASH. L. REV.* 1595, 1598 (1989) (analyzing the American race problem through an imaginary dialogue with an extraterrestrial named Xerxes).

118. WALKER PERCY, *Symbol as Need*, in *THE MESSAGE IN THE BOTTLE*, *supra* note 113, at 289, 292 (reviewing SUSANNE K. LANGER, *FEELING AND FORM* (1953) and SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY* (3d ed. 1957)).

119. HELEN KELLER, *THE STORY OF MY LIFE* 23 (1905); cf. (perhaps) PETE TOWNSHEND & DES MCANUFF, *THE WHO'S TOMMY: THE MUSICAL* (1993) (“That deaf, dumb, and blind kid sure plays a mean pinball”).

120. PERCY, *The Delta Factor*, *supra* note 117, at 35-36.

tive world.<sup>121</sup> This triangular, or “triadic,” visualization of the language function pervades Percy’s essays on linguistics.<sup>122</sup> Percy’s triad links the two Saussurian components of the linguistic sign—the conceptual *signifié* and the acoustic *signifiant*<sup>123</sup>—with the interpreter at the center of Chomskyan linguistics. The triadic vision stands in stark contrast with the bipolar stimulus-response model at the heart of Skinner’s *Verbal Behavior*.<sup>124</sup> By emphasizing the interpreter as the flexible human link between symbolizing word and symbolized object, Percy’s model of language reverses Skinner’s effort to minimize the role of the speaker. The triadic construct concedes the irreducible role of human intuition in any putatively objective test of grammar.<sup>125</sup> The Chomskyan influence is obvious and inextricable.

It is a shame that B.F. Skinner did not become a lawyer; he would have found himself surrounded by like thinkers who believed in their ability to reduce the world to a series of stimuli and responses. Whether the social sciences would have benefitted from his absence is less clear than the legal philosophy he would have adopted. The jurisprudence, so to speak, of behaviorist linguistics would have been positivism unmodified.<sup>126</sup> As between Skinner’s bipolar stimulus-response and Percy’s pivoting triad, the Skinnerian model is the one that befits *The Rule of Law as a Law of Rules*.<sup>127</sup> The new textualism presupposes a strict one-to-one relationship between symbol and object, between a statutory term and its “plain

121. Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”).

122. See generally WALKER PERCY, *Toward a Triadic Theory of Meaning*, in *THE MESSAGE IN THE BOTTLE*, *supra* note 113, at 159. What Percy called his “theory of language” is nothing more than a few elaborations on this basic model. See PERCY, *A Theory of Language*, *supra* note 117, at 325, 327.

123. See SAUSSURE, *supra* note 19, at 99-100.

124. See PERCY, *Toward a Triadic Theory of Meaning*, *supra* note 122, at 162.

125. Consider the following statement by Law and Linguistics Conference participant Michael Geis:

Chomsky gave an argument in support of [intuition] 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 in. If you read the speaker [an ungrammatical sentence,] she’ll perspire and the needle will go haywire . . . because the objective test has proved it’s not grammatical. . . . [T]he 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 calibrate your [otherwise objective] machine.

*Law and Linguistics Conference*, *supra* note 39, at 918.

126. Cf. gingerly CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1989).

127. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

meaning.” Textualism makes a herculean effort to preclude judicial consideration of extrinsic indicia of meaning because it fears that these interpretive practices may misdirect the crucial project of linking words with their meanings. By contrast, the antiformalist schools of legal realism and critical legal studies “maintain that the principal feature of judicial behavior is something *internal* to the judge,” that “external instructions” and influences “make very little difference in what judges do.”<sup>128</sup>

Extended to its logical end, linguistic introspection points to the interpreter—and not the text—as the source of legal meaning.<sup>129</sup> At its worst, the new textualism has so willfully denied the role of the judicial interpreter that it fails to see the seething normative debate lurking in the directive to use “established canons of [statutory] construction.”<sup>130</sup> This sort of new textualist is the Dorian Gray of American law, an unregenerate sinner who projects his political transgressions onto a painting of the sullied judiciary while retaining the bloom of youth and innocence in his cheeks.<sup>131</sup> In the Wilde world of statutory interpretation, the biggest Skinnerhead among contemporary analysts of legal language is Antonin Scalia.

### B. *When I Spake as a Child: The Logical Problem of Legal Education*

The new textualism’s claim that it relies on a rigorously deductive methodology points to a second, even more devastating defect. Like every other “foundational” theory of statutory interpretation, the new textualism is a “top down” model of legal reasoning,<sup>132</sup> proceeding from infallible first premises and deducing its way toward answers to legal problems.<sup>133</sup> Unfortunately, “top down” reasoning bears no resemblance to the way in which humans learn language or master any linguistically based thought

128. *Law and Linguistics Conference*, *supra* note 39, at 879 (statement of Frederick Schauer).

129. See Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 384-86 (1982).

130. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

131. Cf. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 214 (Isobel Murray intro. 1981) (describing the dreaded picture as “the painting of a sorrow / A face without a heart”).

132. For a discussion of foundational theories, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324-45 (1990).

133. See Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 434-35 (1992) (distinguishing between deductive, “top down” and inductive, “bottom up” theories of legal reasoning); cf. Jean-Blaise Grize, *Déduction et Inférence*, in *LIRE LE DROIT: LANGUE, TEXTE, COGNITION* 233, 233 (Danièle Bourcier & Pierre Mackay eds., 1992) (contrasting the mathematical nature of deductive reasoning with the discursive nature of inference).

process. For a sense of the real link between law and language, we may draw our inspiration from Lawrence Solan himself. Before applying his linguistic expertise to legal problems, Solan studied childhood language acquisition.<sup>134</sup> The law will come much closer to appreciating linguistics when it swaps its image of the linguist as a textual technician for an image of the linguist as an interviewer of preschool children.

Chomskyan linguistics gives an introspective answer to Bertrand Russell's question about human knowledge: "How comes it that human beings, whose contacts with the world are brief and personal and limited, are nevertheless able to know as much as they do know?"<sup>135</sup> The paradox of childhood language acquisition presents a particularly acute "logical problem": How do children, even with limited, unstructured exposure to samples of speech, nevertheless achieve complete mastery of the phonology and syntax of adult language?<sup>136</sup> Despite the vagaries of the English language, any native speaker can boast:

A dreadful language? Man alive.  
I'd mastered it when I was five.<sup>137</sup>

Linguistic studies confirm common experience: a five-year-old native

134. See LAWRENCE M. SOLAN, *PRONOMIAL REFERENCE: CHILD LANGUAGE AND THE THEORY OF GRAMMAR* (1983); Lawrence M. Solan, *Parameter Setting and the Development of Pronouns and Reflexives*, in *PARAMETER SETTING* (T. Roeper & E. Williams eds., 1987).

135. BERTRAND RUSSELL, *HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS* 5 (1948), *quoted in* CHOMSKY, *KNOWLEDGE OF LANGUAGE*, *supra* note 102, at xxv; CHOMSKY, *REFLECTIONS ON LANGUAGE*, *supra* note 89, at 5; *cf.* KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 27-30 (rev. ed. 1968) (outlining the premises of "the problem of induction"); W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* 85-86 (2d ed. 1978) (pondering the problems inherent in the "paradox of induction").

136. See *generally* EXPLANATION IN LINGUISTICS: THE LOGICAL PROBLEM OF LANGUAGE ACQUISITION (Norbert Hornstein & David Lightfoot eds., 1981); THE LOGICAL PROBLEM OF LANGUAGE ACQUISITION (C.L. Baker & John J. McCarthy eds., 1981). The logical problem of language acquisition provides the starting point for Chomskyan linguistics:

It seems clear that many children acquire first or second languages quite successfully even though no special care is taken to teach them and no special attention is given to their progress. It also seems apparent that much of the actual speech observed consists of fragments and deviant expressions of a variety of sorts. Thus it seems that a child must have the ability to "invent" a generative grammar that defines well-formedness and assigns interpretations to sentences even though the primary linguistic data that he uses . . . may . . . be deficient in various respects.

CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, *supra* note 61, at 200-01.

