



1995

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Recommended Citation

Francis J. Mootz III, *Desperately Seeking Science*, 73 Wash. U. L. Q. 1009.

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DESPERATELY SEEKING SCIENCE

FRANCIS J. MOOTZ III*

Like a game show contestant with a parting gift
I could not believe my eyes
When I saw through the voice of a trusted friend
Who needs to humor me and tell me lies
Yeah humor me and tell me lies
And I'll lie too and say I don't mind
And as we seek so shall we find.¹

After reading the transcript of the interdisciplinary exchange between linguists and lawyers that took place at Northwestern University last Spring, I was left with a vivid image of the participants rising from their seats and departing. It's a "postmodern" image, I suppose, because it derives from the ultimate cultural kitsch in contemporary America: the daytime televised game show. I imagined the participants wearing smiles resembling those worn by unsuccessful game show contestants as they are ushered off stage with a "gift" of some kind. After a period of high energy and excitement, and with a great deal hanging in the balance, game show contestants all too often face the cold reality that they are leaving the stage with only a gift certificate to the Spiegel catalogue to show for their efforts. Something has been gained, but not quite the expected payoff.

I am not suggesting that the Law and Linguistics Conference was a failure; indeed, I found the transcript to be fascinating. Rather, I sense that the participants must have viewed this first effort as falling far short of the mark they had set.² I fully expect that sustained interdisciplinary efforts

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1. BLUES TRAVELER, *Run Around on FOUR* (A&M Record Co., 1994). Victoria Dutcher proved that she is the hippest person at Western New England when, after I hummed a few bars, she identified the song and obtained a copy of the liner notes on the internet within minutes.

2. In his concluding remarks, Kent Greenawalt expressed skepticism about the prospects for bringing the goals of the conference to fruition:

Well, I think if a sympathetic linguist and a sympathetic law person got together and struggled with some of the theoretical problems we're discussing now, that would be interesting. But on the basis of this group discussion so far, I would not feel optimistic about two people actually managing to combine to say something that was illuminating. . . . So at

will grow out of this conference and that these efforts may even lead to ground-breaking advances. An endless line of future contestants wait patiently in the wings to try their luck, because the jackpot is so appealing. However, it does not appear that anyone is poised to cash in just yet, beyond garnering a few consolation prizes.

In this commentary I offer a lawyer's view of what law and linguistics interdisciplinary studies might mean for legal practice, as well as a legal theorist's view of what importance they may hold for jurisprudence. I do not pretend to have more than cursory knowledge about linguistics, and so my remarks about what linguistics scholars might gain from an interdisciplinary exchange necessarily will be brief and general.

I. MUTUAL INTELLECTUAL COLONIZATION OR INTERDISCIPLINARY STUDIES?

The primary peril threatening every interdisciplinary effort is that the two disciplines will retain their pre-conceived disciplinary self-understanding throughout the exchange. A vital interdisciplinary encounter, it seems to me, requires that both disciplines accept the implicit challenge to reconsider the prejudices that help to shape their disciplinary boundaries and to reconstruct their understanding of legitimate modes and purposes of inquiry.³ All too often, however, what passes for interdisciplinary scholarship involving legal theory is more akin to mutual intellectual colonization, by which I mean the superficial convergence of two distinct disciplines that have like-minded strategies for subjugating the other. Law seeks out external discourses to buttress the legitimacy of its disciplinary structure, while other disciplines seek relevance and importance within the weighty world of legal analysis. It is not necessarily an unproductive

present, I am dubious about how useful collaboration would be, but I think that would be an interesting article.

Law and Linguistics Conference, 73 WASH. U. L.Q. 785, 969-70 (1995).

3. Robert Weisberg made this same point in his early critique of "law and/as literature" interdisciplinary studies:

My general assumption, then, is that truly interdisciplinary study, or at least fertile interdisciplinary study, entails discomfiture. . . . Whatever the specific insights, the goal of scholarship, in [Clifford] Geertz's terms, should not be to establish "interdisciplinary brotherhood," but to produce a "conceptual wrench," or "a sea change in our notion not so much of what knowledge is but of what it is we want to know."

Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 3-4 (1988) (quoting CLIFFORD GEERTZ, LOCAL KNOWLEDGE 23, 30, 34 (1983)). I recently discussed this issue in greater detail as part of my contribution to an interdisciplinary round table assessing legal hermeneutics. Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127, 135-39 (1994).

development for either discipline, but mutual intellectual colonization falls short of what one might hope interdisciplinary studies would accomplish.

