A model for the analysis of the language of lawyers

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A MODEL FOR THE ANALYSIS OF
THE LANGUAGE OF LAWYERS

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Doctor of Arts

by
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A MODEL FOR THE ANALYSIS OF THE LANGUAGE OF LAWYERS

Lawyers have recently become a favorite target for criticism from both within and without their profession; nowhere are they more vulnerable than in their use of the English language. Whether they imitate cuttlefish by obscuring their paths with ink or simply reflect the complexity of twentieth century civilization with their language presents a question not soon to be resolved. Yet since law must serve society and since language must serve law, the questions concerning lawyers' uses and abuses of language will continue to press.

Though common in casual debate, most generalizations about the language of lawyers are difficult—if not impossible—to support. Hence, it is necessary to confront the problem in terms of particulars. Since the language of the law is neither homogenous nor distinctly separate from other varieties of English, it does not yield easily to generic analysis. Yet analyzed it must be. I would like to suggest that analysis should be confined to the specific document, the specific sentence and the specific word that appear within that vast array of discourse which has been dubbed "the language of the law."

The purpose of this article is to present one such specific inquiry as an avenue for suggesting, primarily by example, an analytical model that might be useful for similar
inquiries, both to lawyers and to others who share an interest in the language of lawyers. I would like to design a model whose elements would accommodate any sample of legal language, one that would serve the draftsmen, editors, and critics of statutes, judicial opinions, pleadings, contracts, warranties, briefs and—in short—the whole panoply of legal documents. Yet the very diversity of those documents will compel this article-length presentation to fall short of that aspiration. Thus, the discussion that follows must be read as one of a potentially infinite number of such discussions, with all of the deficiencies attendant upon any single one.

The careful choice of a sample for analysis is, therefore, of utmost importance. The sample that I have chosen for analysis is Section 220(2) of the Restatement (Second) of the Law of Agency. This choice was not arbitrary, but was predicated upon a variety of factors, some of

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1 American Law Institute, Restatement (Second) of the Law of Agency (St. Paul: American Law Institute Publishers, 1958), Sec. 220(2), pp. 485-486. (Hereafter "Section 220.")

2 During the past three academic years, I have led seminars at the University of the Pacific McGeorge School of Law entitled Effective Expression in the Practice of Law. As one of their initial assignments, advanced law students were required to submit a sample of what they considered to represent the best from the language of the law, along with an analysis, in order that the seminar could focus upon the linguistic peculiarities of those samples. Out of approximately 150 samples received, Section 220(2) was the best and most representative of the peculiarities observed, both by the seminars and in the existing literature (see note 3 below). I should like to express my thanks here to all of the contributing members of those seminars, since without them this article would never have been written.
which were, in turn, dictated by certain presuppositions: tentative generalizations about the language that lawyers commonly use.

While many of the most striking peculiarities of the language of lawyers are lexical, others extend to the levels of the phrase, the sentence, the paragraph, and the document. Phrasal placement is sometimes odd and repetition of key phrases is more common than in standard usage. Sentences grow to extreme length and often contain many levels of subordination, as well as multiple coordination. Words, phrases, and even clauses in series—sometimes quite long—are common. Sentences are frequently couched in the passive voice for no apparent reason. These seem to be those features that are most commonly pointed to as peculiar, either in kind or in degree, to the language of the law. Section 220 includes


manifestations of all of them; hence, its choice. Finally, I choose a restatement section— as opposed to some other variety of legal language— because of the well-known care that goes into the drafting and editing of the restatements. This reputation for an extra measure of care allows the critic a presumption that every detail of the passage, down to the seemingly most unimportant punctuation, manifests the intentions of the authors.

My critical scheme will be an attempt at synthesis of three, fairly diverse schools of thought about language. I shall use modern grammar to break the sentence down into its constituent parts. I shall look to traditional rhetorical theory to provide categories for analysis of the balance and study of how certain linguistic constructions, e.g., "prepositional phrases," "misplaced phrases," "lexical items," "negatives," "passives," and "embeddings," affect comprehension.

4"The Restatements of the Law are the most widely accepted secondary authority on United States law written in this century. The state and federal courts have cited the Restatement more than 45,000 times, usually following the Restatement position.

The authority of the Restatements comes from the courts' recognition of the caliber of the people who were responsible for the Restatements and the soundness of the positions stated by them. The Restatements are the product of the American Law Institute, which is composed of 1500 scholars of the law— judges, practitioners, and teachers.

As originally conceived, their purpose was stated by the American Law Institute as follows:

'To present an orderly restatement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also law that has grown from the application by the courts of statutes that were generally enacted and were in force for many years.'"

symmetry of the Section. Throughout, I shall rely upon structural linguistics to provide a model of the "speech event." This model will allow integration of grammatical and rhetorical analyses, as well as its own unique analytical concerns, into a composite whole; thus, the elements of that model will provide the basic structure of my discussion. (All of these approaches, by the way, have proven useful in the analysis of all kinds of language.) Finally, I shall attempt to broaden some of my observations into generalizations about some distinct critical postures that are useful in the analysis of the language of the law.

Let us look at the language of Section 220 itself.

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

5Rhetorical theory has the special advantage of providing categories for analysis that extend to many levels and aspects of the document. In terms of developmental analysis, it gives us the "common topics" of discovery: definition, comparison, relationship, and so on. In terms of stylistic analysis, it gives us the "schemes of construction." Of most use to us here will be parallelism and antithesis, two primary "schemes of balance," and ellipsis, a "scheme of omission." (Other topics, schemes and tropes would prove useful in the analysis of such argumentative legal writing as the memorandum of law and the appellate brief.) Edward P. J. Corbett, Classical Rhetoric, 2nd ed. (New York: Oxford University Press, 1971) pp. 110-145, 463-465, 468-469.

6"Speech event" is a phrase used by the structural linguists to include all instances of communication through
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the
instrumentalities, tools, and the place of work for
the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the
job;
(h) whether or not the work is a part of the regular
business of the employer;
(i) whether or not the parties believe they are creat­ing
the relation of master and servant; and
(j) whether the principal is or is not in business.7

This passage is undeniably difficult. Most readers
of the English language would say that it is unnecessar­ily so; yet any astute reader would concede that evaluat­ing a passage in isolation--apart from its linguistic en­vironment by a reader not a member of its intended audience--
would produce an unfair evaluation of its quality, if not a
mistaken interpretation of its meaning.

In what has come to be the standard text in the
field of legal drafting,8 Professor Dickerson stresses the
communicative aspects of drafting by dwelling upon the impor­tance of "relevant context or environment"9 as one of the
"four main elements"10 in written communication.

language, both oral and written, according to the theory that
writing is essentially written speech.