137. T.S.W., *Hints on Pronunciation for Foreigners*, LONDON SUNDAY TIMES, Jan. 3, 1965, *reprinted in* Carol Chomsky, *Reading, Writing, and Phonology*, 40 HARV. EDUC. REV. 287, 309 (1970), *reprinted in* 1 NOAM CHOMSKY: *CRITICAL ASSESSMENTS*, *supra* note 74, at 200, 220.

speaker can whip even the most thoroughly trained adult foreigner.<sup>138</sup> What the child has acquired—and what the erudite foreigner has not and cannot—is the sense of a grand yet inarticulable order underlying her native tongue. Although most “ordinary speakers” of a language “are generally aware” of their own linguistic “conventions, and are unprepared to articulate them,”<sup>139</sup> they know an ungrammatical sentence when they hear one.<sup>140</sup> Ordinary speakers also know that naked syntax does not a sentence make, as Chomsky illustrated with his famous example, “Colorless green ideas sleep furiously.”<sup>141</sup> The totality of these linguistic intuitions gives rise to “a feeling for a language, or *Sprachgefühl*.”<sup>142</sup> At a certain level of abstraction, the loose, multifaceted nature of a *Sprachgefühl* resembles Wittgenstein’s notion of “familial relationship”;<sup>143</sup> it is a network of similarities rather than a single, defining characteristic that distinguishes one language from another. A group that shares a *Sprachgefühl* constitutes the significant social unit in linguistics: the speech community.<sup>144</sup> Such a community shares not only the underlying conventions of a common *langue*, but also the day-to-day interactions that make up their common *parole*.<sup>145</sup> The speech community’s web of phonologi-

138. See, e.g., R. Bley-Vroman, *The Logical Problem of Foreign Language Learning*, 20 LINGUISTIC ANAL. 3 (1990); M.H. Long, *Matural Constraints on Language Development*, 12 STUD. SECOND LANG. ACQUISITION 251 (1990); Elissa L. Newport, *Maturational Constraints on Language Learning*, 14 COGNITIVE SCI. 11 (1990). This evidence merits an observation and a recommendation on a particular application of linguistics to substantive law. Although children readily master a second language, this gift is a depleting asset. Immigrant children first exposed to English between the ages of 3 and 7 eventually speak English just as well as their American-born counterparts, but the magic spark of childhood language acquisition progressively dwindles until it is extinguished by puberty. Mandatory bilingual education limits the immigrant child’s exposure to everyday English, thus retarding the child’s mastery of the new language. A linguistically informed perspective suggests that legal measures mandating bilingual education serve less to safeguard the best interests of immigrant children and more to appease the political interests of immigrant parents. Cf. Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 164-65 (1994) (discussing how different perceptions of assimilation can spark intergenerational disagreements within immigrant families).

139. Cunningham et al., *supra* note 2, at 1569.

140. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (retorting “I know it when I see it” in response to the criticism that the Supreme Court had failed to formulate a constitutional definition of obscenity).

141. CHOMSKY, SYNTACTIC STRUCTURES, *supra* note 75, at 15.

142. HJELMSLEV, *supra* note 56, at 44 (emphasis in original).

143. See WITTGENSTEIN, *supra* note 67, § 66-71, at 31-34.

144. See DELL HYMES, FOUNDATIONS IN SOCIOLINGUISTICS 51 (1974) (defining a speech community as “a community sharing knowledge of rules for the conduct and interpretation of speech”); Cunningham et al., *supra* note 2, at 1563 n.8.

145. See SAUSSURE, *supra* note 19, at 25-26, 112. I am liberally updating Saussure’s “concept of *langue* as merely a systematic inventory of items” to include what Chomsky called “underlying

cal, morphological, and syntactic conventions comprise the first—and arguably the most enduring—set of rules that each human being acquires.

The logical problem of language acquisition is probably the most succinct, most accurate linguistic model of legal education. Learning the law is like learning a language. Call it a “foreign” language, since all law students come fully equipped with a natural language and none (presumably) have ever spoken the formal language of the law before matriculating. First-year classes in law school have the atmosphere of a Berlitz course; exotic words such as *assumpsit* and *res ipsa loquitur* fill the air,<sup>146</sup> and selected images help acclimate students to the law as a “foreign” culture.<sup>147</sup> Once law professors have finished giving basic semantic lessons in legal “vocabulary,” they spend the remainder of available class time sharpening their students’ grasp of the syntax of legal language—namely, the range and appropriate organization of arguments that legal decisionmakers are willing and able to credit. On occasion the law school as foreign language academy sends its students to a clinical “language lab,” perhaps even on a fluency-building field trip by way of an internship or clerkship. Imagining legal education as an exercise in building foreign language competency captures the best sense of White and Cunningham’s “translation” metaphor. An encounter between a native speaker and a foreigner forces the native speaker “to recognize [hidden linguistic] complexities” so that she can explain her speech community’s linguistic conventions to the outsider.<sup>148</sup> There may not be a more generous description of law teaching.

The duration and progression of legal education resemble those of primary language acquisition. Phonological development in children precedes morphological and syntactic development, as it must;<sup>149</sup> like-

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competence,” or “a system of generative processes.” CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 61, at 4.

146. Cf. *Law and Linguistics Conference*, *supra* note 39, at 810-11 (statement of Schauer) (noting that words such as “habeas corpus” and “assumpsit” have “plain or literal meanings within certain technical domains even though they are unknown to many speakers of standard English,” while others, such as “penalty” have, “in some domains, plain or literal meanings that diverge from the plain or literal meanings they would have in Standard English”).

147. Cf. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (criticizing JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* (4th ed. 1982) for reprinting a disproportionately high number of male judges’ portraits).

148. Cunningham *et al.*, *supra* note 2, at 1569 n.27.

149. For overviews of the far more heated debate over the priority of semantic or syntactic development in childhood language acquisition, see GENEVIÈVE BRAMAUD DU BOUCHERON, *LA MÉMOIRE SÉMANTIQUE DE L’ENFANT* 19-20 (1981); GOODLUCK, *supra* note 61, §§ 4.6-4.6.2, at 99-106



wise, there is universal agreement that the first year of legal training must include an introduction to basic legal concepts such as the Hohfeldian classification of rights and duties. By the age of three, children “have a complex, structurally-based system [of syntactic knowledge] which obeys many of the principles governing the adult grammar.”<sup>150</sup> After three years, the legal academy catapults its students into the outside world. Virtually all law school graduates become duly licensed to practice law in one sense or another; some actually begin their careers by drafting legal opinions for the highest legal tribunals in the country. This presents a “logical problem” akin to that of childhood language acquisition: how can “the youthful . . . agents of House members, Senators, and Supreme Court Justices” be trusted to produce the country’s most significant “legislative and judicial documents”?<sup>151</sup> The reason we survive the “surprising juvenescence” of the law<sup>152</sup> may be that the young lawyer, like the child, has already acquired the underlying “syntax” of the law, primarily through unstructured, haphazard exposure to different examples of legal argument. Additional seasoning adds vocabulary and rhetorical sophistication, but three years are enough to equip law students with the basic intellectual tools of lawyering.<sup>153</sup>

As with language, so with law. The linguistic parallel helps explain why “[r]easoning by analogy is the most familiar form of legal reasoning.”<sup>154</sup> The predominance of analogical reasoning in law leaves most lawyers “not able to explain the basis” for their legal judgments “in much depth or detail.”<sup>155</sup> Even in the absence of a “large-scale theory” of law, lawyers “reason anyway.”<sup>156</sup> Law as a linguistic process seeks something much

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(concluding that syntax precedes semantics).

150. GOODLUCK, *supra* note 61, § 4.4.4, at 97.

151. Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 282 (1994); see also J. Daniel Mahoney, *Law Clerks: For Better or Worse?*, 54 BROOK. L. REV. 321 (1988) (discussing the implications of delegating significant judicial powers to young, inexperienced law clerks); cf. Edith H. Jones, Book Review, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492-93 (1995) (arguing that “law clerks do not significantly affect the outcome of individual cases,” but conceding that “their draftsmanship sometimes, influences the articulation of legal principles”).

152. Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1349 (1986).

153. Cf. CAROL CHOMSKY, *supra* note 96 (arguing that important aspects of syntactic development continue throughout childhood, perhaps until puberty, even though children acquire the essentials of syntax quite early).

154. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

155. *Id.* at 747.

156. *Id.*

simpler and much more concrete than the lofty objectives set forth by top down models of legal reasoning. One of Cunningham's variations on his own translation theme describes the project quite well: "Is the interpretation meaningful, does it make sense?"<sup>157</sup> If a legal argument makes no sense, either to the legal community that generates the argument or to the larger community that submits to the law's binding force, it has as much place in the law as an "ungrammatical" sentence does in natural language.

