1995

Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?

Lawrence Solan
Brooklyn Law School, larry.solan@brooklaw.edu

JUDICIAL DECISIONS AND LINGUISTIC ANALYSIS: IS THERE A LINGUIST IN THE COURT?

LAWRENCE M. SOLAN*

In the background of any discussion about linguistics and law is the question that Clark Cunningham posed: "Is there really anything in the field of legal decision making where a linguist has better information than the judge?"[1] I wish to address that question briefly here.

First, I will discuss certain limits in the potential relevance of linguistic theory to legal analysis. In particular, even on its own terms, linguistics ordinarily will not be a source of authority about how legal documents should be interpreted. I will then discuss two areas in which I believe that linguistic analysis may be of some use to courts. The first, which will be touched on only briefly, involves the discussion by courts of statutes containing complex syntactic structures whose intepretations are in dispute. Although linguists ordinarily have no special ability to interpret such statutes, they may be of help to a court obliged to justify its decision with an account of how the language should be analyzed. Most of the paper will be devoted to the second area, which is word meaning. I will show that courts evaluate the meanings of disputed terms in two different ways—in terms of definitions and in terms of how far the word strays from the prototypical use of the word—and that different approaches to word meaning can have serious jurisprudential ramifications.

THE LIMITED RELEVANCE OF LINGUISTICS TO LAW

The business of judges is to make decisions and to justify them. To the extent that judges need to interpret statutory or other language in performing these tasks, they are as able as anyone else to do so without the help

* Partner, Orans, Elsen & Lupert, One Rockefeller Plaza, New York, New York. B.A. Brandeis University (1974); Ph.D. University of Massachusetts, Amherst (1978); J.D. Harvard Law School (1982). Portions of this paper were presented at the meetings of the Law and Society Association in June, 1995. I am grateful to Peter Tiersma, Steven Winter, Marc Poirier, and Clark Cunningham for their comments and discussion.

1. Clark D. Cunningham, What if the Meaning of Law Was a Matter of Common Sense? A Thought Experiment (May 17, 1995, on file with the author).

of a linguist, and linguistic theory tells us that this is so.[2] Linguistic inquiry starts with the proposition that "[a] person who speaks a language has developed a certain system of knowledge, represented somehow in the mind and, ultimately, in the brain in some physical configuration."[3] The goals of linguistic research are to come to an understanding of this system of knowledge and to explain how it arises. That seemingly dissimilar languages share many common properties in their structure and that children develop some aspects of the structure of language without much exposure to them lead linguists to conclude that a good part of this knowledge results from innate structures that severely limit the kinds of systems of linguistic knowledge that can develop in humans.

To take one example, when we hear the sentence, "John thought he should be more polite to Bill," we recognize that *he* can be construed to refer to John or to some unnamed individual, but not to Bill. But when we hear, "he thought John should be more polite to Bill," *he* can no longer refer to John, and now must refer to some unnamed male. The rule controlling the interpretation of these sentences refers to the syntactic relationship between the position of the pronoun and the position of a potential antecedent.[4] The principle is universal. Languages around the world obey it, and children learning language rarely make errors with respect to it, despite the fact that they have received no instruction. Significantly, the range of available interpretations for these sentences is independent of context.

It is not unusual for judges to interpret pronouns. We all do it unselfconsciously and with extraordinary rapidity. But it is unusual for

---

2. In making this statement, I assume, without argument, that at least part of what a judge must do is to interpret the text, as a speaker of English, in terms of its syntax and the meaning of its words. That is, even if we accept the notion that a legal text is subject to a special set of interpretive rules, judges are well aware of the ordinary meanings of the texts they interpret, and generally recognize these meanings as a significant factor in the process of statutory or contractual construction. This fact is recognized in the canon of construction calling for words in statutes to be given their ordinary meanings unless they are defined otherwise statutorily. *See, e.g.*, Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994). For discussion of various notions of meaning that may be relevant in legal interpretation, see FREDERICK SCHAUER, PLAYING BY THE RULES (1991).

3. NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 3 (1988).

4. The operating principle is called "c-command." Basically, a pronoun may not be in a syntactically higher position in a sentence than its antecedent. See NOAM CHOMSKY, LECTURES ON GOVERNMENT AND BINDING (1981) for detailed discussion. For a non-technical introduction to these issues, see LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993).

judges to have to theorize about how they interpret pronouns. Thus, we would not ordinarily expect judges to have to rely on linguists when they are called to construe a statute containing a pronoun. The same holds true for a myriad of syntactic and interpretive principles studied by linguists.

Those aspects of knowledge of language not predetermined by the kinds of innate structures described above are learned as language-specific facts. A language's vocabulary is the most obvious example. In this domain, people raised in the same linguistic community, i.e., people who acquire the same language, appear to have developed similar, if not identical, systems of linguistic knowledge.[5] We would not expect linguists to stand in a privileged position when it comes to interpreting even these aspects of language, and they do not. As a result of having studied the matter, linguists may be able to bring to the attention of others interpretations of which the linguist is aware. But they cannot and do not dictate to a community how language is to be understood.[6] Linguistics is a descriptive, and to the extent it is successful, an explanatory endeavor. It does not prescribe. Judges who are suspicious of allowing linguists to testify about the meanings of words in an effort to add weight to the position of one of the litigants are, in my opinion, generally on the right track.[7]

LINGUISTICS IN THE COURTS

There are, however, occasions on which judges do theorize about the structure of language. This occurs most often when a dispute requires the court to accept one proffered interpretation and to reject another, and the court feels obliged to explain why it has taken the position it has. When this happens, linguistic analysis may be of some help to judges, who are likely to be far better at interpreting language than they are at talking about why it is that they interpret language the way they do.[8] I will focus here on two circumstances in which I believe this to be true.

---

5. *See* NOAM CHOMSKY, LANGUAGE AND THOUGHT (1993).

6. For two excellent non-technical books that elaborate on these points, see RAY JACKENDOFF, PATTERNS IN THE MIND (1994); STEVEN PINKER, THE LANGUAGE INSTINCT (1994).

7. There are significant exceptions such as the research on comprehensiblity of jury instructions that Judy Levi reported at the conference survey work in trademark cases about usage. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 800, 957-58 (1995).

8. *See* STANLEY FISH, DENNIS MARTINEZ AND THE USES OF THEORY, *in* DOING WHAT COMES NATURALLY 372 (1989).

A. When the Statute is Hard to Read

First, when the language in question, often in a statute or contract, is especially convoluted, there is heightened potential for courts to write confused opinions about language. At the same time, there is heightened opportunity for judges to take advantage of the inelegant language to write an opinion which, on analysis, is not in keeping with the language at all.[9] In either case, such judicial argumentation leads to a jurisprudence that obfuscates. Making matters worse, *stare decisis* operates to propagate faulty linguistic analysis. To avoid unwanted results, a court in Case 2 sometimes walks away from the kind of analysis that it only recently espoused in Case 1.[10]

In these cases, courts no doubt can use assistance in deciding how to express their analysis of the language in question. The Supreme Court's citation to the Cunningham et *al.* review of *The Language of Judges* demonstrates the point.[11] The *X-Citement Video* case,[12] in which the Court recently had to discuss the scope of "knowingly" in a virtually incomprehensible statute,[13] also strikes me as an instance in which linguistic analysis could have a clarifying effect.

B. Concepts and Categories

There is a second, far more pervasive area in which linguistics may play a role in the judicial system. One of the most frequent issues facing courts is the goodness of fit between a particular event that occurred in the world

---

9. *See* Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); SOLAN, *supra* note 4, especially Chapters 2-4.

10. *Compare, e.g.*, United States v. Yermian, 468 U.S. 63 (1984), *with* Liparota v. United States, 471 U.S. 419 (1985) (taking different positions concerning the scope of *knowingly* in syntactically similar statutes).

11. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994), cited by the Supreme Court in United States v. Granderson, 114 S. Ct. 1259, 1267 (1994); United States v. Staples, 114 S. Ct. 1793, 1806 (1994) (Ginsburg, J. concurring); Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994).