7American Law Institute. loc. cit..

8Reed Dickerson, The Fundamentals of Legal Drafting
(Boston: Little, Brown and Company, 1965). See pp. 4-7 for
a definition of "legal drafting."

9Ibid., p. 19.

10Ibid. The other three elements are: "(1) the
author, (2) the audience, (3) the written utterance."
The fourth element in any written communication, including a legal instrument, is the part of the surrounding environment or external context that the written instrument takes into account. External context refers to the social, economic, and cultural setting in which the instrument is to operate. The context in which an instrument operates is significant because it is highly improbable that any document, taken entirely apart from the relevant environment that it presupposes, can convey meaning, except in another environment that shares some of the same elements. It is the essence of a language to reflect and express, and even to affect, the patterns of established ideas and values that help to shape the culture to which it belongs.

External environment consists of two elements: (1) the established patterns of ideas and values immediately underlying the language; and (2) the relevant collateral and usually tacit assumptions that are shared and taken account of by the great bulk of the speech community to which both the draftsman and his audience belong. The first of these two elements gives language its primary meanings. The second conditions or colors the primary meanings and provides the basis for the meanings known as implications. Implication, constituting, as it does, what Hall has called the "silent language," thus furnishes a necessary part of the total message. A telephone call at 3 A.M., for example, carries emergency implications missing from a similar telephone call at 3 P.M. So speaks the silent language of time.11

So context is obviously a delicate concern for draftsmen as well as for writers. The notion has received a great deal of attention by the relatively new discipline of informational theory. According to Roman Jakobson, it behooves the critic to analyze spoken and written communications as speech events. To that end, he has developed the following analytical scheme.12

11 Ibid., pp. 20-21, footnotes deleted.
The ADDRESSER sends a MESSAGE to the ADDRESSEE. To be operative the message requires a CONTEXT referred to ("referent" in another, somewhat ambiguous, nomenclature), seizable by the addressee, and either verbal or capable of being verbalized; a CODE fully, or at least partially, common to the addresser and addressee (or in other words, to the encoder and decoder of the message); and, finally a CONTACT, a physical channel and psychological connection between the addresser and the addressee, enabling both of them to enter and stay in communication. All these factors inalienably involved in verbal communication may be schematized as follows:

CONTEXT
MESSAGE
ADDRESSER--------------------------ADDRESSEE
CODE
CONTACT

We should probably note here that while all of these factors are identifiable in our everyday experience with language, CONTEXT is the most complex and the most troublesome. Keys to its interpretation are that it represents that which is "referred to" by the ADDRESSER, that it is "seizable" by the ADDRESSEE, and that it is roughly analogous to the notion of referent.

While the notion of referent functions adequately when the message is sufficiently concrete—as in "This is a typed page"—that notion loses its critical precision as the message becomes increasingly complex and abstract. For ex-

analyze such various communications as the simple, binary message-transmission that is effected by turning on a light switch and the ultra-sophisticated biological transmissions that are effected by cerebral, electrochemical neurotransmitters. See generally, Umberto Eco, A Theory of Semiotics (Bloomington: Indiana University Press, 1976). This combination of versatility and precision is what makes the Jakobson model so attractive as an analytical tool.
ample, in the message, "Brutus is an honourable man," we would be hard pressed to point to an accessible referent for "honourable" in the same, simple manner that we could point to the referent for "page." We would have to look to other evidence in the CONTACT: the text of Shakespeare's *Julius Caesar*; in the CODE: Elizabethan English; and as elsewhere manifested by the ADDRESSER: William Shakespeare (all of which may give us a key to the irony involved). By the time that we have considered all of these pertinent variables, the notion of "referent," in relation to the word "honourable," has lost its precision and therefore its validity as a critical term.

Hence, we refer to CONTEXT instead, under whose auspices we can accumulate most of the data necessary to analyze properly that aspect of message-transmission. Because of its broad use of "context," one that encompasses both the primary and secondary senses addressed by Dickerson, and because of its integration of context with other closely related factors in the speech event (e.g., the relationship between ADDRESSER and ADDRESSEE) Jakobson's paradigm fits our purposes well. It allows us a precise analytical tool with which to consider the peculiarities of the language of lawyers.

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13 Corbett uses this line, which is repeated several times in Mark Anthony's well-known funereal oration ("Friends, Romans, Countrymen . . . ,") Shakespeare, *Julius Caesar*, III, ii, l. 78 ff.), to illustrate irony (Corbett, *Op. cit.*, pp. 489-490).
Now the task of differentiating legal language from American English of general usage, for the purpose of examining the distinctive features of the former, would be a simple one if we could identify these as two separate and distinct CODES. Though this may have been possible with reference to early English law when the courts used their own peculiar language,¹⁴ it is not such a simple matter with respect to contemporary American legal language. The CODES used by the legal profession and by others are so similar that such a differentiation would seem forced. Upon the common basis of general and legal usage, Dickerson comments:

The principles of communication are not a matter of legal fiat, to be changed at the will of the draftsman. Common to all human effort, they exist independently of the law. Communication is based on the language habits of particular speech communities. Language is founded on usage and, although in particular cases usage can be violated or changed, to dispense with it altogether would make communication impossible. The core of sound communication, therefore, is general adherence to the existing conventions of language. This neither freezes nor sanctifies particular conventions.¹⁵

Yet that peculiar conventions are observed in the language of the law deserves further inquiry. Some of these conventions are functions of CODE.

The two primary elements of any verbal CODE are (1) a vocabulary or lexicon, and (2) a set of rules and conventions


¹⁵ Dickerson, op. cit., pp. 18-19, footnotes deleted.
for combining the individual words into sentences: the rules constitute a grammar and the less formal conventions may be said to constitute a (sometimes tacit) directory for usage and style.

First, let us momentarily set aside lexical matters (to be discussed below as a function of CONTEXT). Next, in keeping with Dickerson's perspective, let us agree that lawyers are compelled to observe the same grammar observed by other speakers of the language. This brings us to those matters that I classified above as less formal conventions: usage (beyond mere lexis) and style.

Analysing the syntax of our sample, Section 220, while bearing the elements of Jakobson's paradigm in mind, will reveal some substantial departures from the conventions of common usage.