We don't think; we talk, we do. Roll over, Blackstone; Nietzsche lives!<sup>158</sup>—"conscious logic is only the 'most superficial part' of human thought."<sup>159</sup> Contrary to the pedantic dogma that inculcates "the habit of thinking [about] what we are doing," "[c]ivilization advances by extending the number of important operations which we can perform without thinking about them."<sup>160</sup> "[T]he human problem solver does not generally think deductively or by exhaustive search of logical space."<sup>161</sup> Rather, "real human thinking" "constantly modifie[s] and extend[s] by parallels, models, and metaphors."<sup>162</sup> The law's natural "focus on particulars" leads to "incompletely theorized" judgments that nevertheless maintain a certain consistency in decisional principles [operating] at a low or intermediate level of abstraction.<sup>163</sup> The survival instinct dictates as much: Even W.V. Quine, despite belittling "[i]nduction" as a "not peculiarly intellectual" activity, conceded that the virtue of simplicity in hypothesis and an "innate sensitivity to certain traits" are both driven by "natural selection."<sup>164</sup>

The similarities that law shares with natural language also explain why the barriers to entry into the law as an intellectual subculture are so shockingly low. The short duration of American legal education and its

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157. Cunningham, *A Search for Common Sense*, *supra* note 6, at 542.

158. *Contra* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring) (boasting that "the original and enduring American" vision of law "sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone").

159. Jim Chen, Book Review, 11 CONST. COMMENTARY 599, 603-04 (1994/95) (quoting FRIEDRICH NIETZSCHE, *The Gay Science* § 354, in A NIETZSCHE READER 66 (R.J. Hollingdale ed. & trans., 1977) and contrasting Nietzsche with 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*\*63-92 (Thomas Green ed., 1979)).

160. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 528 (1945) (quoting Alfred North Whitehead for this observation).

161. Mary Hesse, *Theories, Family Resemblances, and Analogy*, in ANALOGICAL REASONING: PERSPECTIVES OF ARTIFICIAL INTELLIGENCE, COGNITIVE SCIENCE, AND PHILOSOPHY 317, 317 (David H. Helman ed., 1988).

162. *Id.* at 318.

163. Sunstein, *supra* note 154, at 746-47.

164. QUINE & ULLIAN, *supra* note 135, at 73, 88.

potentially high financial rewards have attracted numerous scholars whose first love is something, anything, besides the law.<sup>165</sup> Although the base prose of appellate court decisions and law review articles suggests otherwise, the law nurtures numerous refugees from the economically depressed worlds of the language arts. The impressive number of nonlawyers who have commented intelligently on legal subjects testifies to the relative ease of acquiring law as a second language. These trends suggest that lawyers and legal educators might profitably reorient their culture as one based on artistic inference rather than the rigid, deductive dogma of social science. The flowering of law and economics is *not* contrary evidence; honestly practiced, economics is a branch of rhetoric rather than a precise science.<sup>166</sup>

"Top down," foundationalist approaches to interpretation should be the first victim of the triumph of art over social science as an intellectual model for the law. Understanding the dynamics of "ordinary language" leads not to a dogma dominated by a false promise of "plain meaning," but a much more pragmatic, "bottom up" vision of legal interpretation.<sup>167</sup> Ironically, the antitextualist approach called "practical reason" is the interpretive methodology that most resembles language acquisition in practice.<sup>168</sup> By outperforming every foundational theory of statutory interpretation in predicting what the courts of law will do in fact, practical reason has come closer than any other approach to achieving "explanatory adequacy."<sup>169</sup> The legal instinct that propels practical reason has survived numerous efforts to redefine American law according to the arbitrary dictates of one grand theory or another. Practical reason owes this durability to the analogical process. As in language, analogy in law "does

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165. See Posner, *supra* note 51, at 1510-11.

166. See DONALD N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* 54-86 (1985) (showing how even the econometrically vaunted rational expectations hypothesis, see John F. Muth, *Rational Expectations and the Theory of Price Movements*, 29 *ECONOMETRICA* 315 (1961), is at heart an exercise in the art of rhetorical persuasion); cf. POSNER, *supra* note 24, at 309-16 (defending the potential rhetorical richness of economic analysis of law).

167. Cf. Sunstein, *supra* note 154, at 746 (arguing that analogical legal reasoning "develop[ed] from concrete controversies" constitutes "a version of 'bottom-up' thinking").

168. See generally Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 *VAND. L. REV.* 533 (1992).

169. Compare Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897) (describing law as the project of predicting "what the courts will do in fact, and nothing more pretentious") with Chomsky, *Current Issues in Linguistic Theory*, *supra* note 79, at 63 (arguing that a linguistic theory achieves "explanatory adequacy" when it outperforms other theories in synthesizing "the relevant observed data" into "an explanation for the linguistic intuition of the native speaker").

not create new [logical] patterns; it simply extends the range of a pattern which already exists."<sup>170</sup> In a very real sense, the scholars who have observed how legal rhetoric tends to follow a bottom-up "funnel of abstraction" are the Noam Chomskys of the law, the pioneers of a linguistically informed study of legal universals.<sup>171</sup>

## V. ASPECTS OF A THEORY OF LEGAL SYNTAX

### A. *Rhetorical Structures*

Can the analogy between language and law be stretched beyond its limits? Law is not a natural language; there are no known biological restraints on learning law comparable to the "critical period" for language acquisition during the human life cycle.<sup>172</sup> Nonlinguistic factors undeniably influence the law. The entire field of statutory interpretation consists of one endless debate over the proper balance between the linguistic and the contextual. Hence the prominent role of pragmatism in legal scholarship on statutory interpretation and the prominent role of pragmatists in the law and linguistics movement.

There may be an even greater barrier. As my colleague Phil Frickey concludes in his contribution to this symposium, law is normative to the core.<sup>173</sup> By its own terms, linguistics merely describes. As such, it says nothing about the normative content of language, much less of law. Frickey's brute logic carries him toward the apparently unavoidable conclusion that the law exhausts the useful role of linguists "once the empirical questions are analyzed with their help and the issues turn normative."<sup>174</sup> Once again, however, we can cheat fate by changing our perspective. At a different level of abstraction, we might see that linguistics

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170. CRYSTAL, *supra* note 76, § 54, at 330.

171. See Eskridge & Frickey, *supra* note 132, at 345-62; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1101-13 (1992).

172. See, e.g., ERIC H. LENNEBERG, *BIOLOGICAL FOUNDATIONS OF LANGUAGE* (1967); PINKER, *supra* note 104, at 37-38, 290-96; S. Krashen, *Lateralization, Language Learning and the Critical Period: Some New Evidence*, 23 LANGUAGE LEARNING 63 (1973); see also sources cited *supra* note 138 (describing age-based differences in the ability to acquire a foreign language); cf. SUSAN CURTISS, *GENIE: A PSYCHOLINGUISTIC STUDY OF A MODERN-DAY "WILD CHILD"* (1977) (describing the permanent linguistic disability of a girl who was not exposed to human language until she was more than thirteen years old).

173. See Frickey, *supra* note 111, at 1093-94; see also Michael C. Dorf, *A Comment on Text, Time and Audience Understanding in Constitutional Law*, 73 WASH. U. L.Q. 983, 988 (1995).

174. *Id.* at 1094.

offers the law a powerful explanatory framework by which to analyze statutory disputes.

Structurally speaking, law learning and language acquisition are quite similar. The logical problem of legal education—how one learns to generate creative legal arguments after being exposed to a limited number of concrete legal controversies—is a highly stylized variation on the theme of childhood language acquisition. If both law and language acquisition are bottom up, inductive learning processes that exploit an underlying grammatical instinct, the insight that statutory interpretation as practical reasoning yields argumentative universals suggests the possibility of a “grammar” that guides legal reasoning and rhetoric. It matters little whether our sense of justice originates from a biological wellspring (a truly “natural” law)<sup>175</sup> or must be cultivated through a form of republican education.<sup>176</sup> For now, the task before us is simply to imagine how a legal grammar might look.

Perhaps we have let ourselves be blinded by the genius of others and by our own venality. The sheer technical prowess of existing law and linguistics scholarship may mislead the careless observer into dismissing linguistic analysis as a scientific apology for the new textualism. Lulled into complacency by deconstructionist ideology, many nontextualist legal scholars assume that the search for meaning is the intellectual opium of the right. Mistaken inferences and ideological stubbornness are costly indulgences, for we shall surely overlook the marvel that is unfolding before us. We stand on the verge of imagining a generative “grammar” for the law, uniquely tailored to the political morphology and rhetorical syntax of a system of justice. With further thought and several leaps of faith, we might sketch a legal grammar blissfully unencumbered by the confusion that accompanies discussions of linguistic “meaning,” conventional, ordinary, or plain.