This tendency to truncate interdisciplinary exchanges is evident in the discussions held at the Law and Linguistics Conference. The lawyers were receptive to social scientific assistance in answering their jurisprudential questions, but the questions were wholly determined by legal considerations and had been formulated in response to the disciplinary forces of legal theory long before the Conference was held.⁴ Conversely, the linguists appeared eager to claim scientific status for their theories and to argue that legal practice would be improved by paying heed to their lessons, but they proceeded on the assumption that linguistics would intervene unscathed, as if it had nothing to learn from legal practice.⁵ The process of mutual intellectual colonization is embedded in the *amicus curiae* brief filed by the Law and Linguistics Consortium during the 1993 Supreme Court Term.⁶ Professor Cunningham evidently regards linguistics as a powerful tool for dealing with important legal issues, while the linguists regard law as an appropriate field for application of their theories. Law absorbs linguistics, even as linguistics seeks to conquer law.

I should like to see a truly interdisciplinary exchange, in which the questions that lawyers ask are reconsidered in a radical manner in light of linguistic theory, and the scientific self-assurance of the linguists is chastened by the reality of law as a system not only of speech but also of action. The participants at the conference moved in these directions, although they understandably spent much of the short period of time learning about each other's discipline. If linguistic theory and legal theory shake each other down to the roots by questioning the disciplinary divides, then I believe that future interdisciplinary exchange will have far-reaching and long-standing effects. Easier said than done (a linguist might point out).

4. Thus, Professor Greenawalt explains that he is skeptical about the potential for *productive* interdisciplinary theoretical work *growing out of the positions described at the conference* because "it's a disciplinary matter." *Law and Linguistics Conference, supra* note 2, at 969-70. In other words, *as they were presented at the conference*, linguistic theory and legal theory are separate modes of inquiry that exhibit serious, if not fundamental, differences.

5. The linguists repeatedly drew the methodological distinction between the messy procedures of legal practice (which they characterized as determining what the law is) and the linguistic questions that arise in the course of legal practice (determining what a particular legal text means, apart from the significance that the text may have). *See, e.g., id.* at 866-68, 914-16.

6. Brief *Amicus Curiae* of the Law and Linguistics Consortium in Support of Respondents, *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

II. THE LAW'S INFATUATION WITH THE HUMAN SCIENCES

The mutual intellectual colonization at work in this exchange is played out principally in the discussion of linguistics as a scientific discipline. Many law professors are generally embarrassed by the weak nature of their discipline. Normative legal scholarship often amounts to glorified advocacy briefs that are not particularly rigorous.⁷ It appears unquestionable that the rigors of natural science far surpass those of jurisprudence, but most legal theorists regard even the human sciences as eminently more scholarly than legal theory. This long-standing, deep-seated inferiority complex drives many legal scholars to search for the methodological key to jurisprudential truth by plundering the human sciences.⁸ Scholars at all points on the political spectrum proclaim this move to be a progressive, enlightened and realistic approach to legal problems. Economics, sociology, political science, and even, *gasp*, psychology appear to be grounded in more legitimate (read: empirical-objective) modes of inquiry than jurisprudence.⁹ However, legal thinkers rarely acknowledge that their deep commitment to certain normative assumptions about the social significance of the legal system inform their choice of a discipline (and usually a distinct tradition within the discipline) from which to borrow rigorous methodological tools. Because these commitments precede any explanation or critique that the imported discipline provides, the search for broad-based, scientific and external legitimacy falls short.

The quest for a thoroughly scientific jurisprudence unquestionably has failed. Expert testimony is admitted liberally in litigation and frequently is used in support of legislative and administrative actions, but the experts never supplant the legal actors. The law uses science as it sees fit, according to legal criteria and as decided by legal officials, most of whom

7. Pierre Schlag lambasts mainstream legal scholarship along these lines. See Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

8. Because they are not trained as social scientists, lawyers often overstep their competence when they plunder, a condition that Mark Tushnet has dubbed the "lawyer as astrophysicist" syndrome. See Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979). See generally Mootz, *supra* note 3, at 138-40 (1994) (describing this critique of some legal theorists as voiced by several philosophers).

9. Those legal thinkers who reject the scientific assumptions about knowledge implicit in this assessment find that their theoretical efforts are derided as amateurish subcontract work on the grand philosophical project of Western civilization (always parochially defined, of course). Mootz, *supra* note 3, at 133-35 (describing the "expertise critique" of legal theory by some philosophers). See, e.g., Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33 (1995).

are lawyers or defer to lawyers.¹⁰ Linguistics appears poised to follow this pattern, with linguists offering expert testimony on discrete questions that are framed by and assessed within the legal culture in which they arise. The research proposal suggested at the end of the conference—using linguistic theory to fashion more comprehensible jury instructions—is a vivid example of mutual intellectual colonization. Linguists assert scientific primacy, but this assertion is acknowledged only within the (much) wider realm of legal rules.¹¹