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

13. 18 U.S.C. § 2252 (1994). The statute punishes "any person who knowingly transports or ships in interstate or foreign commerce . . . any visual depiction if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct;" The issue in *X-Citement Video, Inc.*, 115 S. Ct. 464, was whether the statute was constitutionally infirm for failing to require that the defendant *knows* that the producing of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

and a legally relevant concept. Either a single fraud followed by a lengthy cover-up constitutes a "pattern of racketeering activity" under RICO, or it does not.[14] Either an accounting firm that helped prepare documents for a public offering of stock is a "seller" of those securities under Section 12(2) of the Securities Act of 1933, or it is not.[15] In legal decision making, there is generally no middle ground. As Steven Winter observes, the law of the excluded middle, "A or not A," is deeply entrenched in our system.[16]

Conceptualization, as a cognitive process, does not work this way, however. For most words, there is no definition that contains the complete set of necessary and sufficient conditions for membership in the conceptual class that the word expresses. If we try to form tight definitions of a concept that will cover all and only the desired results, we will fail. Any reader who tries right now to define "chair" to include all and only chairs will quickly get the point.[17] Rather, work in linguistics and cognitive psychology shows that we form concepts, at least in part, by absorbing prototypes, and that concepts become indeterminate at the margins.[18] As events and things become more remote from the prototype, they more closely fit into other categories. By elongating our chair, for example, we at some point will create a love seat and then a sofa. In addition, it is generally the case that a given event or thing can be a member of many

---

14. 18 U.S.C. §§ 1961, 1962 (1988 and Supp. 1994). *See* Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016 (7th Cir. 1992). In *Midwest Grinding*, the Court found the plaintiff's allegations of a single fraud followed by subsequent active concealment (perjury or obstruction of justice) did not fit the required pattern. *Id.* at 1024. Instead, the Court found the claim to be an attempt to "fit a square peg in a round hole." *Id.* at 1025.

15. *See* Pinter v. Dahl, 486 U.S. 622 (1988).

16. *See* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

17. For discussion of problems with definitions, see, *e.g.*, J.A. Fodor et al., *Against Definitions*, 8 COGNITION 263 (1980); Roy Sorensen, *Vagueness and the Desiderata for Definition*, *in* DEFINITIONS AND DEFINABILITY: PHILOSOPHICAL PERSPECTIVES 71 (James H. Fetzer et al. eds., 1991), and references cited therein.

18. For a summary of these issues, including references to the underlying literature, see FRANK C. KEIL, CONCEPTS, KINDS, AND COGNITIVE DEVELOPMENT (1989); RAY JACKENDOFF, SEMANTICS AND COGNITION (1983). For an example of prototype analysis in the linguistic literature, see Linda Colemen & Paul Kay, *Prototype Semantics: The English Word* Lie, 57 LANGUAGE 26 (1981). Some researchers have concluded rather convincingly that knowledge of words includes some theory about the word's features as well as prototype analysis. *See, e.g.*, Douglas L. Medin & Edward J. Shoben, *Context and Structure in Conceptual Combination*, 20 COGNITIVE PSYCHOLOGY 158 (1988). *See also* Winter, *supra* note 16 (relying heavily on the work of George Lakoff and Mark Johnson concerning concepts and categorization). *See also* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987).

different categories (e.g., furniture, wooden object, etc.), and people have preferences as to the type of category in which they are most likely to place it. These preferences are in part universal and in part idiosyncratic.

As a result of these aspects of our cognition, we regularly experience instances in which we simply cannot tell whether a thing or an event is a member of a particular class or not. For example, in a well-known experiment,[19] subjects were shown pictures of five differently-shaped vessels and were asked to categorize them as a vase, a cup or a bowl. Some of the pictures were easily identified. But others, the "in-between" shapes, were not, and the subjects experienced uncertainty and disagreement with one another. There is no reason to believe that legally relevant concepts are any different from other concepts in this respect, and in fact, they are not. Legal concepts are hard to define and become indeterminate at the margins just like any other concept. Neither appointment to the bench nor election to the legislature vests individuals with special cognitive capacities.