To an ADDRESSEE unfamiliar with legal language, the most striking (and most distressing) quality of this sentence will probably be its sheer length--one hundred and seventy-three words. This sentence would demand an exceedingly formidable memory to retain its entire MESSAGE while reading it once through.\(^{16}\) Since it is grammatically flawless, let us

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\(^{16}\) The role and functions of memory in the process of reading have been studied at length, especially by the psycholinguists in their quest for an accurate readability formula. They have known for some time that we possess memory of (at least) two kinds: short-term and long-term. Since the clause is the "minimal unit that has semantic determinacy," readers must retain strings of words in short-term memory until reaching (at least) the end of a clause, i.e., until discovering "closure," and thereby ascertaining meaning (Hirsch, *The Philosophy of Composition* (Chicago: Uni-
begin an analysis by breaking it into its primary phrasal and clausal elements. "In determining" begins a fourteen word dependent prepositional phrase, which is followed by the rather brief, nine word independent main clause: "the following matters of fact, among others, are considered." The University of Chicago Press, 1977) p. 108). Once closure is reached and meaning established, the message is (at least in theory) recoded from its grammatical structure into a more abstract form. This recoding allows transfer of the informational content into intermediate or long-term memory and thereby relieves short-term memory of its load in order that it may be called upon to process the next clausal unit. This serial process of occupation and evacuation of short-term memory is absolutely essential to ultimate comprehension in that short-term memory admits of a strict limit upon the amount (or number of bits) of information that it can hold. Upon this much, experts in the field generally agree. (See Hirsch, op. cit., p. 86.)

Studies contributing to the search for a universal readability formula, one that would predict the relative difficulty of any given prose passage, have demonstrated the complexity of evaluating a number of sets of variables that contribute to readability. Certain formulas, while valuable for rating primary school texts, seem to lack the sophistication necessary for evaluating more complex materials. In these, the variables that appear most frequently are word-length and sentence-length, which undoubtedly contribute to reading difficulty. (See generally Flesch, The Art of Readable Writing (New York: Harper and Row, 1949), Fry, "A Readability Formula that Saves Time," Journal of Reading, 11 (1968) p. 513, and Flesch, The Art of Plain Talk (New York: Collier, 1951). To be precise though, a readability formula would presumably measure MESSAGE magnitude through the complexities of CONTEXT and CODE that are implemented in the transmission of the MESSAGE. John R. Bormuth, in "Readability: A new approach," Reading Research Quarterly 1, no. 3 (1966) pp. 79-132, demonstrated through intricate research techniques that: "[o]ver 150 linguistic variables have been shown to correlate with difficulty" ibid., p. 130).

What remains to be established, then, is the precise capacity and character of our language processing mechanisms. We know that certain kinds of training maximize our capacity for related kinds of recoding, just the way that an individual learning radio-telegraphic code builds his capacity for mentally organizing larger and larger chunks of dits and dahs (George A. Miller, "The Magical Number Seven, Plus or
colon, in combination with the cataphoric17 "following," anticipates the series of ten appositive clauses. The hundred and fifty words that make up these clauses constitute the great bulk of the sentence, in terms of both length and informational content. Since this is a sentence of comparative definition by division,18 it is quite appropriate that the criteria that it offers, in phrases a through j, should be so prominent. Further, its definitional character justifies its extreme length insofar as the unity of definition is best manifested by a single, well-integrated sentence.19 Given the complexity of the problem to which this sentence responds (of differentiating a "servant" from an "independent contractor" for the purpose of assigning liability) we see that great length may be a necessary by-product of and a major contributor to the linguistic integrity (i.e., the value as a MESSAGE transmission) of this sentence.

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18 This is a rhetorical, as opposed to a grammatical, characterization of the sentence. See Corbett, op. cit., pp. 110-123.

19 The question of whether or not the unity of defini-
"Among others," the prepositional phrase that interrupts the main clause, seems to weaken the declarative value of the rest of the clause, "the following matters of fact . . . are considered." That is, since neither the main verb, consider, nor the passive voice convey exclusivity, the prepositional phrase may appear to be, at best, redundant, and, at worst, intentionally obfuscating.

But let us look to the peculiarities of law itself for another explanation for this peculiarity of its language. In that light, we could build an argument that the inclusion of "among others" manifests foresight and great caution on the part of the ADDRESSERS. It functions as a recognition of the open texture of the legal language and as a prohibition against interpreting the criteria that follow as exclusive— one that the ADDRESSERS apparently perceived as not only
necessary, but as imperative. 20

The interrupting phrase operates here as a qualifier. While that role is a primary one fulfilled by the interrupting phrase in all types of language, the need for such qualification is nowhere greater than in the language of the law, given its potential, eventual impact upon future, unforeseeable ADDRESSEES (e.g., attorneys, litigants, jurists), and the tendency of all legally trained ADDRESSEES toward careful reading and literal interpretation.

This justification of the inclusion of "among others" contributes to the initial premise that great length is a necessary by-product of the MESSAGE of Section 220 insofar as that interrupting phrase is neither superfluous nor unnecessarily cumbersome. But that phrase accounts for only two of the sentence's one hundred and seventy-three words, while the items in series account for one hundred and fifty; hence, a careful look at the form and sense of these items seems nec-

20 "Whatever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured . . . .

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case," Hart, The Concept of Law (Oxford: Clarendon Press, 1961), pp. 124-125, 132.
ecessary in order to satisfy ourselves that they, like the in-
terrupting phrase, are warranted.

The volume and content of the case-law which these
appositive clauses summarize reveals that the sense which
they convey would be ample for the composition of a short
treatise on the problem of differentiating servants from in-
dependent contractors. So it would seem that this hundred
and seventy-three word sentence is, ironically enough, an at-
tempt at condensation, aspiring to optimum conciseness. To
determine how successful that attempt is, we must look to the
effectiveness of these appositive clauses in transmitting the
intended MESSAGE.

The introductory phrase and main clause are dis-
tributed\textsuperscript{21} to govern the ten appositive clauses that follow
the colon; all ten fall within the scope of the introductory
phrase and main clause. This sentence, then, could be para-
phrased into ten sentences, all of which would begin with the
same twenty-three words. But despite the fact that those ten
sentences would be shorter individually, the task of process-
ing the combined MESSAGE would be more demanding—if only
because the total number of words would be increased by nine
times twenty-three (or two hundred and seven). The ADDRESS-
EES have taken advantage, then, of grammatical principles,
(i.e., cataphoric reference, apposition and maximum ellip-
sis) in order to achieve the enhanced rhetorical effects of

\hspace{1cm} \\textsuperscript{21}The term, "distributed," is borrowed from mathemat-
ics where, for example, \(x(a+b+c \ldots +j) = xa+xb+xc \ldots +xj\).
structural integrity, balance and economy. These combine to approach ideals refined in well-stated mathematical formulae.

But what of those ten appositive clauses themselves? If the mathematical analogy is to be extended, they should also adhere to principles of symmetry.

Each clause names a specific criterion which is partly determinative of an individual's status as either servant or independent contractor. Since the phrase to which they are all set in apposition, matters of fact, is quite general in meaning, their informational diversity is neither surprising nor a serious impediment to comprehension. The form that these clauses take, however, varies substantially from one to the next. One must ask why.