The most fascinating aspect of the transcript for me was the degree to which the pursuit of a truly scientific jurisprudence captivated the participants, even though they knew that the prospects for such a project were dim. At the outset, Mike Geis asserted the scientific status of linguistics after referencing physics as a model, drawing the eager question that the lawyers would repeat throughout the conference: “Is there any transference of that scientific method to what we do?”¹² In an interesting explanation of what linguists mean by a scientific theory, Judith Levi described the transformation of linguistics after Noam Chomsky’s pathbreaking work: “We didn’t just sort of write stories about language, not even stories that we thought were fairly accurate. But we created theories the way physicists and chemists create theories in the sense that we hypothesize something about a set of relevant language data.”¹³ This is a particularly alluring description for many legal theorists, given the recent insistent challenge from within their ranks that law practice and legal theory are composed of nothing more than narratives that lack any claim

10. A good example of the use of developments in science is a case from my contracts course, *Estate of McGovern v. Commonwealth, State Employees’ Retirement Bd.*, 517 A.2d 523 (Pa. 1986), in which the court acknowledged that psychiatry’s sophisticated understanding of mental incapacity includes lack of control over one’s actions in addition to lacking the ability to comprehend the nature of one’s actions, but nevertheless held that only the latter condition meets the *legal* test of the defense of mental incapacity. *Id.* at 526-27. Even when a court conforms the legal test of mental incapacity with contemporary psychiatric understanding of volitional impairment, the legal test inevitably remains distinct from the scientific diagnosis. *See Ortelere v. Teachers’ Retirement Bd.*, 250 N.E.2d 460, 464-65 (N.Y. 1969) (permitting a party lacking the ability to act in a reasonable manner to rescind a contract but only if the other party had reason to know of the condition); RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (1982) (same).

11. *Law and Linguistics Conference*, *supra* note 2, at 966-69.

12. *Id.* at 821. Jerry Sadock later qualified Geis’s comment by suggesting that linguistics is not on a par with physics, but that it scores high on the scientific scale, perhaps higher than any other social science. *Id.* at 905-06.

13. *Id.* at 899.

to an objective basis, subject to scientific analysis.¹⁴

The exciting prospect of importing scientific methodology to legal analysis quickly evaporated when the lawyers learned that the linguists in attendance perform little in the way of traditional empirical work, and that they primarily are concerned with the conventional use of language by ordinary speakers.¹⁵ Bob Bennett and others argued that lawyers successfully communicate legal meaning despite the presence of what ordinary speakers would regard as syntactical or grammatical deviations from conventional usages, placing into question whether scientific linguistic analysis is useful for real world interpretive problems arising within the specialized community of legal speakers.¹⁶ But the lawyers' claim to specialized practices that supersede bare linguistic meaning triggered a familiar rejoinder: If legal actors in fact are not playing by the objective linguistic rules that are subject to scientific reconstruction, then legal practice appears to be an unconstrained exercise of political power.¹⁷ It is only at this juncture that the normative presuppositions of the linguists came to light: They assert the importance of their scientific analysis of language for law because it provides the assurance of constraint that is implicit in the rule of law virtues that the legal system purports to embody.

14. The narrative school of jurisprudence is multi-faceted, complex, and still evolving. Overviews of this approach include, Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 SO. CAL. L. REV. 545 (1995); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); and Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).

15. Even when linguists empirically investigate the uses of a word or phrase, the research is designed to uncover conventional uses of language by designated "ordinary" speakers. See Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1596-1613 (1994) (describing an empirical analysis of the word "enterprise" by looking at its use in publications contained in the Nexis database and by surveying university students with a questionnaire).

16. *Law and Linguistics Conference*, *supra* note 2, at 865-69. Fred Schauer summarized this point nicely: "So the too easy claim that Scalia, O'Connor, Hart and Sacks and many others are making linguistic blunders may misunderstand the background conventions that inform the kinds of statements they are making." *Id.* at 870.

17. Judith Levi questions whether the practice of judges and lawyers of ignoring linguistic meaning results in all legal meaning being "up for grabs." *Id.* at 945. Jerry Sadock asks why, in this environment, legislatures don't pass statutes that simply say ". . . you know!" and leave it at that. *Id.* at 936. Jeffrey Kaplan then summarized this critique with three questions: Does legal practice suggest that legal texts in effect have no linguistic meaning? How do legal actors determine whether the case requires the judge to go outside the linguistic meaning of the text; and, in such cases, what constrains the "interpretation" of the Law? *Id.* at 949. One couldn't ask for a better expression of the position that the radical indeterminacy of legal texts—at least with respect to their legal significance, if not their linguistic meaning—leaves us with nihilism.