We already have the building blocks of a primitive legal grammar. Among existing approaches to statutory interpretation, practical reasoning best reflects the dynamics of natural language acquisition. A legal grammar

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175. See, e.g., Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Exchange*, in *THE ADAPTED MIND*, *supra* note 63, at 163; cf. Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, in *THE ADAPTED MIND*, *supra* note 63, at 289 (analyzing male sexual behavior in humans as the biological equivalent of defining and asserting rights in property).

176. Cf. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995) (describing an ambitious program of universal, communitarian education as essential to the nurturing of citizenship).

that elaborates the “funnel of abstraction” already sketched by William Eskridge and Philip Frickey would, in the best linguistic tradition, *describe* the structure of interpretive arguments without *prescribing* a “foundational” vision of legal norms.<sup>177</sup> Thanks to these two scholars we can begin visualizing the semantic and syntactical building blocks of legal argument. By combining a semantic system inspired by Eskridge’s notion of regulatory variables with a syntactic structure that reflects what Frickey calls the “faithlessness” of the law, we can anticipate the order and content of politically “grammatical” legal arguments—arguments that meet the essential expectations of the law’s relevant political communities.

As a start, we can transform Eskridge’s concept of the “regulatory variable” into the basic semantic unit of our legal grammar.<sup>178</sup> An expanded notion of regulatory variable can include not only text but also all of the myriad nontextual constraints on statutory interpretation. The “interpretive canons,” so crucial to the two-step judicial approach of the new textualism<sup>179</sup> and widely regarded to be among the law’s most malleable decisional tools,<sup>180</sup> are readily reimagined as quintessential regulatory variables. The product of “an interpretive regime that has been created systematically by [common law] courts over the centuries,”<sup>181</sup> the canons have acquired the characteristics of folksayings, or compact summaries of broad but contextually contingent truths.<sup>182</sup> Over time, how one canon or another changes “ordinary meaning” into “legal meaning” becomes so imperceptible that an “established” canon can be regarded as the interpretive equivalent of statutory text.<sup>183</sup> Through this evolutive process, the canons have become an important repository of “public values” drawn from constitutional, statutory, and common law.<sup>184</sup>

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177. See sources cited *supra* note 171; cf. Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional Silence*, 57 IND. L.J. 513 (1982) (using a syntactic model to outline a constitutionally informed approach for making interpretive sense of legislative inaction).

178. See generally *Law and Linguistics Conference*, *supra* note 39, at 940-53.

179. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

180. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How the Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

181. *Law and Linguistics Conference*, *supra* note 39, at 872-73 (statement of Eskridge).

182. See SAMUEL MERMIN, *LAW AND THE LEGAL SYSTEM: AN INTRODUCTION* 264 (2d ed. 1982).

183. Cf. HJELMSLEV, *supra* note 56, at 128-29 (describing how sound laws such as Grimm’s Law or Verner’s Law become so entrenched in a particular language’s phonology that they become “law[s] of state” rather than “law[s] of change”).

184. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989). But see Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806-07, 811 (1983) (arguing that “most of the canons are just

Defining the syntactic component of a legal grammar requires more work. In this symposium, Phil Frickey convincingly argues that the project of statutory interpretation must be evaluated according to its "faithfulness" to something besides a nebulous, quasilinguistic "construct" such as a hypothetically "'autonomous' text, or conventional usage, or authorial intent."<sup>185</sup> Even the Supreme Court's most vocal proponents of the new textualism have conceded the legitimacy of nontextual factors in statutory interpretation.<sup>186</sup> Frickey notes that the law, unlike any natural language, addresses two separate communities and thereby attempts to accomplish two, frequently contradictory goals. The law tries to speak simultaneously to the ordinary "citizenry" and to the "enforcement officers and judges" who are charged with the power and the discretion "to maximize justice in widely divergent circumstances."<sup>187</sup> Evidently the law speaks not only to the "speech community [of] the contemporaneous set of literate and well-educated native speakers of English in the United States," but also to "the smaller professional subset of lawyers and judges" who are likely to understand "technical legal meaning."<sup>188</sup>

This dialogue between legal scholars and linguists has exposed the yawning gap between the law's dual speech communities. The conference discussion of H.L.A. Hart's famous "no vehicles in the park" problem<sup>189</sup> revealed an especially telling contrast. According to the linguists, the true experts on the subject, the ordinary person would describe the statutory term *vehicles* as one that includes the ambulance rushing in to save a heart

wrong," especially "because they impute omniscience to Congress").

185. Frickey, *supra* note 111, at 1094.

186. *See, e.g., Staples v. United States*, 114 S. Ct. 1793, 1804 (1994) (Thomas, J., for the Court) (invoking the rule of lenity); *United States v. R.L.C.*, 503 U.S. 291, 307-08 (1992) (Scalia, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.) (arguing that the rule of lenity cannot be overcome by contrary legislative history); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment, joined by Rehnquist, C.J., and O'Connor, J.) ("Where the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion.") (citations omitted).

187. Frickey, *supra* note 111, at 1086; *see also id.* at 1085 n.2 (distinguishing between "members of the citizenry subject to the primary duty" created by a statute and "primary enforcement officials such as the police"); *Law and Linguistics Conference*, *supra* note 39, at 872 (statement of Eskridge) ("Who is the audience for the canons [of statutory interpretation]? It seems to me the audience for the canons [is] not only other judges, but also Congress and the population.").

188. Cunningham et al., *supra* note 2, at 1563 n.8; *cf. Law and Linguistics Conference*, *supra* note 39, at 824 (describing the Supreme Court "as a very tiny, but important linguistic community") (statement of Cunningham).

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

attack victim in the park. None, from a strictly linguistic point of view, could imagine how the category *vehicles* could exclude the ambulance. By contrast, any good lawyer can imagine several plausible ways to exempt the ambulance, even if she finds some or all such arguments unconvincing. There is no serious *linguistic* debate over the meaning of the sentence, "No vehicles in the park." What the lawyers are really doing is debating whether to punish the ambulance driver (which no one but a diehard positivist would do) and, more significantly, how to justify a decision *not* to punish the driver once the legal debate (quickly) reaches this apparent political consensus.

Unlike the linguist, the lawyer is aware of pragmatic legal barriers to convicting the ambulance driver, such as prosecutorial discretion, qualified immunity, or a justification defense—and of the possibility that judicial interpretation of the statute can supplement or short-circuit these *ad hoc* legal devices. Only the lawyer is engaging in a quasilinguistic, highly normative form of reasoning that balances linguistic understanding with nakedly political judgments and thereby attempts, with no guarantee of success, to reconcile any differences. Unless we can bring this "interpretive process . . . to conscious awareness," lawyers and linguists alike "could understandably conclude that those offering [a competing] interpretation" of the same legal text "either do not know how to read or are being intentionally dishonest."<sup>190</sup>

The real legal battle over the ambulance has nothing to do with the statute's linguistic meaning. From the citizen's point of view, the question is whether we wish to deter ambulance crews or even medically trained bystanders from driving into an otherwise all-pedestrian park when human life is at stake. As a matter of law enforcement, the question is whether the decision to prosecute in circumstances such as these can be safely entrusted to the discretion of executive officers, or whether the judiciary must announce a rule against criminal liability lest overzealous or heartless prosecutors punish comparable violations in the future. For instance, to a court predisposed to describe any legal violation by the ambulance as a *de minimis* infraction, the very fact that the question has reached a court is evidence that prosecutors will not exercise their discretion wisely. These are purely normative questions that presuppose the empirically verifiable linguistic truth that *vehicle* includes an ambulance. The confusion arises when lawyers use the judicial shorthand of saying that *vehicle* excludes an

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190. Cunningham et al., *supra* note 2, at 1584.



ambulance that enters the park under exigent circumstances. A court that makes this statement is not making a scientific judgment on the definition of *vehicle*; it is making a normative judgment on the extent to which society ought to bend an otherwise obvious and established rule. The greatest potential for legal misuse of language lies not in the failure to consult the statutory language, but in the temptation to disguise the law's inescapably normative judgments as objective quests for linguistic truth.<sup>191</sup>

The context in which Clark Cunningham first performed linguistics analysis of law provides another example.<sup>192</sup> We can easily reframe the question raised in *Warden v. Hayden*<sup>193</sup>—whether a warrantless search made in the course of a “hot pursuit” is nevertheless constitutionally sound—in quasilinguistic terms. Is such a warrantless search *unreasonable* within the meaning of the fourth amendment?<sup>194</sup> Or perhaps we could ask whether a *search* took place at all, again within the meaning of the fourth amendment. The constitutional debate, however, does not turn on the linguistic meaning of *search*, *seizure*, *unreasonable*, or *warrant*. Every native speaker of American English knows these simple words and is prepared to debate their meaning, even in this legal context.<sup>195</sup> *Warden v. Hayden* implied as much when it rejected the sterile legal distinction between “mere evidence” and “fruits and instrumentalities” as a workable definition of *seizure*.<sup>196</sup> On the other hand, opinions regarding particular police practices will differ within the law's relevant political communities. Just how meticulous police officers have to be when pursuing a fleeing felon or perishable evidence is a question of values.

