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The Interpretation and Application of Statutes, by Reed Dickerson

Lee Loevinger
Hogan & Hartson

Book Review

THE INTERPRETATION AND APPLICATION OF STATUTES. By Reed Dickerson. Boston, Mass.: Little, Brown & Co. 1975. Pp. xx, 309. $16.50.

A few years ago a popular book and topic of discussion was *Why Johnny Can't Read.*[1] More recently a cover story in Newsweek was entitled *Why Johnny Can't Write.*[2] As any moderately literate person knows, reading and writing are merely different aspects of the same function. It is a function which, by all evidence, is being less competently practiced than in earlier periods not only by the general population but also by those presumably "educated," and even by those professionally engaged in reading and writing. As a recent editorial remarked, "imprecision in the use of words is only one of the symptoms of galloping illiteracy in American classrooms today;"[3] an example of this incompetence is a recent report of the Church Committee which confused the simple concepts of "synecdoche" and "euphemism."[4]

A number of reasons have been suggested to explain the lamentable fact that most college graduates are "unable to write ordinary, expository English with any real degree of structure and lucidity."[5] A common (and plausible) explanation is the popularity of television and its offering of passive entertainment which entices the young away from participation in the more involved activity of reading. On the adult level, computer printouts and conference calls have minimized the importance of exchanging written verbal communications. Currently popular political activism, and some of its academic corollaries, preaches that traditional standard English is simply another elitist instrument that serves to discriminate against underprivileged minorities who should have the right to use their own language—whatever that language may be.

Whatever the causes, the evidence is clear that teaching at all levels is putting less emphasis on, or entirely omitting, the elements of vocabulary, grammar, structure, and style in reading and writing. Ronald

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[1] R. FLESCH, WHY JOHNNY CAN'T READ (1955).

[2] NEWSWEEK, Dec. 8, 1975, at 58.

[3] Washington Star, Dec. 7, 1975, at F2.

[4] *Id.*

[5] NEWSWEEK, Dec. 8, 1975, at 58.

Berman, chairman of the National Endowment for the Humanities, characterizes this as a "regression toward the intellectually invertebrate."[6] The results are apparent not only among liberal arts graduates, but also among law students and law school graduates of recent years.

Unfortunately language, written language, constitutes the machinery of the law. There can be law only in a simple, primitive sense (such as custom) without language. Law can have a degree of precision and certainty, widespread application and continuity through time, only through written language. Modern law, in its massive volume and almost incomprehensible complexity, would be unthinkable without written language. Deterioration in the ability of the population in general, and of lawyers in particular, to read and write with skill or competence will inevitably result in deterioration of the quality of our law, and ultimately of our culture.

Thus it is noteworthy and important when a law teacher undertakes to bring together the traditional principles of interpretation of legal writing and the insights of contemporary philosophical and scientific inquiry in order to provide an intellectually rigorous framework for interpreting and applying statutes. This Professor Dickerson has done. In the process he has written a text which, in many respects, is broader than its ostensible subject and which can well serve lawyers as an introduction to the semantics and the interpretation of all documents.

Professor Dickerson begins by pointing out that the traditional overemphasis on the literal aspects of meaning has provoked today's reactionary underemphasis. This is a useful historical perspective. Many contemporaries seem to suggest that they and their associates are the first to discover the difficulties and vagaries of verbal expression. Actually it is an ancient theme. Many years ago Henry Adams wrote: "No one means all he says, and yet very few say all they mean, for words are slippery and thought is viscous."[7] This is as true of lawyers and legislators as it is of others.

In his introductory chapters, Professor Dickerson explains the four constitutional assumptions on which statutory interpretation rests. These are: first, that the legislature has the supreme power to write statutes; second, that the exclusive means by which a legislature may create new law is by writing a statute; third, that a statute must be written in the generally accepted language and interpreted by generally accepted standards of communication; and, fourth, that statutes must be reasonably

[6] *Id.*

[7] H.B. ADAMS, THE EDUCATION OF HENRY ADAMS 420 (1942).

available to those affected by them. Although these assumptions may appear obvious, they have interesting implications in application, as in the use of legislative history.

Professor Dickerson next distinguishes between the cognitive function of ascertaining statutory meaning and the creative function of judicial lawmaking. The next half dozen chapters, although couched in terms of statutory interpretation, constitute a general exposition of some basic principles of semantics. The variety of meanings of the concept of "meaning" are explored. There is a discussion of the distinctions between the basic ideas of ambiguity (uncertainty of alternative reference), vagueness (indeterminacy in scope of reference), and generality (the breadth of reference). Following chapters distinguish between legislative intent (that which the legislature was trying to say) and legislative purpose (that objective which the legislature was trying to achieve). The fundamental and universal importance of context in determining the meaning of any verbal communication is analyzed and discussed at some length. This much, comprising about half the book, is a useful and cogent exposition of semantic principles applicable to the interpretation of documents in general and legal documents in particular.