Five begin with whether, three of those with whether or not, and an additional one includes whether in medial position. The remaining four seem formally diverse—both from the whether clauses and from each other. In fact, though, the principle of symmetry has been grammatically extended to reach all ten. By virtue of their character as appositives, they are all noun phrases and clauses. Another, more distinguishing similarity resides slightly beneath the surface: they all are (or, at least, suggest) interrogative clauses.22 The three whether or not clauses (b, h & i) pose

22 The whether or not and whether clauses all strictly conform to Quirk and Greenbaum's (op. cit.) description of interrogative clauses at section 11.14-11.15. The remaining four (a, c, d & f) do not. Because of their lack of predica-
simple "yes-no" questions. 23 The other three clauses that contain whether (e, g & j) pose "alternative" questions. 24 The four clauses (a, c, d & f), those remaining which are most formally diverse, all imply "wh-" questions. 25 Their diversity is compelled by the diverse character of the criteria to which they point (e.g., extent of control, skill required, length of time). No matter what the character of the CODE, the potential for symmetry is limited by the informational diversity of the MESSAGE.

It would appear that the drafters of the Section 220 have taken optimum advantage of the potential of grammar for producing a symmetrical sentence through parallel clauses and phrases, since every evidence of asymmetry points not to a feature of CODE, but to a feature of the diversity, complexity and magnitude of the MESSAGE. Maximum ellipsis has been achieved by maximizing the scope of the cataphoric reference, which, in turn, produces economy. The compound, one-to-ten apposition clearly establishes the intended relation-

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23 Quirk and Greenbaum, sec. 7.51.
24 Ibid., sec. 7.54.
25 Ibid. sec. 7.52.
ship of identity. The parallel structural character of the ten matters of fact aids the ADDRESSEE in comprehension (so far as is possible given the blend of alternative, yes-no, and wh- questions involved). Further economy of diction may be tested by scanning this sentence for redundant elements or unnecessary repetitions. I discover none. 26

Punctuation is a further element of CODE that remains unconsidered, and, while its significance is relatively minor when compared to that of grammatical and structural balance, it bears at least passing consideration. The punctuation in this sentence may be safely characterized as close: 27 that is, where punctuation is optional, it has been included. Examples of such optional punctuation are the paired commas that surround by the agreement in a and in the locality in c, and the comma that precedes the conjunctive and in the series of three nominal elements--instrumentalities, tools, and place of work--in e.

While modern trends in usage tend toward open--as opposed to close--punctuation, the latter is desirable when it serves as an aid to comprehension. Since the optional commas which are included in our example assist the ADDRESSEE in identifying syntactical units and in clarifying grammatical

26 The single possible exception is the phrasing of criterion j: while it appears to be a "yes-no" question, it is couched in an "alternative" construction.

relationships, close punctuation must be considered an asset here. 28

This general rule of thumb concerning punctuation governs the inclusion of the nine semicolons. While the primary function of the semicolon is to link two coordinate clauses whose relatedness is too great to phrase in two separate sentences, an approved secondary function is to separate units with internal commas. 29 When used according to this secondary function, the semicolon's role in the CODE is virtually identical to that of the comma. Viewed in terms of the mathematical analogy, the comma and the semicolon serve purposes in syntax similar to those served by parentheses and brackets in the complex mathematical equation. Because of the frequency of occurrence in legal language of complex syntax loaded with interrupting elements, this secondary use of the semicolon--as a kind of "superordinate comma"--is much more common than use according to its primary function.

As a further aid to comprehension, the ADDRESSER has tabulated the ten appositive clauses (with the letters a through j) and has set them off with the sort of indentation and lineation that readers are accustomed to seeing in outline format. While the combination of these devices, some-

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28 The grouping of bits, or single pieces, of information into chunks, or interrelated configurations, decreases the effort which must be expended to process that information. See, Miller, op. cit., pp. 92-96.
29 Ebbitt and Ebbitt, op. cit., pp. 629-630.
times referred to as "enumerated tabulation," is not strictly an aspect of grammar or usage, it contributes significantly to the ease with which this massive coordination may be processed; hence, enumerated tabulation should be thought of as a feature of CODE which gains its importance through expediting MESSAGE transmission.

Though, as indicated above, another primary feature of CODE is the vocabulary of a language, lexical matters must be discussed in terms of the dynamic relationship between CODE and CONTEXT. And while the specialized vocabulary of the law is most certainly a feature of usage with rhetorical implications, the Jakobson paradigm has the virtue of allowing the critic to segregate a discussion of meaning (CONTEXT) from a discussion of form (CODE)—so far as that is possible. Here, we are concerned with the sense of the words in our example, and the ways in which that sense differs from the corresponding sense of those words when they appear outside of a legal CONTEXT.

Once more, we shall need to establish some categories for analysis. Let us begin with the parts of speech: noun, adjective, verb, adverb, article, demonstrative, pronoun, preposition, conjunction and interjection. (Because of the oral and almost exclusively attitudinal character of the interjection, it does not occur in formal legal usage, and,

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therefore, may be disregarded here.) The remaining parts of speech fall into two classifications: closed-system items and open-class items. 31 The number of closed-system items in a language—articles, demonstratives, pronouns, prepositions and conjunctions—is static; that is, these sets of words cannot normally be extended by addition of new members.

The items are said to constitute a system in being (i) reciprocally exclusive: the decision to use one of them in a structure excludes the possibility of using any other ...; and (ii) reciprocally defining: it is less easy to state the meaning of any individual item than to define it in relation to the rest of the system. 32

So the use of the pronoun he in a sentence, for example, precludes the use of any other pronoun in its place (e.g., she, they or him), and it would be difficult to define words such as and, of or the without referring to them as a conjunction, a preposition or an article, respectively.

On the other hand, open-class items—nouns, adjectives, verbs and adverbs—may be extended indefinitely by the addition of new members to the classes (e.g., with words like aviatrix, television, neutrino and antiquark). Scientific and technological advances during this century alone have introduced a great flock of new open-class items into the language.

31 Quirk and Greenbaum, secs. 2.14-2.15. Wydick (op. cit., pp. 7-10) refers to most closed-system items as "working words" and most open-class items as "glue words." These categories, while slightly less precise, may be easier to work with.

32 Quirk and Greenbaum, loc. cit.
This distinction between open-class and closed-system items would lead us to anticipate that the variation in diction between legal and general usage is confined to the open-class items, and this is largely true.\(^3\) In our example, the CONTEXTS for such words as in, whether, one, another, the, among and over are absolutely identical to their CONTEXTS in non-legal usage, where they fulfill identical syntactical functions.