The confusion arises from that ever so used and useful legal phrase,<sup>197</sup>

191. Cf. Frickey, *supra* note 111, at 1094 (“To the extent that legal scholars and judges hide the normative ball under the guise of mere interpretation, they do deserve our criticism and, if the delusion continues, our scorn.”).

192. See Cunningham, *A Search for Common Sense*, *supra* note 6.

193. 387 U.S. 294 (1967).

194. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

195. Lest there be any doubt about popular awareness of criminal procedure in the United States, consider how many ordinary Americans can recite all five elements of the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966).

196. 387 U.S. at 300-10.

197. Cf. *Barasch v. Duquesne Power & Light Co.*, 488 U.S. 299, 302 (1989) (assessing the constitutionality of a state law that limited regulated electric utilities to a return on property “used and

“within the meaning of.” But for the Bill of Rights, the regulation *vel non* of police behavior during hot pursuits would be the exclusive province of legislative and executive policymakers. The constitutional jurisprudence of searches and seizures merely substitutes the judicially dominated common law for a decisionmaking process conducted by the other branches of government. As a matter of political self-preservation, the judiciary has every incentive to describe its case law as an objective quest for linguistic meaning rather than a palpably antidemocratic debate over proper police procedure. Solan rightly described his mission in *The Language of Judges* in political rather than linguistic terms: “The issue . . . is . . . how judges attempt to mask the fact that a case is hard in the first place.”<sup>198</sup> More often than not, the quasiscientific rhetoric of a judicial opinion masks a discretionary political judgment behind a veil of apparent linguistic compulsion. The jargon of critical legal studies states the proposition well: legal invocations of linguistic meaning deny the contingency of the law.

### B. *A Lecture on Government and Blinding*

Is the law so fraudulent that “plain” or “ordinary” language plays no role? Hardly! By the same token, no extant legal system rests on language alone to the complete exclusion of the unspoken and the unwritten. Although the law aspires to be understood as ordinary language by the public at large, virtually every interpretive approach incorporates nontextual components. The prospect of a “literal,” purely textual legal system is too horrible to contemplate except as a caricature.<sup>199</sup> In its more sophisticated incarnations, the new textualism neither asserts the infallibility of plain language nor disclaims all reliance on nonlinguistic factors in interpretation. Frank Easterbrook, a founder of the new textualism<sup>200</sup> and one of its most prominent judicial practitioners,<sup>201</sup> has rested his philosophy “not on a silly belief that texts have timeless meanings divorced from their many

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useful” for providing electrical service).

198. SOLAN, *THE LANGUAGE OF JUDGES*, *supra* note 3, at 208 n.10.

199. *Cf.* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 631-37 (1949) (outlining a hard-line positivism through the alter ego of the fictional Justice Keen).

200. *See, e.g.*, Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL’Y 87 (1984); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1988).

201. *See, e.g.*, *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc) (Easterbrook, J.), *aff’d sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

contexts, . . . but on the constitutional allocation of powers."<sup>202</sup> This bit of honest legal realism offers us hope for bridging the chasm between law and language.

Let us eschew the tempting of academia, the formalist seduction of the law.<sup>203</sup> Law does not live by words alone, but on every value given voice through participatory politics.<sup>204</sup> The "language" of law is not language as such. Rather, it is a bundle of independent political values, embodied not only in statutory language but also in "extratextual" doctrines. A stated preference for textual analysis carries only the normative weight that is implicit in the policy "baseline" from which interpretation begins.<sup>205</sup> The tension between two familiar interpretive canons illustrates the point. The canon that statutes in derogation of the common law should be narrowly construed presumes that citizens have organized their private affairs according to understandings that predate a relatively recent statute. The opposing canon, which urges liberal construction of remedial statutes, presumes that discoverable, popularly enacted statutes provide a better matrix by which to organize a system of private ordering. The language of the statute—its nonlegal, "conventional," "ordinary," or "plain" meaning—has not changed. The interpreter's values are the crucial—and variable—factor.

The court's split institutional personality also distorts the apparent significance of statutory language. In order to describe how an interpreting court reconciles its conflicting institutional responsibilities, we can modify Walker Percy's model for describing the link between a symbol and the symbolized object. While in the well-house, Helen Keller tried to match the water that was flowing over one hand with the symbol *water* that was being formed in the other. Similarly, in this age of statutes, the legal project most often consists of interpreter's effort to match statutory language with the legal "meaning" of that statute. But the judicial interpreter at the fulcrum of the legal Delta phenomenon is attempting to make a second, crucial reconciliation. She is trying to communicate, through the legal

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202 *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.).

203. Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). See generally Book Note, *The Priest Who Kept His Faith But Lost His Job*, 103 HARV. L. REV. 2074 (1990) (analyzing Bork's formalist judicial philosophy in religious terms).

204. Cf. *Deut.* 8:3; *Matt.* 4:4; *Luke* 4:4.

205. For an illuminating application of the baseline concept, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (noting how Lochnerian adjudication favored a norm of "government inaction" in order to preserve "the existing distribution of wealth and entitlements" based on "the baseline set by the common law").

language of the judicial opinion, the “meaning” of the statute to two distinct audiences: the populace bound by primary legal duties as well as the administrative apparatus charged with the obligation to enforce the law. This is why “[h]ypotheticals about domestic employees instructed to fetch soupmeat, however informative about communication in nonlegal contexts, do not seem . . . to capture the heart of the problem when the coercive power of the law is involved.”<sup>206</sup> The principal concern “‘is political rather than epistemological or hermeneutic.’”<sup>207</sup>

We need to realign the traditional distinction between the textual and the nontextual according to the law’s political dualism. Lawyers and academics across the ideological spectrum have failed to articulate the political function of text. The most slavish supporters of the new textualism defend their technique as an “apolitical” interpretive approach. For their part, proponents of competing interpretive techniques have undervalued the political significance of statutory language, perhaps in an overzealous effort to offset the new textualism’s more outlandish normative claims. The significance of text becomes much clearer once we consider how the interpreter at the center of any legal dispute must serve multiple constituencies.

In a society where citizens presumably read the law,<sup>208</sup> statutory language *is* the law. “Ordinary” language—unmodified by substantive concerns regarding federalism, separation of powers, or other constitutional concerns—is what the law says and what the law means. A judicial search for “ordinary meaning” comes closest to capturing the intent of the enacting legislature, whose members are presumably the most direct representatives of the citizenry. Honoring the ordinary citizen’s unassisted reading of a statute best serves the rule of law. This process so closely resembles the naming function in ordinary language that we may call it the “noun phrase” or the “subject” in an interpretive “sentence,” an exercise in statutory interpretation. Because the vast majority of human beings speak a language that tends to place the subject before the verb in simple sentences,<sup>209</sup> let

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206. Frickey, *supra* note 111, at 1089 (footnote omitted). For discussions of the soupmeat hypothetical, see sources cited *supra* notes 68 and 69.

207. *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) (quoting *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1346 (7th Cir. 1992) (Posner, J.)).

208. *But cf.* *Cheek v. United States*, 498 U.S. 192, 199-201 (1991) (holding that criminal liability for “willfully” violating federal tax law requires actual knowledge of the Internal Revenue Code).

209. See *CRYSTAL*, *supra* note 76, § 16, at 98 (estimating that 75 percent of human languages, including many of the most widely spoken, that impose a structure on word order tend to place the

us place this "noun phrase" on the left side of our legal grammar.