Without recourse to scientific expertise as a guide, the linguists appeared to be saying, you cannot successfully legitimate your practice according to the interpretive rules that legal actors claim to follow; deep down, of course, all lawyers know that they are correct. If legal actors do not abide by the scientifically determined ordinary meaning of authoritative legal texts, then what passes for a “specialized” discourse among judges begins to look a lot like unconstrained discretion by members of a political-professional elite.¹⁸ The conference thus reenacts the same old story of the unfulfilled quest for a normatively justified certainty, one that most recently has been played out in the law and economics phenomenon. Interdisciplinary encounters with the human sciences leave legal scholars with a feeling of *deja vu*, over and over and over again.¹⁹

I have defended the rule of law, as it is instantiated in legal practice, without recourse to the scientific ideal of objectivity, but I will not rehearse those arguments here.²⁰ Rather, I wish to emphasize that the linguists never claimed to have scientific authority for directing legal practice beyond the minimal expert competency on narrowly defined legal issues

18. The traditional alternative to textualism/plain meaning—originalism—suffers the disadvantage that there is no historical methodology that appears to be even close to the scientific status of linguistics. Perhaps the embarrassing misuse of historical understanding by judges, lawyers and law professors will lead traditionalists to the more “secure” linguistic foundations of the “new textualism.” It is interesting to note that the leftist critique of legal discourse may also seek to undermine the technical, jargon-laden use of language by the profession, although the return to “ordinary discourse” will be only the first step toward unearthing the contradictions and social ideologies reflected in such discourse, as opposed to the celebration of existing social relations. Cf. Peter Goodrich, *The Role of Linguistics in Legal Analysis*, 47 MOD. L. REV. 523, 533-34 (1984).

19. This pattern has an impressive pedigree. Early in the American experience of written constitutionalism, Francis Lieber attempted to use German hermeneutical philosophy as a source of “immutable principles and fixed rules for interpreting and construing” the constitution. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* viii (3d ed. 1880). A significant branch of the legal realist movement sought to supplant legal mysticism with the rigors of the social sciences. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1931); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1910), 25 HARV. L. REV. 140, 489 (1911). Ultimately, Pound and Frank both disavowed strong adherence to this strategy. LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, 43-46, 169-70 (1986). This pattern manifests itself most recently in the law and economics movement as a “scientific” response to the collapse of process jurisprudence. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). Posner too has moved away from this position, recently declaring himself to be a “pragmatist.” Peter F. Lake, *Posner’s Pragmatist Jurisprudence*, 73 NEB. L. REV. 545, 555.

20. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993); Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious Is Plausible*, 61 TENN. L. REV. 69 (1993); Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523 (1988).

that other social and natural scientists offer. Although ubiquitous references to “plain meaning” and “ambiguity” in legal practice would appear to establish that linguistic science has special significance for lawyers dealing with the interpretation of legal texts, much the same might be said of the importance of psychiatry to criminal lawyers struggling with issues of “responsibility.” I expect that expert testimony by psychiatrists regarding criminal responsibility will serve as a useful model for expert testimony by linguists. Linguists can make an important contribution, but they cannot resolve once and for all the long-standing jurisprudential disputes about legal interpretation.

One of the problems raised for discussion illustrates my contention. No participant suggested that the horribly mangled prenuptial agreement distributed by Charles Fillmore²¹ was linguistically pristine and hermeneutically perspicuous, but the linguistic critique of the document seemed rather beside the point in the context of legal practice. Mike Geis agreed that the lawyers could reconstruct the legal significance of the document, but he suggested that the unrepresented woman shouldn't be held to these specialized meanings unless the husband's lawyer communicated the legal effect of the document accurately and in a linguistically proper manner.²² This normative assertion—which undoubtedly would be embraced by a number of law professors, and perhaps a few judges—derives not from the scientific analysis of linguistic meaning, of course, but rather from wider legal norms governing contractual obligation. Had the trial judge been willing to accept expert testimony that the document was a linguistic mess, this evidence at most would have proved a relevant fact for the judge to consider when adjudicating the parties' rights and obligations as established by governing legal norms.²³ Consequently, Geis's assertion would have no special force or authority for the many law professors and judges who reject the idea that legally binding documents must either be written in a

21. See generally *Law and Linguistics Conference*, *supra* note 2, at 809.

22. *Id.* at 931.