While disposing of the whole category of closed-system items narrows the necessary scope of our inquiry into CONTEXT, focus upon the remaining (open-class) items begins to lay bare what is probably the single most formidable barrier to a clear understanding of the language of the law—both particularly, as with our example, and generically, as a peculiar linguistic phenomenon.

Let us begin by simply listing the root forms of the open-class items from the first, twenty-three word segment of our example and labeling them according to their parts of speech.

<table>
<thead>
<tr>
<th>Word</th>
<th>Part of Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>determine</td>
<td>verb</td>
</tr>
<tr>
<td>act</td>
<td>verb</td>
</tr>
<tr>
<td>be</td>
<td>verb</td>
</tr>
<tr>
<td>servant</td>
<td>noun</td>
</tr>
<tr>
<td>independent</td>
<td>adjective</td>
</tr>
<tr>
<td>contractor</td>
<td>noun</td>
</tr>
</tbody>
</table>

\(^3\) Occasionally, though, a legal document will stipulate altered definitions for closed-system items. For example, "words importing the masculine gender may be applied to females" (1 U.S.C. 1) changes the meaning of the pronoun "he," substantially.
following    adjective
matter      noun
fact         noun
be           verb
consider    verb

All of these words are relatively current in common usage. None would give any competent reader of English the least occasion to pause. But the problem is this: for some of these words, the legal CONTEXT is significantly different from the CONTEXT that they would carry in a non-legal environment, while for others, no such difference in CONTEXT distinguishes their legal meanings from their common meanings.

Once these open-class items are isolated for examination, three observations are possible: (a) that the degree of difference between their meanings in the legal CONTEXT and the CONTEXT of general usage\(^{34}\) varies from no difference whatsoever to a difference that approaches the absolute; (b) that some gain specialized meaning simply by virtue of their appearance in CONTEXT\(_1\) and by the even more particular CONTEXT that is peculiar to such documents as decisions and restatements; and (c) that some must be treated in combination, as phrasal elements, to retain a proper sense of their denotation in CONTEXT\(_1\).

Bearing these general observations in mind, then, I shall deal with the above open-class items to attempt to

\(^{34}\)For the sake of brevity, I shall refer to the CONTEXT of the language of the law as CONTEXT\(_1\) and to the CONTEXT of general usage as CONTEXT\(_g\) throughout the remainder of this discussion.
analyse them in CONTEXT₁, as they are used in the Section 220.

The word, determine, conveys a sense quite similar to one of its primary denotations in general parlance. The single significant difference concerns the motive for--and more especially, the impact of--the determine-ation involved. The foundation for this distinction lies in that CONTEXT peculiar to decisions, restatements, scholarly treatises, hornbooks and other statements of rationale, based upon policy, behind the law. Who or what is doing the determining? Because of the passive voice in which the sentence is cast, where the subject of the main verb (consider) is truncated, the complement of the sentence does not offer an explicit key to the who or what question. The answer is, of course, that the law and its official representatives are the agents of the action. As in any kind of discourse, the agent of the action is inferred from the context. In more particular terms, juries and judges bear responsibility for "determining whether one acting for another is a servant or an independent contractor," with the guidance of binding authority of previous decisions and such persuasive authority as the Restatement. In CONTEXT₁, determine carries the substantial weight of the authority of the law and of its potential alteration upon the destinies of litigants--foreseen and unforeseen. In Dickerson's terms, this is the effect of "ex-

35 See note 4 above.
ternal context." When compared to its CONTEXT$_g$, determine simply differs in terms of that particular authority which is associated with the institution of law.

As verbs, both determine and consider must be DECODED with the authority of the (implied) agents of the action in mind. The verb, act, however, carries no such peculiar sense in CONTEXT$_1$. In fact, its sense is identical to the corresponding sense of act in CONTEXT$_g$. This correspondence of meaning extends, in large part, to the intensive verb, be, in the clause, "whether one acting for another is a servant or an independent contractor."

But here again the authority of the law adds weight to the predication—here to the relationship of identity established between the pronoun, one, and its complements, servant and independent contractor. The be in this clause might be read in CONTEXT$_1$ to imply, "whether one acting for another is [for the purpose of assigning liability, to be defined as] a servant or an independent contractor."

Servant is the first item of diction to be confronted in our sample whose meaning is unique in CONTEXT$_1$. Elsewhere in the Restatement, the term is defined:

[a] servant is an agent employed by a master to perform service in his affairs whose physical conduct in the

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36 Quirk and Greenbaum, secs. 12.8-12.10. But note that Wydick (op. cit., p. 8) classifies forms of the verb, to be, as "glue words."

37 Quirk and Greenbaum, loc. cit.

38 Sec. 2(2).
performance of the service is controlled or is subject to the right to control by the master.

This definition bears little resemblance to the common denotations of servant in sentences such as, "This is the servant's day off," or "The governor is a public servant." Its context draws its precision, in part, from collateral terms of law (i.e., agent and master) which are central to its legal meaning. Here is a linguistic situation which threatens to confuse the addressee, who is unschooled in context, with a long chain of interdependent meanings.

In order to understand the semantic thrust of this Restatement section, the addressee must seek the meaning of some of its terms from other sources. Once the pertinent definition is discovered, the reader finds that his ultimate goal, comprehension, may be far from reached. An understanding of what constitutes a servant requires prior understanding, according to the above definition, of what constitutes an agent and a master. Further search reveals that similar problems will arise with the discovery of the Restatement definitions of master and agent. While this complex

39 For example, a master's vicarious liability must be predicated upon negligence, which is defined by the law of torts.

40 "A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service." Restatement (Second) of the Law of Agency, op. cit. (hereafter "Restatement"), sec. 2(l).

41 "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his
problem of definition is not insoluble, it does make substantial demands upon any ADDRESSEE and especially one who is not familiar with the subtleties of the common law, its fluid character and its use of language. Two intimately related problems, quite apart from long chains of related definitions, seem almost bound to put the ultimate goal of thorough comprehension out of reach. First, the fact that words with a specialized sense in CONTEXT\textsubscript{1} also appear in general usage tempts the ADDRESSEE to DECODE them according to his common lexicon. Second, discrimination between those words (like servant) that have a highly specialized sense in CONTEXT\textsubscript{1} and those others (like act) with no specialized sense requires prior understanding, prior recognition. These two problems of construing the proper CONTEXT function as barriers to comprehension. Their net effect is to force the reader to select a CONTEXT, either general or legal, for every open-class item he confronts in reading a legal document, where the criteria for selection are unknown. While not impossible, this process is a bit like driving a complex route in a foreign country, where the road forks frequently and where the language of the road signs is unknown to the driver. Like that driver, the reader's route is likely to be circuitous and full of frustration.

control, and consent by the other so to act. The one for whom action is to be taken is the principal. The one who is to act as the agent." Restatement, sec. 1(1-3).
That frustration is largely diminished with the appearance of words that are either peculiar to the CODE of legal language or have fallen out of common use or both. While servant continues to be recognized as current by lexical authorities, it seems to have fallen into relative disuse. I would guess that only rarely today do we speak or write of a servant in the CONTEXT: "someone privately employed to perform domestic services."

