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The Ambiguity of Interpretation: Distinguishing Interpretation from Construction

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THE AMBIGUITY OF INTERPRETATION: DISTINGUISHING INTERPRETATION FROM CONSTRUCTION

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Our law is a law of words. Words enable the legal profession to engage in discourse about the law—to articulate what the law is and what it ought to be. Perhaps more fundamentally, most of what we call law consists of words, whether in the form of statutes, judicial opinions, or the myriad other sources of law. Not surprisingly, therefore, the interpretation and meaning of legal language assumes great importance.

One might expect that linguistics—the scientific study of language—would have much to offer the legal profession, which is so often occupied with the interpretation of legal texts. That possibility was evidently the point of departure for this conference. Those reading the proceedings will, however, be struck by how linguists and legal scholars employ quite different discourses about language, especially when it comes to meaning and interpretation.

I will argue that many of these differences on the nature of meaning derive from the ambiguity of the verb *interpret*, an insight that I owe to Michael Hancher.[1] That a word is ambiguous is hardly surprising, of course. What is interesting is the nature of that ambiguity and its implications for linguistic and legal approaches to meaning.

Much of what follows will be reminiscent of points raised by participants in the conference. At a minimum, I hope to restate those points in a way that may be somewhat more accessible to nonlegal scholars, especially those familiar with speech act theory. At the same time, I hope to illustrate for legal scholars how a better understanding of speech acts might contribute to the development of legal theory.

When linguists speak of "interpret," they generally appear to be referring to a mental process by which a person extracts something called "meaning" from physical input, in this case, spoken or written language. For example,

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1. Michael Hancher, *What Kind of Speech Act is Interpretation?* 10 POETICS 263 (1981).

Georgia Green defines "communication" as the "successful interpretation by an addressee of a speaker's intent in performing a linguistic act."[2] Thus, Jane may make an utterance containing the proposition *P*. In interpreting *P*, I go through the process of determining what Jane means by *P*. This mental process of interpretation involves various linguistic devices, which have been the object of a great deal of study recently. In addition to using "interpret" or "interpretation" to refer to this mental process, we may also use these terms in reference to a mental state, thus focusing more on the outcome of the process.

Ordinarily, therefore, interpretation is a mental process or a mental state rather than a speech act. We continually interpret language, generally without feeling a need to directly articulate our interpretation. Of course, we can assert or represent that we are giving an utterance a particular interpretation. If I am unsure what Jane means by *P*, I can seek confirmation of my preliminary interpretation by saying something like, "When you said *P*, you meant *X*, didn't you?" In fact, I can assert my interpretation more formally by stating that I "interpret" *P* to mean *X*.

Thus, interpretation, when referring to ordinary language usage, refers primarily to a mental process that attempts to infer the communicative intentions of the speaker or writer. For any number of reasons, that process can go awry. Thus, if I articulate my interpretation of *P* to Jane, she may correct me. Or she may correct me after she notices that I am acting in a way that is inconsistent with what she intended to communicate. All too often, however, misinterpretations are never discovered, precisely because interpretation is a cognitive process that normally stays in the mind of the hearer.

Thus, an interpretation may be right or wrong, something that is often empirically testable. When someone gives me directions on how to reach her remote mountain cabin, it is critical that I correctly interpret her instructions. I need to understand what she intends to communicate to me by means of the directions. If I misinterpret her instructions, I may never reach the cabin.[3]

This type of ordinary language interpretation is also quite common in the legal sphere. A lawyer who reads a statute is clearly involved in the mental

2. GEORGIA GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 1 (1989) (citation omitted).

3. Of course, there are examples—literary interpretation comes to mind—where truth or correctness may not be deemed essential, or even desirable. Or the correctness of an interpretation may be unknowable.

process of interpretation while he is reading. And he may assert that interpretation when he goes to court and argues that his client is entitled to summary judgment because of the meaning that he attributes to that statute.

Yet there is also a form of legal interpretation that is quite distinct from ordinary language interpretation. This occurs when a legal actor—usually a court—*declares* that certain legal language will have a particular meaning. For purposes of clarity, I propose that we resuscitate the somewhat obsolescent term statutory *construction* (and the related verb *construe*). I propose that we limit "interpretation" to refer to the mental process or state referred to above, and use the term "construction" to refer to the process by which a court declares an authoritative interpretation of the meaning of some legal language.[4] Observe that while an interpretation is often not articulated, statutory construction can occur only by means of the speech act of construing.