Many of what we consider to be hard cases result from the requirement that we make a final determination about the relationship between an event and a concept that we most naturally regard as indeterminate. It is frequently the system's insistence that we not acknowledge this indeterminacy at the margins, but instead make a decision, that causes hard cases to be hard. What makes easy cases easy, in contrast, is the proximity of their events to the prototypes that motivated the legally relevant concepts in the first place. As hard as some RICO cases are, it is not difficult to conclude that an individual who has been engaged in one bribery scheme after another over a period of years, and has invested the proceeds to run a business, has engaged in a "pattern of racketeering activity," as the statute requires.[20] The decision making process is good at handling easy, prototypical cases and strains when handling hard cases. Advances in linguistics and cognitive psychology can help to explain why this is so and to make judges more aware of certain choices that they necessarily make in confronting problems of word meaning.

To illustrate the tension between the definitional and prototypical views of word meaning in the judicial setting, let us examine several Supreme Court cases in which the issue arises. *Smith v. United States*[21] is a

---

19. *See* William Labov, *The Boundaries of Words and their Meanings*, *in* NEW WAYS OF ANALYZING VARIATION IN ENGLISH (Charles J.N. Bailey & Roger W. Shuy eds., 1973).

20. *See* United States v. Biaggi, 909 F.2d 662, 685-87 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

21. 113 S. Ct. 2050 (1993).

statutory construction case in which the majority looked to the definition of a concept while the dissent attempted to use a prototype analysis. In *Smith*, the defendant had attended a meeting with people who turned out to be government agents and informants, in which he agreed to trade an automatic weapon for some cocaine. He got cold feet and fled, but was apprehended after a high-speed chase. He was indicted and convicted of conspiracy to possess cocaine with intent to distribute and attempt to possess cocaine with intent to distribute, both inchoate drug trafficking crimes.[22] Section 924(c)(1) of the Criminal Code provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years, and if the firearm is a machinegun, . . . to imprisonment for thirty years.[23]

Smith was sentenced to the thirty-year statutory penalty. The issue on appeal was whether his aborted efforts to trade a machinegun for cocaine constituted use of a firearm during and in relation to a drug trafficking crime.

Writing for the majority, Justice O'Connor went to the dictionary, which interpreted "use" very broadly to mean, "'[t]o convert to one's service' or 'to employ.'"[24] O'Connor reasoned that trading a machinegun to commit a drug trafficking crime is an instance of employing the machinegun to commit such a crime. The activity thus fits within the definition of the word "use," and the conviction should be affirmed.

Justice Scalia, writing in dissent on behalf of himself and two others, replied:

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks "Do you use a cane?" he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon. To be sure, "one can use a firearm in a number of ways," including

---

22. *Id.* at 2053 (construing 18 U.S.C. §§ 2, 841(a)(1) & 846 (1988 & Supp. 1993)).

23. 18 U.S.C. § 924(c)(1) (1988 & Supp. 1995).

24. 113 S. Ct. at 2054. Justice O'Connor referred both to WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed. 1949) (quoted in the text) and to BLACK'S LAW DICTIONARY 1541 (6th ed. 1990), which offered a similar definition. *Id.* For a recent discussion about the tendency of courts to rely on dictionaries, see Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994); Lawrence Solan, *When Judges Use the Dictionary*, 68 AMERICAN SPEECH 50 (1993).

> as an article of exchange, just as one can "use" a cane as a hall decoration—but that is not the ordinary meaning of "using" the one or the other. The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used.[25]

Relying on the canon of construction that words in a statute are to be given their ordinary meaning, Scalia's point is not that the attempted swap cannot fit within the definition of "use a firearm," but rather that Smith's actions are such a peculiar example of that concept that they have strayed too far from the prototypical case to be considered legitimately within the "ordinary meaning" of the statute.

O'Connor and Scalia each applied her/his analysis reasonably. That is, swapping a machinegun for drugs really is a "use" of a machinegun, but it is a very peculiar one, in all likelihood remote from the core concept that motivated Congress to enact the statute and the President to sign it. The issue, then, is not which analysis is performed more competently, but which kind of analysis courts should use.