Chronologically considered, the CONTEXT₁ of servant was undoubtedly drawn from CONTEXT₉; in fact, at its point of introduction into legal language, its CONTEXT₁ was probably identical to its CONTEXT₉. Then the CONTEXTS began to diverge. In common parlance, change in the meaning of servant was compelled by changing social attitudes, in England and America, about such things as domestic help and rising wage levels for that help (which left servants in only the most wealthy households), employer-employee relationships (which moved away from the total subjugation that servant, as compared with employee, tends to connote), and class and race distinctions (which, particularly in the post-bellum American south, had great effects upon the notion of domestic service).


43 The American Heritage Dictionary.

44 Oxford English Dictionary, definitions under "servant."
Further, servant was often used as a euphemism for slave during the 17th and 18th centuries in America. Therefore, servant, in CONTEXT, has since accumulated many of those negative social connotations associated with the relationship of master and servant: the corresponding CONTEXT in which servant appears exclusively. This, combined with the increasing prosperity of the servant-less classes, heralded the virtual demise of servant (especially in the CONTEXT it carries in the phrase, master and servant) in America. Of course, these semantic shifts are not unique, but are typical of the shifting meaning of words in all languages.

Now, despite the relative disappearance of servant in American usage, it remained current in legal usage and its meaning there continued to develop. It retained the CONTEXT of "one employed," but it became narrower, nearly neutral (in terms of connotations), and much more precise. The Restatement definition summarizes the result (to its date of publication) of that evolution: one that chronicles ordinary processes of semantic change where those processes are affected by litigation.

A primary effect of the divergence of servant between two CONTEXTS and its decline in CONTEXT is that servant now stands out as an easily recognizable element of the language of the law, which bears little resemblance to (and therefore

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45 Oxford English Dictionary, definition 3b. under "servant."
causes little confusion with) its corresponding element in common usage. Prior recognition, then, is probably not crucial when a non-lawyer confronts servant in a legal document.

But prior recognition would be a necessary prerequisite for that reader to know that both independent contractor and matters of fact must be treated--i.e., DECODED--as phrasal units in CONTEXT\(_1\).

Neither independent nor contractor is the least bit unusual in everyday speech or writing. As a cognate of contract, one of the most important notions in the common law, contractor carries a myriad of implications in CONTEXT\(_1\). Yet even if this is known to the ADDRESSEE and he therefore reads independent contractor to mean "a contractor who is independent" or "one who contracts independently," he has improperly DECODED the MESSAGE. Like servant, independent contractor denotes a sense which is set out elsewhere in the Restatement. Further, part of its meaning may be derived from the law of contracts. But since servants--as well as independent contractors--may contract, the distinguishing semantic intent (. . . whether one . . . is [x] or [y] . . . ) is lost upon a reader who recognizes only that contractor is different in CONTEXT\(_1\) if he does not recognize that independent contractor means something quite different from the legal meaning of contractor combined with either the general meaning of independent or a specialized meaning for it in CONTEXT\(_1\). More specifically, when not used to modify contractor, independent carries no specialized sense in CONTEXT\(_1\). But when the
phrase occurs, the two words combine to constitute a unique CONTEXT\textsubscript{1},\textsuperscript{46} and only then.

Servant and independent contractor are syntactically juxtaposed in a relationship of contradistinction (or antithesis) in Section 220. The unique characteristics of servant provide a clue to the ADDRESSEE that independent contractor must be treated as a phrasal unit and that it, like servant, will be likely to carry a specialized sense. In short, the binary relationship that is clearly established by syntactical form offers a key to CONTEXT.

A similar syntactical clue draws the ADDRESSEE'S attention to matters of fact. The cataphoric indicator of apposition (i.e., the following) which precedes this phrase carries no specialized meaning in CONTEXT\textsubscript{1}. It does, however, indicate that matters of fact denotes the categorization that will embrace all ten of the appositive clauses. Such categorization, especially when implemented to compare and define, is nearly bound to have specialized implications in CONTEXT\textsubscript{1}.

The object of the preposition in this phrase, fact, has far-reaching implications, as well as narrowly specialized meanings, in CONTEXT\textsubscript{1}. While no juxtaposed contradistinctions are explicit here, whenever an ADDRESSEE who is

\textsuperscript{46}"An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." Restatement, sec. 2(3).
familiar with CONTEXT₁ confronts the phrase, matters (or issues or questions) of fact, he knows that at least one dialectic is implied: matters of fact as opposed to matters (or issues or questions) of law, or as opposed to matters of opinion, or to both.

As with servant, precedential authority compels the meaning of fact in any CONTEXT₁. In its broadest sense there, fact is "either a state of things, that is, an existence, or a motion, that is, an event." 47 In terms of procedure, "questions of fact are for the jury; questions of law for the court . . . ," 48 and

[a] "fact", as distinguished from the "law," may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law. 49

In relation to opinion, the word "facts," as used in the proposition that representation must consist of "matters of fact" distinguishes "fact" from mere matters of opinion. 50

Since the Restatement section deals not with facts, but with criteria for their selection, matters of fact must be treated as phrasal to retain the above distinctions: to enable the


48 Hinckley v. Town of Barnstable, 311 Mass. 600, 42 N.E. 2nd 581.

49 Ibid., p. 584.

ADDRESSEE to DECODE the ten appositive clauses as: (1) considerations which must be based upon actual "existences" or "events" rather than upon opinions, and (2) considerations which must rest with juries rather than with judges. This second consideration gains obvious importance by virtue of the seventh amendment prohibition against reexamination of facts that are once determined by a jury.\(^51\)

Coincidentally, this phrase remains idiomatically current in CONTEXT\(_g\) in such constructions as: "As a matter of fact, I've been waiting for hours," and "He maintains a matter-of-fact attitude." The evolution of this phrase, however, seems to have occurred in a fashion opposite to the parallel evolution of servant; that is, CONTEXT\(_l\) predates CONTEXT\(_g\) for matter of fact.\(^52\) In any event, the two CONTEXTS have become quite dissimilar (yet still retain a kernel of shared sense).

Because they are intended to transmit MESSAGES that are matters of fact—as opposed to matters of law—the ten appositive clauses are composed almost exclusively of words whose CONTEXT\(_l\) is identical to CONTEXT\(_g\).\(^53\) Yet even here, similar hazards for the reader exist. Any word drawn from

\(^{51}\) U.S. Constitution amendment VII.