Declarations are a class of speech acts that are particularly relevant to the law, although they almost certainly occur in all complex institutions. As a class, declarations make something the case by declaring it to be the case.[5] Thus, I can nominate John for office by saying "I nominate John," and the chairperson can adjourn a meeting by declaring "This meeting is adjourned."

Furthermore, according to Searle and Vanderveken, "declarations require an extralinguistic institution and a special position of the speaker."[6] For me

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4. The conference participants discussed a possible distinction between "interpretation" and "construction." *Law and Linguistics Conference*, 73 WASH. U. L.Q. 800, 890-92 (1995). Bill Eskridge pointed out that over a century and a half ago, Francis Lieber used the terms in a sense similar to how I propose they be used here. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (1880). Lieber wrote that "[i]nterpretation is the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey." *Id.* at 23. On the other hand, "[c]onstruction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text." *Id.* at 56. Lieber's view of construction is apparently broader than what I propose, however, since he would apparently include under construction any judicial action regarding a statute that is not merely interpretation. For example, he views declaring a law to be invalid as a type of construction. *Id.* at 60.

Michael Moore put forth a different terminological distinction, referring to *meaning* as that term is defined by linguistics, and referring to what judges do as *interpretation*. *Conference*, *supra* note 4, at 886. Since it requires interpretation to arrive at linguistic meaning, and since the enterprise of judges is often the construction of legal meaning where there was none before, I prefer Lieber's original terminology, subject to my proposed modifications.

5. JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 206 (1985).

6. *Id.* at 205.

to be able to nominate John for office, there must be an organization with elective offices in which members have the power to nominate candidates. And in most institutional contexts, it is only the person who is running a meeting who has the authority to adjourn it; in other cases, a majority of the members may have this power following a correctly made motion for adjournment.

Many declarations, to be effective, must be made not only by a designated individual or group, but also in accordance with established institutional procedures. Within a club, for example, there might be a commissioner of elections who can declare a member to be president of the club. But institutional procedures may require that the commissioner first provide for nomination of candidates, allow the candidates to make speeches to the members, hold an election with secret ballots on a specified date, tally the votes in the presence of five other members, and so forth. Failure to follow these procedures may invalidate the declaration that Billy is the new president.

As noted, declarations are quite common in the legal setting. Thus, the President of the United States has the authority to declare that a locality is a disaster area. This declaration is an act that by law the President is authorized to do,[7] and it is performed within a particular institutional framework: the federal government. As with the example of the club election, there are established institutional procedures that a president must follow. For example, the governor of the affected state must first request the declaration, and she must forward certain information regarding the situation to the federal government.[8]

Declarations generally have the effect of creating or modifying an institutional state of affairs. Declaring that Billy is the new club president, if done properly, modifies the former reality in which Joanne was president and creates a new institutional state of affairs in which the president is Billy. Likewise, for the American president to declare, following an earthquake, that a locality is a disaster area makes it a disaster area.

Consequently, the truth or correctness of a declaration is not particularly relevant. What matters is *validity*: whether the proper person made the declaration and correct institutional procedures were followed. Experts on earthquakes or language could argue into perpetuity that the earthquake did not qualify as a true disaster, as that term is commonly understood. They

7. 42 U.S.C. § 5170 (1988).
8. *Id.*

might well be correct. Nevertheless, within the institutional framework of the federal government, it is a disaster area because the President has so declared. Likewise, baseball fans may argue that an umpire's decision is wrong, based on certain evidence, but on another level, the umpire's call is correct by definition. On this level, the umpire is never wrong.[9]

Returning now to the issue of legal language, it should be evident that when judges engage in statutory construction, they are not merely interpreting, but are declaring meaning. Statutory construction occurs only inside a formalized institutional structure. Within that judicial institution, it is judges who are authorized to construe statutes. Lawyers, linguists, and laypersons can all interpret statutes on the basis of ordinary language principles, and they are free to assert and argue their interpretations. Yet no one but judges can construe a statute. And once a judge does so—thus giving it an authoritative meaning—other institutional actors are bound by it. Of course, a lower court can still assert its own interpretation of a statute in the text of its opinion, and lawyers can openly disagree with the higher court's construction. But in carrying out their institutional role of adjudicating cases, lower courts must follow the higher court's construction.[10]

I believe that most actors in the judicial system would agree that the above description of statutory construction is, as a descriptive matter, fairly accurate. Much less certain and more controversial are the institutional procedures that courts should follow in construing statutes. How the club commissioner of elections should declare a winner in the election for president is probably set out in detail in the club's bylaws, but there are few authoritative rules regarding how judges ought to construe statutes.