The choice between these two views of what it means for an event to fit within a legally-relevant concept has signficant consequences. Typically, but not always,[26] the definitional approach will lead to broad interpretation and the prototypical approach will lead to narrower interpretation. While the definitional approach asks whether an event whose legal status is in dispute *can* be construed as coming within the outer boundaries of a concept, the prototypical approach asks whether it *should* be construed as coming within the boundaries of a concept given the remoteness of the event from the core, or prototype of the concept. Definitions work from the outside and move inward, and prototypes work from the inside and move outward.

The prototype approach, in addition to being more consistent with the way in which we actually understand the meanings of words, incorporates into judicial inquiry questions that the definitional approach excludes. For example, in identifying the prototype and deciding how far from it the court may travel, a court *ipso facto* comes to an understanding of what conduct is at the core of the statute in the first place. Thus, the prototype

---

25. 113 S. Ct. at 2061 (citation omitted).

26. *See infra* notes 33-37 and accompanying text (discussing MCI Telecommunications Corp. v. American Telephone and Telegraph Co., 114 S. Ct. 2223 (1994)). Even in *Smith*, the prototypical analysis does not logically require the result that Scalia proposed in his dissent. One may conclude that trading a machine gun for cocaine does come close enough to the core of using a firearm. Thus, the choice of analysis is not entirely result-oriented.

approach, while textual in nature, necessarily requires inquiry into normative issues that textualism purports to eschew.[27]

The discussion in *Smith* made explicit a debate that had occurred several years earlier in *Schmuck v. United States*.[28] The defendant in *Schmuck* was in the business of setting back odometers in cars, and then selling them to dealers in Wisconsin. The dealers would then resell the cars to their retail customers. Once a car was resold, the dealer would, on behalf of his customer, mail a title registration form to the Wisconsin Department of Transportation. The issue in *Schmuck* was whether this mailing was "for the purpose of executing [the] scheme or artifice," as required by the federal mail fraud statute.[29]

Writing for a majority of five, Justice Blackmun wrote that "a rational jury" could have concluded that Schmuck caused the mailing by the dealers to occur for the purpose of executing the scheme. The jury could have concluded that "the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers."[30]

Justice Scalia dissented: "In other words, it is mail fraud, not mail and fraud, that incurs liablity. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud."[31] Relying on earlier cases, Scalia concluded that the relationship between the fraud and the mailing in *Schmuck* was too attenuated to constitute mail fraud.

Perhaps the most radical aspect of *Schmuck* is its letting the jury decide whether the mailing was for the purpose of executing a fraud. Traditionally, it has always been within the domain of the court to determine whether a

---

27. For a discussion of textualism and its alternatives, see WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); Pierce, *supra* note 9. *See also Law and Linguistics Conference*, 73 WASH. U. L.Q. 800, 940-53 (1995) (discussing the notion of dynamic statutory interpretation). Even using prototype analysis instead of definitional analysis, a court limiting itself to the words of a statute would be precluded from considering all the information a dynamic model would make available.

28 489 U.S. 705 (1989).

29. The statute, 18 U.S.C. § 1341 (1995) reads in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail or such carrier according to the direction thereon, . . . any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.

30. 489 U.S. at 711-12.

31. *Id.* at 723.

particular set of facts violates a criminal statute.[32] In *Shmuck*, however, the majority could not conclude that the conduct was criminal even using the definitional approach. To preserve the conviction, it reduced the standard to whether a "reasonable jury" could so conclude. If this holding were to be followed, and jurors were asked to interpret statutes as well as to find facts, it would lead to enormously complicated questions about how jurors define the statutes that they are then asked to apply to the facts that they find.

Justice Scalia appears to be the driving force both behind textualism generally, and prototype analysis specifically. Yet, neither he nor the other justices on the Supreme Court are consistent in which type of analysis they select. For example, in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*,[33] the Court had to interpret two conflicting provisions of the Communications Act. Section 203(a) requires that "[e]very common carrier . . . file with the Commission . . . schedules showing all charges . . . ."[34] Section 203(b)(2) states: "The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section . . . "[35] At issue in *MCI* was whether the power to "modify" under Section 203(b)(2) gave the Federal Communications Commission authority to eliminate the filing requirement of Section 203(a) for nondominant carriers.