\(^{52}\) Oxford English Dictionary, see the examples under definitions A.a. and A.b.

\(^{53}\) The exceptions are master, servant, and principal, all of which are introduced, at least by implication, in the initial construction. See notes 39 and 40 above.
CONTEXT\textsubscript{g} may take on a specialized CONTEXT\textsubscript{l} simply by virtue of its being focused upon in litigation. If, for example, digging ditches by hand is held not to be a distinct occupation or business while doing so with a tractor is held to the contrary, that phrase would take on a discriminating CONTEXT\textsubscript{l} only accessible through painstaking research.

Having examined some of the intricacies of CONTEXT that are involved in DECODING legal MESSAGES, we may move on to the dynamics of the ADDRESSER-ADDRESSEE relationship that are peculiar to legal language. Since it is obvious that when both parties to a verbal event share a CODE and a sense of CONTEXT (as when the communication is between lawyer and lawyer or lawyer and judge) few problems will intrude, I am here concerned with the event where those features are not shared. Such events transpire frequently in law office conferences with clients, and in the courtroom where neither litigant nor juror is intimate with the language of the law. If the lawyer or judge speaks of a matter with legal significance, and he maintains the specificity and precision of legal language, the transmission may be schematized as follows: 54

\[
\text{CONTEXT}_l \\
\text{MESSAGE} \\
\text{ADDRESSER}_l \text{--} \text{ADDRESSEE}_g \\
\text{CODE}_l \\
\text{CONTACT}_l
\]

54 Here, I begin using "l" and "g" as subscripts with ADDRESSER, ADDRESSEE, CODE, and CONTACT. (See note 33 above.)
But since the ADDRESSEE\textsubscript{g} is unfamiliar with CONTEXT\textsubscript{1} (and, to a lesser extent, with CODE\textsubscript{1}) this event is almost bound to prove unsuccessful. It would approximate—but not be identical to—a situation where a speaker of English is addressing a speaker of Spanish. And, as every practicing lawyer and sitting judge knows, at least a modicum of translation is as necessary between lawyers and laymen as it is between speakers of foreign tongues. Since the lawyer or judge will be the single party who is familiar with both CONTEXTS (and both CODES—to whatever degree that these have separate existences), he will be the one compelled to fulfill the role of translator.

If, for example, the lawyer is asked by a client to predict the outcome of a particular suit, he will first listen carefully to the client's narrative of the pertinent events. Then, through research and further investigation he will align those events with the pertinent rules of law; this will involve renaming (or RECODING\textsuperscript{55}) certain existences and events. In effect, he will have translated the factual situation into the CODE and CONTEXT shared by the legal profession. Finally, he will respond to the client's inquiry by re-translating the result of his research into language that is accessible to the client. This entire process may be schematized in four steps.

\footnote{55 See Miller, op. cit., p. 95.}
1. Client narrates events to lawyer:

\[
\begin{align*}
\text{CONTEXT}_g & \quad \text{MESSAGE}_i \\
\text{ADDRESSER}_g & \quad \text{ADDRESSEE}_1 \\
\text{CONTACT}_g & \quad \text{CODE}_g
\end{align*}
\]

2. Lawyer predicts legal consequences (to himself):

\[
\begin{align*}
\text{CONTEXT}_g & \quad \rightarrow \quad \text{CONTEXT}_1 \\
\text{MESSAGE}_i & \quad \rightarrow \quad \text{MESSAGE}_{ii} \\
\text{CODE}_g & \quad \rightarrow \quad \text{CODE}_1
\end{align*}
\]

3. Lawyer translates probable legal consequences (for client):

\[
\begin{align*}
\text{CONTEXT}_1 & \quad \rightarrow \quad \text{CONTEXT}_g \\
\text{MESSAGE}_{ii} & \quad \rightarrow \quad \text{MESSAGE}_{iii} \\
\text{CODE}_1 & \quad \rightarrow \quad \text{CODE}_g
\end{align*}
\]

4. Lawyer relates probable legal consequences to client:

\[
\begin{align*}
\text{CONTEXT}_g & \quad \text{MESSAGE}_{iii} \\
\text{ADDRESSER}_1 & \quad \text{ADDRESSEE}_g \\
\text{CONTACT}_g & \quad \text{CODE}_g
\end{align*}
\]

In this process, the second and third steps are not verbal events, but by virtue of the encoding and recoding involved, they resemble verbal events. The resemblance

\[56\] The refining and reorganization of information that is involved in these steps is similar to that kind of recoding that we perform when we translate our experiences.
has this important characteristic: whether the lawyer's role in a verbal event is that of ADDRESSER or ADDRESSEE, where the other party to the event is a layman, the lawyer must assume a dual linguistic responsibility: he must listen (or speak) in two languages at once. He must be an ADDRESSEE$_{1+g}$ to the precise extent that the language of the law differs from the language of general parlance. The translations involved may be performed so rapidly that the lawyer himself may not even be aware of the function he is performing, as with an uncomplicated case in step three above. Or those translations may be quite complex and time-consuming, as in step two where a great deal of research and analysis is required (e.g., in a case that will turn upon the CONTEXT$_1$ of equal protection of the laws). To the lawyer who will take affront at such a substantial part of his profession being characterized as mere translation, I ask that he consider the case of the Christian missionary who attempts to teach the Word of Scripture to a primitive society where no translation of the Book exists. I mean to set up no ethical or metaphysical analogy, but simply one that speaks of the task's complexity.

This paradigmatic representation is meant to demonstrate the unique and important roles that the lawyer serves into words, but since it is a mental recoding of an already verbally coded message, it is once removed from the experiential level. If "[t]he kind of linguistic recoding that people do seems . . . to be the very lifeblood of the thought processes," (ibid.) the sort of recoding that I have represented in steps two and three above is close to heart of what is known as "thinking like a lawyer."
as ADDRESSER and ADDRESSEE. By virtue of his peculiar capacity to ENCODE statements of fact into predictions of legal consequences (step 2) and to RECODE those predictions into advice as to rights and duties (step 3), he is able to offer access to the edifice of the law.

One of the manifestations of that edifice is the court. By the time that two parties to a dispute come to court for its resolution, the four steps, enumerated above, will have been performed by both. The attorneys for each will have predicted the legal consequences from the facts, and those (frequently tentative) predictions will run contrary to each other.

As advocates and adversaries, the two attorneys will argue why their respective processes of translation—correlations of fact and law—are correct. The form of these arguments will be highly constrained by the rules of procedure, and what may and may not be presented will be determined by the law of evidence. Where the CONTACT, that "physical channel and psychological connection between the addresser and addressee," 57 occurs in court—whether it be oral or written—the informational content of the MESSAGE must conform to the artificial, but necessary constraints of procedure and evidence.