The remainder of the book is devoted to analysis and discussion of problems that are characteristic of statutory interpretation. There is a long chapter on the uses and abuses of legislative history in which the variant and conflicting views of the most prominent writers on the subject are weighed carefully. Professor Dickerson gives a Canadian citation for the gibe (which some of us had attributed to Justice Frankfurter) that in the United States whenever the legislative history is ambiguous it is permissible to refer to the language of the statute.[8] He then notes that the Supreme Court has come close to turning this parody into a principle of law by stating that one must look primarily to the statutes because the legislative history is ambiguous.[9] This sort of thing seems to warrant the judgment that "the courts' currently widespread use of federal legislative materials is professionally shocking. . . ."[10] Practical experience in the law corroborates the conclusion urged by Professor Dickerson, that legislative history should be used only with the greatest restraint. The use of extrinsic legislative materials threatens to create a proliferating mass of legal sources so extensive, specialized, refined, and hard to find that the interpretation and application of statutes will become a virtually impossible task. He also issues the interest-

[8] R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 164 (1975).

[9] *Id.* at 164 n.65.

[10] *Id.* at 163.

ing warning that misuse of the computer could easily aggravate, rather than solve, the problem of legislative pollution in the legal ecology.

The last four chapters consider a variety of specific canons of statutory construction, as well as the general dogmas of "strict" versus "liberal" construction. In general, Professor Dickerson concludes that the conventional rules in the field are either tautological, unhelpful, or positively misleading. His ultimate conclusion is the unassailably sound one that by far the most effective control that a legislature can exercise over the way that courts and others read and apply statutes is better draftsmanship and better use of the tools of communication.

Any book on communication necessarily invites appraisal by the standard of its ability to communicate. By this standard, Professor Dickerson merits considerably more than a passing grade. His book is well organized and outlined. The points are clearly stated and explicated. The organization is logical, and the logic is coherent and reasonably rigorous. If the work is subject to any criticism on this point, it is that there seems to be an over-emphasis on logical taxonomy. Every significant term and concept is analyzed and classified in relation to all the others. Indeed, this does help elucidate many of the murky concepts that abound in this field and thus is convenient for the reader. Yet I am left with the uneasy feeling that these things are analyzed and categorized just a little too neatly. As Henry Adams said, thought is viscous and words are slippery. So we must be careful not to give the impression that verbal categories completely encompass intellectual concepts. Or, to put it another way, we must be ever conscious of the fact that, at best, each term represents only the focus of an idea and is always surrounded by a penumbra of uncertainty, broad or narrow though it may be.

Basically Professor Dickerson's book is a handbook of instructions on how to use the most common and important elements of the law—words and statutes. Like all instructional handbooks, it is written in a straightforward manner with little pretension to literary style. It is academic, perhaps pedantic, in examining and quoting at length many, if not most, of the others who have written on the same topics. One wonders if the ideas might not have been conveyed more effectively by relegating the references to other writers to footnotes or end notes and discussing only the major lines of thought. The subject is so important and the analysis so reasonable that one wishes this book might have been written with the grace and style of a Holmes so that it might attract an audience far beyond the law schools.

In any event, it is certain that a book like this is badly needed in the law schools. Today statutory law is of concern to everyone, and is of controlling importance in every field of law from antitrust to zoning. But beyond that, the principles of communication that must be employed in the interpretation and application of statutes are also applicable in reading and interpreting other legal documents. The principles that enable one to read with understanding are also guides to writing with clarity and precision. Consequently the message of this book is important not only because it will aid in the interpretation and application of statutes but also because it will have a pervasive and basic influence on a lawyer's functioning in all other fields of law. If I were the dean of a law school, no student would be graduated from the school without having studied and passed an examination on the subject matter of this book. If I were a law school professor, I would welcome this book as a textbook. As a practicing lawyer, I would prefer to employ graduates who have studied this subject and this text. If I were a law school student, I would study this book whether or not it was required.

The ability to read and write well is indispensable to the competent practice of law in a legislature, in a law office, or on the bench. This is the best lawyer-oriented exposition of the subject I have seen. The book has flaws, but perhaps the flawless exposition will never be written. Until a better book on this subject appears, every law student, lawyer, and judge should read this one. Johnny—who has been having difficulty in reading and writing for a number of years—is now going to Congress, practicing law, and sitting on the bench. Johnny the legislator, the lawyer, and the judge must learn to read and write more competently both for his own sake and that of society. This book will help.

LEE LOEVINGER*

*B.A. 1933, J.D. 1936, University of Minnesota; Partner: Hogan & Hartson, Washington, D.C.