Under the *Chevron*[36] doctrine, the Court must give deference to the statutory interpretation of agencies unless the statutory language unambiguously prohibits such interpretation. The FCC had determined that the statute gave it the authority to "modify" the filing requirements by waiving them for certain carriers. A finding of statutory ambiguity would lead to acceptance of the Commission's position that its power to modify included the power to eliminate the requirement under certain circumstances.

The Court found the statute unambiguous, and therefore overturned the agency's interpretation. Writing for the majority, Justice Scalia cited a host of dictionaries whose definitions of *modify* focus on limitations on the amount of permissible change denoted by that concept. The majority

---

32. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519 (1994).

33. 114 S. Ct. 2223 (1994).

34. 47 U.S.C. § 203(a) (1988).

35. 47 U.S.C. § 203(b)(2) (1988).

36. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

rejected the "peculiar *Webster's Third definition*"[37] that failed to focus on these limitations, but focused rather on the notion of change itself.

I expect that most speakers would agree that calling the elimination of the filing requirement for small carriers a "modification" of the filing requirement rather stretches the concept, but that it is not unambiguously beyond its reaches. Under a prototype analysis, it becomes possible to debate the point. But the *Chevron* doctrine makes such debate impermissible, for any recognition of indeterminacy answers the question before the argument even begins. As Richard Pierce points out,[38] the Court has forced itself to find clear language in this realm of decision making in many cases in which the language is plainly vague or ambiguous. Thus, in cases such as *MCI*, in which the Court strikes down agency action, the prototype analysis disappears.

SOME IMPLICATIONS

Courts have survived for a long time, and will continue to survive, without linguists playing a large role. Nonetheless, it would benefit the system if judges were to become more conscious of the ramifications of the arguments that they make concerning the interpretation of language, and if legislators were to become more conscious of the range of possible interpretations that will later face the courts.

I have focused here principally on problems with word meaning that arise from the need to adjudicate disputes whose events stray from the core of a concept, but do not necessarily fall completely outside the concept. Because the prototype approach to word meaning more closely approximates our actual knowledge of words, and because it ordinarily permits acknowledgement of gradations of meaning that we all, including judges, experience, I believe that courts should more consciously examine disputed terms in this way.

The choice has significant ramifications. With respect to criminal statutes, courts must decide whether or not the events constitute a crime. Consistent with the prototype approach to meaning, courts would do well to apply the rule of lenity, thereby ruling in the defendant's favor, as the events stray further from the core of the concept. Of course, there is no way to state with any precision when this should occur, but that is a function of our cognitive limitations, with which we must all live.

---

37. 114 S. Ct. at 2230.

38. *See* Pierce, *supra* note 9, at 754-56.

Issues concerning the match between events and the language of a statute, a contract or a common law doctrine arise in civil cases as well. The driving desire of most litigants to settle lawsuits to avoid the all-or-nothing result of a litigation is often the consequence of the legal-conceptual system as it now exists, in which complex events are couched in zero-sum terms. While the resolution of disputes without resort to the entire litigation process is obviously a positive consequence, any system of justice that promotes fair settlements outside the system by threatening disproportionate results inside the system should be closely examined.

Interestingly, consistent with the prototype approach to conceptualization, many doctrines involved in civil litigation acknowledge that events do not always fit neatly into legally-relevant categories. Among these are comparative negligence, causation of damages, equitable distribution, joint custody, and the broad discretion that courts have in granting injunctive relief, all of which permit gradations of award to the winning party. Such doctrines recognize that the world does not divide up into "A or not A," but also contains one situation after another in which "sort of A" is more the case.[39] Advances in linguistics and cognitive psychology show how this is so. Awareness by judges and legislators of these advances clearly cannot hurt, and can potentially lead to better reasoned decisions.

---

39. *See* Winter, *supra* note 16.