By contrast, the specialized law enforcement audience recognizes that the law is not only a body of statutory language, but also a mass of legal principles that modifies legal language. Some, such as the rule of lenity,<sup>210</sup> arise from constitutional concerns; others, such as a preference for liberal application of antitrust policy,<sup>211</sup> give voice to policy preferences readily inferred by judges from the entire body of statutory law.<sup>212</sup> The constitutional canons condense the best of common law wisdom; the statutory canons seem to exploit the transplanted civilian concept of the "equity of a statute."<sup>213</sup> Because these regulatory variables modify and rechannel the meaning of statutory language as the legal "noun" of every interpretive "sentence," let us call this the "verb phrase" of our legal grammar and place it to the right.

The two halves of every interpretive "sentence" are at war with each other. Frickey succinctly describes the problem of reconciling the two sides as a crisis of faith, for no judge can serve two masters.<sup>214</sup> As Paul Campos states the dilemma, a judge either interprets a legal text as the agent of the drafting legislature or else engages in the altogether different enterprise of "reauthoring" the text.<sup>215</sup> The legal interpreter day by day must choose "'one of these things tway": the faithful but ugly, or the beautiful but unfaithful.<sup>216</sup> "Faithful," literal statutory readings offend broader legal values, but more equitably cogent interpretations do greater violence to legal text.

As with natural languages, some legal grammars tend to elaborate the left

subject before the verb).

210. See, e.g., *United States v. Granderson*, 114 S. Ct. 1259, 1263 (1994); *United States v. Kozminski*, 487 U.S. 931, 939 (1988).

211. See, e.g., *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993).

212. For examples of how courts treat codes or related statutes as sources of principled law, see *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975).

213. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 40-94 (1969); Konrad Zweigert & Hans-Jürgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 *TULANE L. REV.* 704 (1970).

214. See Frickey, *supra* note 111, at 1086; cf. *Matt. 6:24*; *Luke 16:13*.

215. See Campos, *supra* note 26, at 1093.

216. GEOFFREY CHAUCER, *THE CANTERBURY TALES* 182 (Michael Murphy ed., 1991) ("'Choose now,' quod she, 'one of these things tway: / To have me foul and old till that I die, / And be to you a true, humble wife, / And never you displeas in all my life; / Or else you will have me young and fair, / And take your aventure of the repair / That shall be to your house because of me, / (Or in some other place it may well be).").

branch, while others orient themselves toward the right. Natural languages that tend to place the subject before the verb have three possible positions for the object: (1) after both the subject and the verb, or SVO, (2) between the subject and the verb, or SOV, or (3) before both the subject and the verb, or OSV. Though theoretically possible, OSV syntax is so rare among human languages that its use in *The Empire Strikes Back* and *The Return of the Jedi*<sup>217</sup> gives the extraterrestrial Yoda a truly exotic aura in these movies.<sup>218</sup> On the fiftieth anniversary of V-J Day, we can avoid both a war of words and a war of the worlds by confining ourselves to the syntactic patterns represented by the leading languages of World War II. SVO languages such as English and French are “right-branching” in the sense that the head of a phrase appears on the left and modifying material accumulates to the right.<sup>219</sup> In right-branching languages, relative clauses follow the noun they modify. By contrast, SOV languages such as Japanese and, to a much lesser extent, German are “left-branching” in that they plant the head of a phrase on the right and extend modifications toward the left. Relative clauses thus precede the noun they modify.<sup>220</sup>

To see the difference, compare the following sentences in English and in Japanese:

English (right-branching):	<i>The lawyer who studies linguistics will succeed.</i>
Japanese (left-branching):	<i>Gengogaku o benkyoshita bengoshi-wa seikosuru.</i>
Morphological gloss:	<i>Linguistics has studied lawyer-subject will succeed.</i>

In English, the noun *lawyer* serves as the head of the sentence; both the modifying phrase *who studies linguistics* and the verb phrase *will succeed* follow the head. In Japanese, the two verbs *benkyoshita* (“study”) and *seikosuru* (“succeed”) anchor the subordinate clause and the independent clause, and modifying material is built up before, or to the left of, these heads.

As applied to law, the distinction between right- and left-branching

217. See *THE EMPIRE STRIKES BACK* (Twentieth Century Fox 1981); *THE RETURN OF THE JEDI* (Twentieth Century Fox 1983).

218. See *CRYSTAL*, *supra* note 76, § 16, at 98 (quoting Yoda as saying, among other things, “When nine hundred years you reach, look as good you will not”).

219. See *GOODLUCK*, *supra* note 61, § 4.1.1, at 63; see also *id.* § 4.6.1, at 103 (noting that VSO languages share the right-branching tendencies of SVO languages).

220. See *id.* § 4.1.1, at 63.

separates text from context, the “plain meaning” of a statute from a “same reading” of a statute. Practical reason’s funnel of abstraction posits that virtually every effort to interpret a statute in the United States begins by examining statutory text and moves through progressively less authoritative indicators of statutory meaning.<sup>221</sup> Syntactically speaking, American legal rhetoric puts textual “subjects” before nontextual “verbs.” But S-V languages can feel quite different, thanks to the difference between right-branching syntax and left-branching syntax. There may be a similar divide in American law. A *right-branching* system of legal rhetoric places the “head” of each interpretive sentence on the left side of our legal grammar, in the rule-of-law “noun phrase.” The placement of the head to the left suggests a paramount interest in legislative supremacy, and a rightward sweep through nontextual regulatory variables links the interest in the rule of law with the process-oriented and substantive interests expressed in the institutional “verb phrase” on the right side. By contrast, a *left-branching* system of legal rhetoric declares a broader institutional interest as the “head” of the interpretive process and then pivots leftward through other regulatory variables, including rule-of-law values implicit in a commitment to legal texts.

How do established approaches to statutory interpretation fit within this sort of analysis? As a matter of vocabulary alone, the legal process technique perfected by Hart and Sacks seems replete with process- or policy-oriented interpretive doctrines that dominate the “verbal” branch of our legal grammar. Witness the prominence of the lenity and constitutionality canons in the legal process literature. As a matter of method, *The Legal Process* explicitly prescribes a left-branching approach. Consider Hart and Sacks’s “concise statement of the task” that confronts the judicial interpreter:

In interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; *and then*
2. 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 either —
  - (a) a meaning they will not bear, or
  - (b) a meaning which would violate an established policy of clear statement.<sup>222</sup>

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221. See sources cited *supra* note 171.

222. HART & SACKS, *supra* note 69, at 1374 (emphasis added).

By declaring statutory purpose to be the primary goal of statutory orientation, legal process plants the rhetorical pivot of its interpretive methodology at the far right end. Although Hart and Sacks's second step implies a preference for textual integrity over "established polic[ies] of clear statement," this single right-branching tendency does not offset the overarching left-branching proclivity of legal process.<sup>223</sup> The judicial assumption "that the legislature [is] made up of reasonable persons pursuing reasonable purposes reasonably" dominates any textually based, rule-of-law interest.<sup>224</sup> Indeed, Hart and Sacks explicitly conceded that "[t]he meaning of words can almost always be narrowed if the context seems to call for narrowing."<sup>225</sup>

The new textualism provides an interesting contrast—and exhibits some startling similarities. Its "noun-" or "text-heavy" vocabulary suggests that textualist judges guide their readings of statutory language primarily by "adjectival" textual canons such as *ejusdem generis*, *noscitur a sociis*, and *expressio unius est exclusio alterius*.<sup>226</sup> By its terms, the new textualism proclaims a right-branching methodology:

[F]irst, find the ordinary meaning of [a statute's] language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.<sup>227</sup>

Unlike the legal process formula, the textualist recipe puts statutory language at the head of its interpretive sentences. This is the hallmark of a right-branching system of legal rhetoric: The rule of law rests on textual primacy and legislative supremacy.<sup>228</sup> If the new textualism limited its

223. Cf. GOODLUCK, *supra* note 61, § 4.1.1, at 64 (noting that the organization of phrases frequently deviates from the pattern suggested by the overall right- or left-branching tendency of a language and describing the placement of adjectives before nouns in English as one such deviation from the general right-branching pattern of the language).

224. HART & SACKS, *supra* note 69, at 1378.

225. *Id.* at 1376.

226. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) ("The [textualist's] task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best . . . account of the meaning of the statute. This exercise places a great premium on cleverness.")

227. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

228. See, e.g., Earl Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991); Lawrence Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare*



arsenal of canons to the text-based, intrinsic variety—or at least cabined its use of more explicitly nontextual regulatory variables—it might live up to its billing. But the new textualism consistently undermines its stated right-branching approach by its increasing reliance on clear statement rules and other constitutionally informed substantive canons.<sup>229</sup> The Rehnquist Court's predilection for the rule of lenity and similar canons contradicts "the rule-of-law value in following statutory text."<sup>230</sup> These patently purposive concerns have become so prominent that the new textualism as practiced now follows a left-branching rhetorical syntax that is structurally indistinguishable from that of *The Legal Process*.<sup>231</sup>

This remarkable confluence between legal process and the new textualism suggests that the natural orientation of statutory interpretation in the United States is purposive and left-branching. After a decade in power, the new textualism's effort to reverse the rational flow of American public law has apparently failed to loosen the grip of traditional legal process. More likely, the new textualism never had the will to power. It could not muster the supernatural strength to overcome the human, all too human, allure of the common law and the value-shaping power that the common law vests in courts. Throughout its ascendancy, the Rehnquist Court has not used its authority to "articulat[e] . . . a text-based rule of law," but rather to enforce an "economic libertarian, anti-regulatory philosophy" that is as consciously political as Karl Llewellyn himself.<sup>232</sup> She who would reverse the rhetorical flow of the Supreme Court, she who would "be a creator in good and evil" must first "be a destroyer and break values."<sup>233</sup> This the Rehnquist Court has not done and probably cannot do. Rather, like the child learning to speak her mother tongue, it has internalized the prevailing left-branching syntax of American law and creatively inserted regulatory variables better suited to effecting its policy preferences. *Ecce lex*: By manipulating the "rhetoric of purpose" that pervades "each category of

Decisis, 88 MICH. L. REV. 177 (1989).

229. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); cf. Eskridge & Frickey, *supra* note 11, at 81-87 (describing the current Supreme Court's regime of clear statement rules as "the Stealth Constitution").

230. Eskridge & Frickey, *supra* note 11, at 71.

231. See Frickey, *supra* note 111, at 1090 ("The more one accepts canons aimed at promoting functional and practical interpretation, the more this kind of textualism begins to merge with other theories of interpretation.").

232. Eskridge & Frickey, *supra* note 11, at 75.

233. FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 139 (R.J. Hollingdale trans., 1969).

statutory adjudication”—“constitutional judicial review, statutory interpretation, and administrative judicial review”—the Justices “ascribe a statutory purpose whose nature and scope enables the court to reach a foreordained outcome.”<sup>234</sup>

Perhaps the best indicator of American law’s left-branching tendencies comes from neither end of today’s ideological spectrum, but from its dead center. Consider the following opening gambits from the opinions of that eternal moderate, Sandra Day O’Connor:

This is a case about federalism.<sup>235</sup>

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.<sup>236</sup>

This case implicates one of our Nation’s newest problems of public policy and perhaps our oldest question of constitutional law.<sup>237</sup>

Liberty finds no refuge in a jurisprudence of doubt.<sup>238</sup>

Whatever else one might say about Justice O’Connor, this much is undeniable. She is blunt. The paramount political values underlying this admittedly limited but seemingly diverse sampling of her opinions, stretching from habeas corpus to substantive due process and the Tenth Amendment, appear to be federalism and *stare decisis*. It is hard to imagine legal interests further removed from the simple rule-of-law notion that animates the new textualism and other invocations of “plain meaning.”<sup>239</sup> It may well be, as the funnel of abstraction suggests, that the American judicial opinion organizes itself superficially by starting with text and moving toward less authoritative indicia of statutory meaning. But the equally consistent emergence of decisive nontextual doctrines in law suggests that the deep structure of American legal thought plants itself on a nontextual mooring and pivots leftward in search of textual support for decisive preferences internal to the judicial interpreter.

At first glance, the disparity between legal reasoning and opinion-writing seems counterintuitive. How possibly can judges think in a left-branching,

234. Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 121 (1995).

235. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (O’Connor, J.).

236. *Gregory v. Ashcroft*, 501 U.S. 452, 456 (1991) (O’Connor, J.).

237. *New York v. United States*, 112 S. Ct. 2408, 2414 (1992) (O’Connor, J.).

238. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2803 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

239. See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 820 (criticizing the way in which adherence to *stare decisis* allows the fortuitous timing of cases to affect the substantive content of the law).

purposive way, only to write opinions as though they followed a right-branching, text-centered methodology? This is the legal equivalent of thinking Japanese and speaking French. Again, it bears remembering that although legal thought resembles linguistic thought, the law is not a natural language.<sup>240</sup> There is a vastly greater time lapse between judicial decision and opinion-writing than between thought and speech. In a system of justice whose highest court can decide as many as twenty cases in minutes and then spend weeks or months crafting its opinions,<sup>241</sup> there is ample time to translate raw instinct into refined legal prose—and thereby to filter out any “impurities” that suggest the real nature of the judicial process. Usually, any crucial disparities between the initial, instinctive decision and the more calculated opinion will manifest themselves in the form of dissent increasingly favored by Justice Antonin Scalia, the concurrence in the judgment.<sup>242</sup> Only on the rarest occasions, when the battle over the *post hoc* rationalization of a decision involves far greater stakes than the outcome as such, does the otherwise hidden transformation of legal reasoning into legal language become obvious.<sup>243</sup>

One question remains: Why? If American legal thought truly tends to be purposive and left-branching, why do judges and lawyers tend to organize their arguments according to a text-centered, right-branching system of rhetoric? Why does the funnel of abstraction capture the expression but not the underlying, dispositive logic of legal process, new textualism, or the moderate judicial philosophy of an O'Connor-like moderate? Without purporting to give a complete answer, I submit that the problem lies in American law's continuing struggle to reconcile its nominal fidelity to legislative supremacy and democratic accountability with its lingering belief

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240. Cf. PINKER, *supra* note 104, at 189 (“[A]lthough language is an instinct, written language is not.”).

241. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 438-41 (1979) (contrasting the “twenty minutes” that the Justices spent in conference with the far more painstaking opinion-writing process that yielded five landmark death penalty decisions on July 2, 1976: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976)).

242. See Chen, *supra* note 151, at 289. See generally John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Opinions*, 77 CORNELL L. REV. 1593 (1992).

243. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); John M. Rogers, “*I Vote This Way Because I’m Wrong*”: *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439 (1990-91).

that only common law judges can achieve a rational, depoliticized legal system. Statutory interpretation in a common law system desperately wants to acknowledge legislative supremacy but cannot renounce the historical primacy of judge-made law. The tension is most salient in “legisprudential” doctrines such as *stare decisis*,<sup>244</sup> judicial prospectivity,<sup>245</sup> and statutory retroactivity<sup>246</sup>—the most fragile points of conflict between statutes and common law as sources of primary rights and duties.<sup>247</sup> My poorly informed guess is that right-branching legal reasoning and rhetoric flourish together in civil law jurisdictions, where statutes unencumbered by a common law backdrop act not only as sources of public policy but also as principled law.<sup>248</sup> This initial effort at charting American judicial reasoning as a linguistically guided process suggests that our juriscentric legal system, is trying once again to heed multiple voices, to serve multiple masters, to be faithful to multiple lovers. On this point, there is little that linguistics can add to the wisdom already accumulated in the law of agency and the lore of love.

## VI. THE WORD MADE FLESH

If indeed “[t]he law is a profession of words,”<sup>249</sup> it cannot and ought not limit its relationship with linguistics to hermeneutic games invented by language philosophers and other amateur linguists. The founders of the law and linguistics movement have taught us how to analyze “the actual use of language in concrete [legal] situations.”<sup>250</sup> As we perfect their technique, we should move steadily from the study of legal *performance* to a comprehensive examination of legal *competence*, of the language-fueled engine that drives the enormously creative legal mind. From the limited set of decided cases, let us attempt to infer “the underlying system of [formal] rules,” implicit political values, and accepted rhetorical devices by which

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244. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Flood v. Kuhn*, 407 U.S. 258 (1972).

245. See, e.g., *Harper v. Virginia Dep’t of Taxation*, 113 S. Ct. 2510 (1993); *Jim Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Griffith v. Kentucky*, 479 U.S. 314 (1987); cf. *Teague v. Lane*, 489 U.S. 288 (1989).