One approach is that judges should construe a statute in the same manner that they—or an ordinary or reasonable member of the speech community—would normally interpret the statute's language. In other words, the construction ought to be the same as the interpretation. This position seems close to what many strict constructionists would argue.

The problem, as so many legal scholars have recognized, is that the

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9. *See* Hancher, *supra* note 1, at 274-75.

10. The requirement that lower courts must follow the higher court's decisions, and that courts follow their own prior decisions, is obviously a function of precedent. In a system without precedent, judges would not declare meaning, but at most would declare the outcome of the case before them, leaving the meaning of the statute to be reexamined later. Of course, even in a system without precedent, a court's interpretation would have some persuasive value, but it would not be binding in later cases.

language of statutes is often vague, incomplete, or at least ambiguous. Constitutional language, which is normally phrased in fairly general or broad terms, is usually even harder to interpret exactly. Obviously, interpretation—which depends on the intentions of the speaker—cannot supply meaning where none was intended. Nor can interpretation disambiguate an utterance when the intentions of the speaker are unknown or even unknowable, as is often true with statutes or constitutional provisions. Unlike ordinary conversation, in which I can ask Jane what she meant by *P*, a judge cannot ask a legislature what it meant by a statute that it enacted fifty years ago, even assuming that there was originally a shared collective intent. In the face of such problems, a judge might refuse to enforce an ambiguous or incomplete statute, essentially sending it back to the legislature for clarification, but this seems a cumbersome and inefficient process that all too often will fail to do justice to the parties before the court. The job of courts, after all, is to decide disputes, not to delay their resolution.

Judges therefore frequently cannot interpret statutes by attempting to infer the intentions of the legislature, as reflected in its enactments. In other words, interpretation often fails. Consequently, judges may have little choice but to transcend interpretation by constructing meaning that was not there before.

Perhaps a more realistic approach is that interpretation should at least form the point of departure for any construction. This is one way of understanding the plain meaning rule, which states that if the meaning of a statute is plain, judges should not engage in construction. In my proposed terminology, this would require that the judge begin by examining the text of the statute, and if this leads to a relatively determinate interpretation, the judge should construe the statute in accordance with that interpretation. Only if interpretation is not reasonably possible should a judge engage in construction.

A variant of the above approach would not necessarily begin with interpretation, but would nonetheless constrain any construction to fit within the confines of a reasonably possible, or at least conceivable, interpretation.[11]

Interpretation is thus an important component of statutory construction. Sometimes it might be the only factor that a judge needs to consider in

11. Fred Schauer discussed this option at the conference, using the metaphor of a picture frame from Hans Kelsen. *Conference*, *supra* note 4, at 950. In my terms, the reasonably possible interpretations of a statute would delimit the bounds within which construction could occur.

construing a statute. In an ideal world, where prescient and benevolent legislatures would draft perfectly comprehensive and comprehensible laws, construction would always begin and end with interpretation.

In reality, of course, judges must often go beyond the text. For that reason, the term statutory *construction* seems particularly apt. Judges may have to build or construct meaning where there was none before. More controversially, some would argue that judges should in some cases, perhaps for reasons of justice or morality, construct meaning even where interpretation is relatively determinate.

Not surprisingly, courts are usually reluctant to admit that they are constructing meaning rather than simply interpreting. Judges tend to write as though they are engaged in a purely linguistic endeavor, striving as best they can to derive meaning from text. Thus, statutory construction is commonly clothed in the rhetoric of interpretation. Indeed, this is a major insight in Larry Solan's book,[12] which ultimately initiated the discussion between the linguists and legal scholars at the Conference. Solan points out that the constructions that judges give to statutory and constitutional text do not always match the most reasonable interpretation of the language, even when judges purport simply to be articulating the plain meaning of the text. The rhetoric of interpretation hence serves to legitimize a particular construction. However, it may also mask factors besides interpretation that are at play.[13] Passing off construction as mere interpretation obscures the real issue: how should judges construe a statute when interpretation fails?

Linguists may well have something to contribute to this debate. They certainly have a great deal to contribute to questions of interpretation, especially where a legal text consists of ordinary language. If nothing else, a more sophisticated approach to interpretation can point out where judges are adding to or modifying the text that they purport to interpret and may thus compel them to better justify their constructions. Legal scholars and judges could thus learn a great deal about interpretation from linguists.

Ultimately, however, legal scholars must continue to focus on what is for them a far more critical concern: the construction of meaning by the judiciary.

Who is doing the building?

What materials are they using?

And what sorts of edifices are they constructing?

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

13. *Id.* at 62 ("[J]udges do not make good linguists because they are using linguistic principles to accomplish an agenda distinct from the principles about which they write.").