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Gary S. Lawson
Northwestern University

LINGUISTICS AND LEGAL EPISTEMOLOGY: WHY THE LAW PAYS LESS ATTENTION TO LINGUISTS THAN IT SHOULD

GARY S. LAWSON*

Law and linguistics ought to be natural partners. Modern statutory and constitutional interpretation[1] increasingly focuses on the generally accepted public meaning of legal language. Even persons who do not believe (as I do) that some form of public understanding of the relevant text is the end-all, if not quite the be-all, of such interpretation are likely to regard the public understanding of statutory language as at least one relevant factor in legal interpretation. And who better than linguists to inform the law about the true facts regarding public usage and understanding of legal language?

The law, however, is going to have a harder time accepting the help of linguists than it probably should. Professor Fillmore reports in the conference proceedings that when he and a colleague tried to offer an expert opinion about the meaning of a prenuptial agreement, the judge said "that she didn't need to be told by a linguist what the English language meant and so this testimony was rejected."[2] There are profound reasons, deeply ingrained in the American legal system, why this unfortunate judicial response to the contributions of linguists is likely to be widespread. My aim in this comment is to identify some of the barriers that need to be overcome before the law can make optimum use of the teachings of linguistics.

Suppose that two parties enter into a contract that provides, in part, "If the generally accepted meaning among the public (defined as persons A) of phrase X in context Y is Z, then the contract price shall be $N; otherwise, the contract price shall be $M." Suppose further that the parties disagree about whether the relevant public interprets the phrase as Z or as something else. The amount of liability under the contract turns on this

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* Professor, Northwestern University School of Law. B.A. Claremont College (1980); J.D. Yale Law School (1983). I am grateful to Patricia B. Granger for her always-insightful comments.

1. The Law and Linguistics Conference concentrated on statutory interpretation, leaving for another day the question whether there are differences between statutory and constitutional interpretation that are relevant to the relationship between law and linguistics. For simplicity's sake, I follow that practice here, though with doubts that any such differences exist.

2. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 924 (1995).

dispute. Would a court exclude testimony from competent linguists that bears on this question because the jury (or judge in a bench trial) "didn't need to be told by a linguist what the English language meant?"

Perhaps, though it is hard to see on what grounds the testimony would be excluded. The evidence certainly meets any reasonable standard of relevance. In many cases, the generally accepted public understanding of a phrase would be a fit subject for judicial notice, but it is not difficult to imagine circumstances in which the phrase's meaning could reasonably be controverted. In that circumstance, expert evidence from linguists may be the best available method of establishing the relevant meaning and at a minimum seems clearly admissible for that purpose.

Suppose now that the same phrase appears in a statute and that one party is liable to another if but only if the phrase in the statute means Z. Suppose further that the judge accepts a theory of statutory interpretation in which the generally accepted public meaning of a phrase in its statutory context is at least one important ingredient of statutory meaning. The same linguist that testified in the previous contract case comes forward to offer precisely the same testimony about the statute's generally accepted public meaning. It is almost certain, I predict, that a judge in this case would reject testimony from linguists, just as the judge did in Professor Fillmore's case. Why are the outcomes in my two examples so likely to differ?

The answer is that, in my contract example, the linguist is testifying with respect to a question of *fact*, while in my statutory interpretation example, the linguist is testifying as to a question of *law*. Expert testimony and the presentation of scientific evidence are familiar and essential means in our legal system for proving questions of fact. As a general matter, however, our legal system simply refuses even to recognize that propositions of law must be *proven*, and the law therefore does not pay close attention to the mechanisms and procedures by which that proof must be made. As a result, evidence from linguists that ought to be an integral part of the law-finding process looks "out of place" to judges. These judges no doubt reason that expert testimony, cross-examination, and the like are all devices for proving *facts*, not for reaching conclusions about the *law*.

This response by the legal system is a mistake, but it is a mistake so entrenched in our practices that I fear it is impossible to remedy. I have elsewhere discussed at length the nature of, and problems involved in

proving, legal propositions.[3] A few of these points bear specifically on the potential role of linguists in legal interpretation.

First, under almost any plausible theory of legal meaning, every proposition of law is reducible to propositions of fact. If one believes, for example, that statutory meaning is to be found in generally accepted public understandings, it is a *fact* whether the public understanding of phrase X in context Y is or is not Z. If one believes that statutory meaning is to be found in the intentions of the lawmakers, those intentions—whether actual subjective intentions or some hypothetical general intentions—are *facts*. If statutes should be read to promote some specified policy goals, the extent to which an interpretation will or will not promote those goals is a *factual* question (though in many circumstances a highly complex one). Furthermore, even if one believes that a statute means whatever some moral theory says it should mean, the content of that moral theory and the degree to which any given statutory interpretation corresponds with that content are questions of fact.

Second, all propositions of fact are subject to proof (or disproof), which epistemologically involves three elements: principles of admissibility (what counts as evidence for or against the claim?), principles of significance (how much weight is given to the admissible evidence?), and standards of proof (how much admissible evidence do we need in order to validate or invalidate a claim?). In other words, for every factual claim, it is reasonable to ask the claimant, "What did you count as evidence; how heavily did you weigh it; and how much evidence did you require before asserting your claim?"