23. The lawyers were quick to point out that most written contracts are not understood completely by at least one of the parties, whether or not the document conforms with all relevant linguistic conventions. *Id.* at 930-31. In contract law, then, the desired legal value may not be obtained simply by requiring linguistic clarity in complex written agreements. In fact, the opposite may be true at least to the extent that the average person will not review a complex document to discern the admittedly clear and precise meaning conveyed. Under the doctrine of reasonable expectations, courts look beyond the linguistic plain meaning of an insurance contract and enforce coverage when the insured reasonably expects that the loss is covered by the policy. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

manner that can be understood by an ordinary person or must be explained to the parties in such a manner.²⁴ Linguistics does not appear to relax the burdens of legal decision-making so much as to provide a limited amount of relevant input regarding certain circumscribed, pre-defined legal questions.²⁵

All the talk about the scientific status of linguistics seems to reveal a deep anxiety shared by the lawyers and a misunderstanding of the legal process (fostered by the deceptive characterizations offered by judges and lawyers) shared by the linguists. The practice of legal interpretation is thoroughly infused with a pragmatics that is animated by deeply contested issues of morality and justice; consequently, the practice might be supplemented by linguistic science, but certainly even discrete legal disputes will never be wholly determined by it.²⁶ Judges and lawyers have

24. Such a rule is not unknown in the law, but it is a limited exception to the general rules of contract interpretation. *See, e.g.*, *Miller v. Sears*, 636 P.2d 1183 (Ala. 1981); RESTATEMENT (SECOND) OF CONTRACTS § 173 (fiduciaries may contract with their beneficiaries only if the terms of the contract are fair and the beneficiaries act with full understanding of all relevant facts and their legal rights.) *Cf. Hionis v. Northern Mutual Ins. Co.*, 327 A.2d 3631, 365 (Pa. Super. 1974) (holding that an insurer could enforce an unambiguous exclusion in an insurance policy only upon proof that the insured “was aware of the exclusion or limitation and that the effect thereof was explained to him.”), *rationale overruled by*, *Standard Venetion Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563, 567 (Pa. 1983) (“the burden imposed by *Hionis* fails to accord proper significance to the written contract, which has historically been the true test of the parties’ intentions.”).

25. *Law and Linguistics Conference*, *supra* note 2, at 931-34. The situation doesn’t change when the issue concerns statutory interpretation rather than common law elucidation. If Justice Scalia borrowed his analysis of the language of the statute in the *X-Citement Video* case directly and wholesale from the consortium’s brief, prior legal practice would remain essentially unchanged. The discussion of the case did not sufficiently address and account for the broader point of Justice Scalia’s dissent in the *X-Citement Video* case. 115 S. Ct. at 473. Far from utilizing a scientific account of linguistic meaning, such as was argued in the amicus brief filed by the Law and Linguistics Consortium, Scalia notes what he presumes is a fact about the language of the statute in the course of a rather complex and subtle analysis. Scalia suggests that he might be open to supplementing the linguistic meaning of the statute by requiring means *rea* with respect to the pornographic nature of the material placed in interstate commerce and then upholding this “interpreted” statute from challenge under the First Amendment. The real disagreement between the judges voting to reverse and the judges voting to affirm appears (to my untutored eye in constitutional matters) to be a debate about how to read the statute *in light of the respective judges’ conceptions about the limitations placed on Congress by the First Amendment*. This disagreement, in turn, is shaped largely by the conflict between a political theory that views judges as partners with legislatures in the implementation of legal norms (the “conversation” model) and a political theory that views judges as being empowered to follow only the rules laid down (the “rules” model). It doesn’t get more pragmatic than this, despite the ostensible claims by the judges about the linguistic meaning of the language of the statute.

26. I am convinced that expert testimony by linguists would provide evidence of far superior probity in cases where a judge might otherwise consult a dictionary. *See* Cunningham et al., *supra* note 15, at 1614-17. My point is that I always regard a judge’s reference to a dictionary definition as adding

traditionally conflated legal interpretation and straightforward linguistic analysis in a naive manner, but contemporary theorists have disrupted this fanciful account by uncovering the social and political context in which legal language is wielded.²⁷ The law professors at the conference know this lesson well—most of them profess it in their own work—but the tantalizing possibility that linguistic theory might prove them wrong appeared to raise at least a momentary hope. In the end, though, there is no science for elucidating the legal norms that emerge and develop in the course of legal practice.²⁸

III. LEGAL INTERPRETATION AND LINGUISTICS

My assessment has been critical up to this point. I have argued that interdisciplinary studies often amount to mutual intellectual colonization, and that this tendency is revealed when initial claims about the scientific status and methodological superiority of linguistics are followed by an absorption of the science as a limited supplement to legal practice. I now wish to describe more fully my initial thoughts about a positive program for an interdisciplinary exchange between law and linguistics.