246. See, e.g., *Landgraf v. USI Film Prods., Inc.*, 114 S. Ct. 1483 (1994); *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994).

247. See generally ESKRIDGE & FRICKEY, *supra* note 68, at 423-81.

248. See generally sources cited *supra* note 213.

249. DAVID MELINKOFF, *THE LANGUAGE OF LAW* 1 (1963).

250. CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, *supra* note 61, at 4.

interpretive “speaker-hearer[s]” shape the law.<sup>251</sup> As this literature matures, “we may see in retrospect that we moved toward the understanding of the general conditions on [legal] structures by the detailed investigation of one or another ‘concrete’ realization.”<sup>252</sup>

The apparent division between legal rhetoric and legal reasoning suggests that the law’s underlying syntax observes the Chomskyan distinction between surface structure (or S-structure) and deep structure (or D-structure).<sup>253</sup> The complex interaction between formal, institutional, and pragmatic factors in statutory interpretation may reach a depth that parallels the third level of Chomskyan grammar—LF, or logical form.<sup>254</sup> Acknowledging the wedge between legal thought and legal expression provides a valuable first step toward a more complete understanding of law as a species of language acquisition. The next step will surely require a more systematic exploration of relationships between regulatory variables. Doctrines permitting “plain text” to defeat extratextual factors such as the rule of lenity<sup>255</sup> or deference to agency interpretation<sup>256</sup> suggest that there may be legal analogues to linguistic rules of government and binding—the rules that control the interactions between nouns and verbs, pronouns and antecedents, and the like.<sup>257</sup> As the investigation widens, its focus may paradoxically narrow; if indeed there is a grammar underlying legal thought, we might eventually conclude that it, like its linguistic counterpart UG, permits “only a finite set of possible core grammars,”<sup>258</sup> a limited number of politically tenable approaches to the universal “enterprise of subjecting human conduct to rules.”<sup>259</sup>

As applied to law, the intellectual tools used in the quest for linguistic universals have excavated a hollow core. There are no fixed stars in

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251. *Id.*

252. NOAM CHOMSKY, *ESSAYS ON FORM AND INTERPRETATION* 207 (1977)

253. *See* CHOMSKY, *LECTURES ON GOVERNMENT AND BINDING*, *supra* note 101, at 5.

254. *See id.* at 4.

255. *See, e.g.*, *Posters’ N’ Things, Ltd., v. United States*, 114 S. Ct. 1747, 1750-54 (1994).

256. *See, e.g.*, *MCI Telecommunications Corp. v. AT&T Corp.*, 114 S. Ct. 2223, 2231-31 (1994); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417-18 (1992), *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 521 (conceding that a plain meaning approach often undermines the competing norm of deference to agency interpretation of statutes). *See generally* Merrill, *supra* note 224 (discussing the relationship between textualism and the rule of judicial deference to administrative interpretations of law).

257. *Cf.* CHOMSKY, *LECTURES ON GOVERNMENT AND BINDING*, *supra* note 101, at 153-230.

258. *Id.* at 11.

259. FULLER, *supra* note 62, at 122.

law;<sup>260</sup> the law's temporarily motionless astronomical anomalies are soon eclipsed by superior political and economic forces.<sup>261</sup> Textualist "determinacy" and legal process "equilibrium" are both fraudulent. The only stability in law stems from the crude desires of those who temporarily command the power to legislate, enforce, and interpret in the positive state. Now that linguists have discredited the Sapir-Whorf hypothesis,<sup>262</sup> lawyers have no reason to expect that any prescriptive approach to constitutional or statutory text will exert a meaningful constraint on law and legal interpreters. Let traditional lawyers adhere to the illusion of "principled" legal reason if they wish, for the rule of law is the crack cocaine of the masses.<sup>263</sup> The truth has been within us all along: The social dynamics of the political system inherently limit majoritarian tyranny, excessive executive discretion, and other disasters for democracy without generating coherent legal principles. Political discipline is the legal equivalent of the implicit phonological code that keeps lazy speakers from flattening their speech and greedy listeners from demanding exaggerated distinctions between similar phonemes.<sup>264</sup>

So it appears that linguistic analysis in the hands of a free-market advocate<sup>265</sup> yields a conclusion that reeks of Critical Legal Studies. If this

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260. *Contra* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (describing the principle "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" as a "fixed star in our constitutional constellation").

261. *Cf.* Chen & Gifford, *supra* note 15, at 1318-19 ("[T]he speedy world of communications has already eclipsed the fixed star of federal communications law.").

262. The Sapir-Whorf hypothesis posited that the semantic and syntactic features of human language define the range of behavior and abstract thought. *See generally* LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (J.B. Carroll ed. 1956). For a devastating criticism of the hypothesis, see PINKER, *supra* note 104, at 59-67 (scoring yet another victory against the Standard Social Science Model). Despite his association with this hypothesis, Edward Sapir took pains to distinguish language from literature and other language-related expressions of culture and to combat the assumption that humans exhibit racially or ethnically linked linguistic tendencies. *See* SAPIR, *supra* note 72, at 207-20.

263. *Ponder with disbelief* State v. Russell, 477 N.W.2d 886 (Minn. 1991) (striking down Minnesota's crack cocaine sentencing law because of its disparate impact on African-American crack dealers vis-à-vis white cocaine dealers).

264. *See* PINKER, *supra* note 104, at 180-81 (describing how every speaker's expectation of listening and every listener's expectation of speaking regulate a phonological system); *cf.* Jim Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91, 131-32 (1992) (noting how the interchangeability of buying and selling roles in commercial markets keeps merchants from breaching their own rules). The phenomenon of self-regulation is common to all types of social behavior characterized by an expectation of repeat performance. *See generally* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 83-105 (1989).

265. That is to say, free markets, free minds, free love. *Compare* Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809 (1995) (advocating the systematic demolition of anti-market measures in American agricultural law) with Chen, *Unloving*, *supra* note 138 (advocating the complete liberation

be heresy, make the most of it.<sup>266</sup> “The tools belong to the man who can use them.”<sup>267</sup> To the extent that they have been inspired by Quine and Wittgenstein, legal scholars as amateur linguists have been crippled by self-imposed epistemological “restrictions that . . . simply exclude from serious study the many fascinating questions” raised by linguistic analysis of law.<sup>268</sup> If Critical Legal Studies and kindred intellectual movements continue to confine themselves to the prescriptively impotent tools of dissent and deconstruction,<sup>269</sup> the law’s voices of discontent will continue to miss the formidable critical power of legal analysis inspired by Chomskyan linguistics.<sup>270</sup>

In the beginning was the word, and the word was with the law, and the word was law. The bearers of the word were not the light, though they came to show us the light. The continuing infusion of linguistic wisdom into the law accelerates the decline of law as an autonomous discipline.<sup>271</sup> Linguists have shown us several new ways of understanding ourselves as lawyers. May linguistics continue to enlighten the legal project and to quicken the deadening language of the law. May the law so touched become at last the word made flesh.<sup>272</sup>

of family formation from race-based regulation).

266. Cf. WILLIAM WIRT, *THE LIFE AND CHARACTER OF PATRICK HENRY* 18 (1818) (quoting Patrick Henry’s May 1765 speech to the Virginia Convention: “If this be treason, make the most of it”).

267. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (quoting a “maxim” often attributed to Napoleon).

268. Chomsky, *Some Empirical Assumptions in Modern Philosophy of Language*, *supra* note 92, at 282.

269. See, e.g., Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779 (1992) (detailing how CLS excelled at criticizing more structured approaches to legal scholarship but floundered miserably when challenged to propose normatively superior alternatives); cf. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993) (painting an even more dismal portrait of the “storytelling” technique often used by critical race theorists and radical legal feminists). In light of how even Christian legal studies can be used for critical purposes, see Chen, *supra* note 159, at 610-11 (making such a reading of H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993)), the critical tradition in American legal scholarship exhibits an appalling methodological poverty.

270. Is it any surprise that Noam Chomsky is one of America’s most prolific and most despised commentators on social and political affairs? See, e.g., NOAM CHOMSKY, *THE CULTURE OF TERRORISM* (1988); NOAM CHOMSKY, *THE FATEFUL TRIANGLE: ISRAEL, THE UNITED STATES, AND THE PALESTINIANS* (1984); NOAM CHOMSKY, *ON POWER AND IDEOLOGY: THE MANAGUA LECTURES* (1988).

271. Cf. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761 (1987).

272. Cf. John 1:14.