Further, the processes of translation of MESSAGES in and out of CONTEXT must be continuously performed by the at-

57 See note 12 above.
torneys in order to maintain effective communication between the clients and the court. (In a broader sense, these translations ensure communication between the parties to litigation and the law.)

When a jury is impaneled, the mix of verbal events becomes even more complex. Through a careful blend of CONTEXT₁ and CONTEXT₂, the attorneys and the judge must bear the responsibility for accommodating that audience of jurors.

The necessity for constant translation by lawyers and judges where audiences include laymen points to an important feature of that subset of speech events in the language of the law. That subset may be characterized through the single constituent element of Jakobson's paradigm that remains un-

58"When we are seeking to clarify some of the important terms in a discussion, we can quote definitions from a dictionary. But the dictionary definitions will suit our purposes only when these accepted definitions agree with our notions. Sometimes, however, we have to devise our own definitions, either because the accepted definitions are too vague or because we believe them to be erroneous or inadequate. In such cases, we stipulate the meaning we will attach to certain terms in our discussion." Corbett, op. cit., p. 112. When terms of law are at issue, stipulative definition becomes imperative to bridge the gap between CONTEXT₂ and CONTEXT₁.

59"But in light of the dynamics of the ADDRESSER-ADDRESSEE relationship, audience accommodation extends well beyond processes of translation. Especially in an advocacy situation, "[a]ccommodation involves the method and manner of developing the entire argument--what evidence you use and how you use it, what appeals you make and how you make them. Accommodation affects the order in which you set forth the separate arguments and the weight and emphasis you give to each of them. It determines many features of style." Ebbitt and Ebbitt, op. cit., p. 169."
considered in this discussion--CONTACT. Let us approach this element by asking the question: does Section 220 fulfill the requirements of a CONTACT for the non-lawyer? Put another way, does Section 220 provide "a physical channel and psychological connection" sufficient for the non-lawyer to seize its MESSAGE?

The physical channel is certainly there, but the psychological connection, in order to be successful, must be predicated upon a shared CODE and a common sense of CONTEXT. I think, given our previous discussions of CODE and CONTEXT, these must be considered deficient and, hence, inadequate for successful MESSAGE transmission. This inadequacy may finally be seen as a function of CONTACT, the document itself. The net effect of the inaccessibility of such legal documents as Section 220 is that the layman will need a lawyer to construe its meaning for him.

Whether this is necessary or unnecessary, just or unjust, avoidable or unavoidable is beyond the scope of this discussion. I ask the reader to draw his own conclusions on those matters. My project here extends only to the presentation of a model for analyzing samples of legal language, and depends for its validity upon its capacity to reach all of the crucial variables that are found in lawyers' language.60

60 The importance of the choice of a sample for analysis should also be noted in this context. If (a) the presuppositions that led to the choice of Section 220(2) were well-founded (see notes 2 and 4 above), and (b) that sample is, in fact, representative, the analytical scheme should, if properly applied and extended by extrapolation, have utility.
My contention is that the Jakobson scheme, by virtue of its concern with the whole event—unlike diction, grammar, or even rhetoric alone—does so.

In closing, allow me to generalize upon the critical postures that I have brought to bear upon Section 220. Beginning with the non-lexical elements of CODE, I scanned the speech event for features that might be considered to evidence departures from standard usage for, as Professor Dickerson suggests, "general adherence to the existing conventions of language"\textsuperscript{61} should always provide the foundation upon which good writing is built. Where such departures were found, as with the great syntactical length of Section 220, I then sought justification for those departures that may counterbalance the difficulty that they cause the reader. But it should be noted that this search for justification may be inappropriate where the presumption of careful drafting and editing is not warranted. In any event, though, the disadvantage of a departure from common convention must be balanced with a correlative advantage gained by it. In my analysis of nonlexical elements, I found the sentence length, the inclusion of the interrupting phrase, and the structure of the appositive phrases and clauses to be justified by other concerns. Further, I found the difficulty that these departures cause the reader to be minimized by other devices: maximum ellipsis, close punctuation, symmetry through paralle-

\textsuperscript{61}See pp. 7-8 above.
lelism, and enumerated tabulation.

Next, I scanned the Section for lexical elements of CODE to discover the difficulty of the diction. By analyzing these in terms of their CONTEXT, I was able to establish some categories for the diction of the law.\(^6^2\) In this part of my analysis, I was also able to estimate the accessibility of the passage to legal and non-legal ADDRESSEES, taking into account syntactical and other clues to the specialized diction of the law.

Since the problem of CONTEXT is intimately related to ADDRESSER-ADDRESSEE relationships, and since the variables there are few, I next surveyed the permutations of those relationships. The anticipated ADDRESSER-ADDRESSEE relationship of a legal document should never be ignored, especially where the lawyer will be compelled to fulfill the role of translator.

Finally, I looked at the character of the CONTACT itself, emphasizing the fact that it must facilitate an adequate "psychological connection" to make MESSAGE transmission successful. Here, once again, the importance of proper identification of the other elements of Jakobson's paradigm—to wit, ADDRESSER, ADDRESSEE, CODE and CONTEXT—was stressed.

It must finally be borne in mind that the Jakobson paradigm is not a critical device to supplant all others; rather, its utility is completely dependent upon the critic's

\(^{62}\) For another categorization of the diction of the law, see Mellinkoff, op. cit., pp. 11-20.
facility with such primary critical skills as versatility with grammar, syntax, usage, style and rhetoric. These critical disciplines categorize and articulate what Dickerson refers to as the "principles of communication [that] are not a matter of legal fiat." They are therefore essential to any characterization of CONTEXT or CODE. They are irreplaceable. As a secondary critical device, the Jakobson paradigm integrates and supplements them to fashion a kind of holistic, as opposed to atomistic, view of the speech event.

It is my position that the integrity and defensibility of the language of lawyers depends upon an ordering and focusing of critical skills. It is my hope that the foregoing discussion might contribute to that order and focus.

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63 See p. 7 above.
SELECTED BIBLIOGRAPHY

(This bibliography is divided into two major sections: (A) GENERAL REFERENCE—those works concerned with language generally, and (B) THE LANGUAGE OF THE LAW—those works that are concerned specifically with the language of lawyers. The minimal desk-reference library for the critic of legal language should include one book each from the fields of grammar and rhetoric, as well as a composition handbook and a good dictionary.)

A. GENERAL REFERENCE

1. Grammar


2. Rhetoric


3. Composition Handbooks


4. Usage


5. Dictionaries


6. Structural Linguistics


7. Readability


B. THE LANGUAGE OF THE LAW