On a personal level, I believe that exposure to linguistic theory would benefit my scholarship. In a series of articles, I have attempted to marry lessons from contemporary hermeneutical philosophy with the experience of legal practice, rejecting both the comforting belief in foundational legal norms explicated by formalistic reasoning and the disturbing belief in the absence of coherence and reasoning in legal practice.²⁹ Because I am interested in the activity of language and do not focus solely on legal questions,³⁰ linguistic theory would complement my research project. I

very little, if anything, to the legal analysis in the opinion.

27. Goodrich, *supra* note 18.

28. Consider the review essay recently published by the *Yale Law Journal* that spurred the conference, in which the four authors survey the scholarly debate over the “new textualism” in statutory interpretation and then admit that their “essay does not address these difficult jurisprudential issues. Rather, it explores what assistance linguistics can give to a judge *to the extent she chooses for whatever reason* to use the ordinary language meaning of a text to guide her decisionmaking.” Cunningham et al., *supra* note 15, at 1565 (emphasis supplied). At worst, this project is premised on a tautology—judges willing to enforce a statute according to a linguist’s assessment of what the statute would mean to an “ordinary” speaker will be assisted by linguistic science. At best, this project suggests that a plain meaning approach might prove to be more acceptable once judges understand the contributions that linguistics can make to this methodology of decision-making.

29. See *supra* note 15.

30. Philosophical hermeneutics regards language as our openness to the world, and therefore as a unitary (though dynamic and historical) ground of meaning.

invite and certainly would benefit from a critique provided by linguistic theory, as I expect that it would lead me to regard my previous work in a different, more illuminating light. I am no less susceptible than other scholars to the aggrandizing attitude of colonization that immediately brackets different approaches and views them through previously ground lenses, but I hope that I would remain as open as possible to the challenges posed by linguistic theory.

More generally, the contours of future productive interdisciplinary work can be discerned in the transcript. At the least productive level, linguistic theory could prove to be a suitable polemical target for non-traditional legal theorists who might deride it as an example of scientific methodology that fails to add anything useful to legal understanding. As Judith Levi remarked at the close of the conference, some benefit might be gained by identifying the irreconcilable differences between the disciplines.³¹ These differences likely would center around the contrast of linguistics as a

Language is not just one of man's possessions in the world; rather on it depends the fact that man has a world at all.

...
To live in a linguistic world, as one does as a member of a linguistic community, does not mean that one is placed in an environment as animals are. We cannot see a linguistic world from above in this way, for there is no point of view outside the experience of the world in language from which it could become an object.

HANS-GEORG GADAMER, *TRUTH AND METHOD* 443, 452 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1992) (1960). As the leading contemporary hermeneutic philosopher, Gadamer has spent his long career investigating the experience of meaning within different traditions of inquiry and understanding in order to elucidate what he terms our "hermeneutical situation." Gadamer argues that literature, aesthetics, theology, science, law, ethics, and other modes of experience each reveal something about the truth of understanding, a truth that is not captured by any disciplinary methodology, nor even by the totality of the methodological attitude that animates the sciences.

No doubt the problem of language has attained a central position within the philosophy of our century. It has a position that is congruent neither with the older tradition of Humboldt's language philosophy nor with the comprehensive claims of the general science of language or linguistics. To some extent we owe this to the reacknowledgment of the practical life world that has taken place on the one hand within phenomenological research and on the other within the Anglo-Saxon pragmatic tradition of thought. With the thematization of language as it belongs indissolubly to the human life world, a new basis for the old metaphysical question about the whole seems to be available. In this context language is not a mere instrument or a special capacity with which humanity is endowed; rather it is the medium in which we live from the outset as social natures and which holds open the totality within which we live our lives. Orientation toward the whole: some such reality resides in language but not as long as one is dealing with the monological modes of speech or scientific sign systems, which are exhaustively determined by the research area being designated in any given case.

Hans-Georg Gadamer, *Science and Philosophy*, in *REASON IN THE AGE OF SCIENCE* 4 (Frederick G. Lawrence trans., 1981).

31. *Law and Linguistics Conference*, *supra* note 2, at 970.

verifiable scientific inquiry and law as an exercise of moral-political judgment.³² Bill Eskridge's scholarship describes a similar demarcation, and he concludes that the continuing pretense of obeisance to linguistic meaning by legal actors is an inexplicable mystery.³³

However, linguistic theory can and should serve a more vital function than providing new fodder for long-standing jurisprudential arguments. Features of a robust interdisciplinary effort can be reconstructed from some of the positions taken by the participants at the conference by demonstrating how the practitioners in each discipline might be challenged to entertain discomfiting thoughts.