Third, the American legal system classifies claims in legal proceedings as "propositions of fact" or "propositions of law"[4] and treats each kind of claim very differently for many purposes. Those claims labelled "propositions of fact" must be proved through a highly stylized system of procedural and substantive rules. For example, evidence to support such propositions must meet preestablished standards of admissibility. Moreover, the quantum of evidence needed to establish factual claims is always

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3. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 18 HARV. J.L. & PUB. POL'Y (forthcoming 1995); Gary Lawson, *Proving Ownership*, 11 SOCIAL PHIL. & POL'Y 139 (1994); Gary Lawson, *Proving the Law*, 86 NW. U.L. REV. 859 (1992).

4. There are many practical problems with this method of classification, some of which give rise to a shadowy realm of "mixed questions of law and fact." Those problems need not concern us here, as long as there are any circumstances in which the law's conventions can clearly place issues on the law/fact axis.

specified,[5] and one party or another bears the burden of proof. In sum, where factual propositions are concerned, the legal system is keenly aware of the need for proof, and it gives extensive, explicit consideration to the forms and standards by which proof of such claims must be made.

For those claims labelled "propositions of law," however, the legal system responds very differently. The law in many ways simply does not conceive of legal propositions as something that must be *proven.* Although theories of legal interpretation function, even if unwittingly, as sources of principles of admissibility and significance (your interpretative theory tells you what to count as evidence of a right answer and how much to count it), the law generally does not provide any formal rules for the proof of legal propositions. There are no limits on judicial notice where propositions of law are concerned; the judge is not limited to the materials, arguments, or even the interpretations put forward by the parties. More significantly, with a few exceptions, the law does not explicitly specify the standard of proof for legal propositions[6] or establish who bears the burden of proof in the event that no interpretation meets the relevant standard. In sum, the law, for whatever reason, strongly resists the idea that legal propositions are something for which proof, in its traditional legal sense, is required or appropriate. That resistance no doubt underlies the reaction that Professor Fillmore encountered when he and his colleague sought to prove something about a document's language, and it will surely be an obstacle to full-blown acceptance by the law of the testimony of linguists in matters of legal interpretation.[7]

Accordingly, if the law is going to recognize the contributions that

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5. In general, the prosecution in a criminal case must prove its case beyond a reasonable doubt; in most civil cases the plaintiff must prove its case by a preponderance of the evidence; and in some civil cases the plaintiff must meet some intermediate standard, such as clear and convincing evidence.

6. A few jurisdictions require the government in criminal cases to prove relevant legal propositions beyond a reasonable doubt. *See* Robert Batey, *Techniques of Strict Construction: The Supreme Court and the Gun Control Act of 1968*, 13 AM. J. CRIM. LAW 123, 133-35 (1986). For the most part, however, the law is silent about the standard of proof for legal propositions. *See* Lawson, *Proving the Law*, *supra* note 3, at 888-94.

7. These problems are not unique to linguists or to theories of interpretation that make linguistic evidence relevant. Suppose that one believes that statutory interpretation should search for the subjective intentions of the lawmakers. Then, evidence from psychologists, sociologists, historians, or political scientists would seem to be highly relevant but would no doubt encounter the same obstacles as does evidence from linguists in other contexts. Similarly, if one believes that statutory meaning depends on the extent to which statutes promote good social policy, a wide range of theorists, including economists, political scientists, and game theoreticians, could all play an important role in the interpretative enterprise but surely would receive a judicial reception at least as hostile as did Professor Fillmore and his colleague.

linguists can make to the interpretative enterprise, the law must first recognize that legal propositions, like factual propositions, are indeed subject to *proof.* At that point, the law will have to confront the need explicitly to specify a standard of proof for legal propositions, to assign a burden of proof for legal propositions, and to address the other practical problems concerning proof that it now generally sweeps under the rug where legal propositions are concerned.

It is possible that the outlook for acceptance by the law of the help of linguists in interpretation is not as gloomy as I have suggested. In fact, the law has long explicitly handled—without serious incident—all of these problems involving proof with respect to propositions of *foreign* law.[8] Parties arguing about the content of foreign law are assigned burdens of proof, the standards of proof that govern factual claims apply as well to claims regarding foreign law, and, most importantly for present purposes, expert testimony is an accepted method for proving foreign law.[9] There is no fundamental reason why the law could not apply some of these practices concerning proof of foreign law to domestic law and thus utilize the expert help of linguists in legal interpretation. Nonetheless, that kind of large-scale shift in thinking about domestic legal propositions is, at best, a long way off. Without such a shift, I do not expect linguists to receive a very warm reception from judges engaged in statutory interpretation.

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8. For a more extensive discussion of the proof of foreign law, see Lawson, *Proving the Law*, *supra* note 3, at 898-900.

9. *See* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW: CASES-TEXTS-MATERIALS (5th ed. 1987).