Georgia Green's suggestion that linguistics may soon be regarded wholly in terms of pragmatics, although vigorously challenged by other linguists, provides an interesting point of entry for interdisciplinary studies.³⁴ If Green and other linguists are moving to the view that language has meaning only in its use within a context, law certainly provides an exemplary focus for describing how and why this might be so. I do not find the linguists' claim that legal practice is different than ordinary communication because of its substantial effects on persons to be very persuasive.³⁵ Indeed, legal discourse seems to provide only a particularly strong example of how language operates within dysfunctional families, corporate culture, long-term intimate relationships and other venues, since they all involve thick, historical settings in which language is used. Of

32. Compare Michael Moore's comment, *Law and Linguistics Conference*, *supra* note 2, at 855-56 ("I think it's fruitful to distinguish our moral knowledge about the values that . . . a statute can intelligibly serve from the semantics of what the words mean.") with Judith Levi's comment, *id.* at 868 (A statute is "a social act, it's a political act, it's a legal act with legal force and linguists don't talk about legal force. We shouldn't. We talk about language.").

33. *Id.* at 893-94. *Cf. id.* at 950 (Fred Schauer agreeing that current judicial practice permits interpretations of statutes that the words cannot bear, despite their claims of working within linguistic constraints). On this level, then, traditional legal theory and its purported respect for "plain meaning" in legal interpretation would present a polemical target for linguistic scholars. This project would be quite straightforward: linguists would demonstrate that judges claiming to enforce the ordinary and plain meaning of legal texts often do not succeed. See LAWRENCE SOLAN, *THE LANGUAGE OF JUDGES* 11 (1993) ("Throughout this book, we will see how judges resort to linguistic argumentation that either falls hopelessly flat, collapsing into incoherence, or can best be seen as window dressing, part of an effort to mask some other agenda that is at the root of the judge's opinion."). My reading of Solan's thesis is *not* that he seeks to make judges better linguists, but rather that he seeks to challenge judges to defend their practice without the pretense that linguistic science determines their decisions. *Id.* at 186 ("Interpretive principles do not make good legal principles.").

34. *Law and Linguistics Conference*, *supra* note 2, at 828-30, 838.

35. Judith Levi suggested that the problem of cumulative interpretations over long periods of time has not been explored in linguistic theory because "[t]here is something so unique to the legal system about this problem—that it's consequential, that it has third party effects and so forth." *Id.* at 921.

course, I could be completely wrong, but explaining why I am wrong might provoke interesting debate.

Additionally, the increasing emphasis on pragmatics by some linguists appears to parallel the movement in legal theory from conceptual formalism to a realistic account of legal practice. The linguists' description of the scientific nature of their discipline sounds very much like Langdell's effort to define a scientific manner of legal study.³⁶ Langdell too thought that he could review the relevant data (the decided cases), discern the implicit conceptual structure of the discourse, and then adjudicate which of the samples exhibit correct moves within the discourse and which samples exhibit discursive errors.³⁷ The conventions are strong enough in many situations to lend the appearance that this is possible, but the common law—and language generally—is in flux and cannot be formalized on the edges. Developing comparative disciplinary histories might reveal some interesting linkages and common themes, and perhaps might lead to a deeper understanding of broad intellectual adjustments that have shaped both disciplines. One such grand effort—Jürgen Habermas's attempt to delineate a “universal pragmatics” that grounds social theory and critique—already draws law and linguistics within its ambit.³⁸

36. See C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* (1879).

37. *Id.* at ix.

38. See Jürgen Habermas, *What is Universal Pragmatics?*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1-68 (Thomas McCarthy trans., 1979) (1976). For a recent assessment, see Albrecht Wellmer, *What is a Pragmatic Theory of Meaning? Variations on the Proposition “We Understand a Speech Act When We Know What Makes It Acceptable,”* in *PHILOSOPHICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF ENLIGHTENMENT* 171-219 (William Rehg trans., Axel Honneth et al. eds., 1992).

Habermas is constructing a theory of communicative rationality that expands the scope of communicative competence beyond the bare capacity to construct or dissect grammatical sentences. He argues that all comprehensible communications are predicated on an implicitly raised universal pragmatic structure of claims to validity. See generally, 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1984) [“COMMUNICATIVE ACTION”] and 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1987) [“LIFEWORLD AND SYSTEM”]. Habermas's philosophical project actively joins in the “linguistic turn” away from the “logocentric bottleneck” of the ontological tradition of Western thought, JÜRGEN HABERMAS, *Metaphysics after Kant*, in *POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS* 20 (William Mark Hohengarten trans., 1992) [“POSTMETAPHYSICAL THINKING”], by following the contemporary shift in focus from semantic analysis to pragmatics. JÜRGEN HABERMAS, *Themes in Postmetaphysical Thinking*, in *POSTMETAPHYSICAL THINKING* at 44-48.

Reaching understanding is the inherent telos of human speech.

HABERMAS, *COMMUNICATIVE ACTION* 287.

The *pragmatic* level of agreement that is effective for coordination connects the *semantic* level of understanding meaning with the *empirical* level of developing further—in a manner

On the other hand, legal theorists challenged by the different tradition of linguistic theory might find that they see problematic issues differently. For example, Fred Schauer repeatedly made reference to his larger scholarly project of delineating the different institutional structures and procedures that can be employed within a legal system, emphasizing that the practice of moving beyond linguistic meaning in legal practice reflects a choice rather than the nature of legal language.³⁹ At this point, those who emphasize pragmatics within linguistics—after having explored legal practice as an exemplary language game—might very well criticize the

dependent on the context—the accord relevant to the sequel of interaction. How this connection comes about can be explained by means of the theory of meaning; for this purpose, the formal-semantic approach limited to understanding sentences has to be expanded *We understand a speech act when we know what makes it acceptable.*

Id. at 297.

In this debate [with linguists who view pragmatics as “a complex and derivative phenomenon” that can be traced to semantic understanding] we are not concerned with questions of territorial boundaries or of nominal definitions but with whether *the concept of the validity of a sentence* can be explicated independently of *the concept of redeeming the validity claim raised through the utterance of the sentence*. I am defending the thesis that this is not possible . . . the very analysis of the conditions of the validity of sentences *itself* compels us to analyze the conditions for the intersubjective recognition of corresponding validity claims.

Id. at 316.

If the investigations of the last decade in socio-, ethno-, and psycholinguistics converge in any one respect, it is on the often and variously demonstrated point that the collective background and context of speakers and hearers determines interpretations of their explicit utterances to an extraordinarily high degree.

Id. at 335.

Literal meanings are, then, relative to a deep-seated, implicit knowledge, *about* which we normally know nothing, because it is simply unproblematic and does not pass the threshold of communicative utterances that can be valid or invalid.

Id. at 337. The possibility for divergence between the literal or semantic meaning of an utterance and the meaning that the utterance holds for the communicating parties is increased when the communication occurs within a complex social system such as the legal system.

When the speaker puts forward an assertion with a simple predicative observation sentence in the present indicative, the reasons that interpret the truth conditions of the sentence are typically easy to survey. When, in contrast, a court renders a judgment in a complicated matter . . . the evaluation of the validity—and thus also the *comprehension*—of the court verdict . . . will require knowledge of more demanding kinds of reasons. Otherwise we do not understand what is said—not even if we understand the individual words as a result of their frequent past appearance in *other* sentences.

JÜRGEN HABERMAS, *Toward a Critique of the Theory of Meaning*, in POSTMETAPHYSICAL THINKING 77-78. Habermas’s effort to articulate a proceduralist account of law is premised on his belief that the legal system is a vital nexus for the traditional lifeworld of individuals living within a political state and the modern systems of social organization constituting that state, and is firmly grounded in his philosophy of communicative action. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1995) and HABERMAS, LIFEWORLD AND SYSTEM 356-73 (a preliminary discussion of the internal colonization of the lifeworld through juridification processes that are subject to critical analysis).

39. *Law and Linguistics Conference*, *supra* note 2, at 846-47, 944, 949-50.

belief that these complex practices can usefully be termed a product of choice. Chosen by whom? Chosen when? Chosen from among what options? That our legal system represents the cumulative effect of countless individual "choices" and their continuing effects is not debatable, but this does not mean that we can choose a new approach to law if it suits us better. As Jerry Sadock noted, the description of legal texts as "regulatory variables," seems to add nothing to "ordinary pragmatic concepts" that explain how utterances acquire their sense,⁴⁰ but surely these pragmatic principles are not chosen by the participants in dialogue as much as the participants' choices within the practice are shaped by the pragmatically-determined norms. Linguistics might challenge law's imperial belief that it generates itself as if *ex nihilo*, by exposing that law is embedded in a pragmatically-defined, normatively-laden tradition that may at best be reconstructed to some degree, but never constructed anew from the level of understanding up to the level of action.

CONCLUSION

Although admittedly sketchy, my suggestions for avenues of further interdisciplinary work are intended to point the way toward a discomfiting reorientation of law and linguistics. Such a reorientation would be a significant event, although it seems evident that the United States Supreme Court could not use this event to assist it in deciding cases. I would not like to see the interdisciplinary exchange oriented toward immediate payoffs in legal practice, as I fear that the impact of such a functional approach in reality would be minimal. My theme is simple: There is no justification for taking the envelope containing \$100; instead, legal theorists and linguists should take a real chance and choose instead to focus on what's hidden behind the curtain. I am willing to gamble that there is more than a consolation prize to be gained.

40 *Id.* at 951-52.

