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# THE LIMITED RELEVANCE OF PLAIN MEANING

STEPHEN F. ROSS\*

In this essay, I want to take the heretical position that linguists' principal expertise—ascertaining how language is used by ordinary speakers of English—is often of little value in interpreting controversial non-criminal federal statutes.<sup>1</sup> These statutes, to use Ed Rubin's phrase, are usually not "transitive": they are not directed at ordinary citizen speakers of English, but at a small community of lawyers, regulators, and people subject to their specific regulations.<sup>2</sup> Although linguistic techniques might still aid in understanding their meaning, my thesis is that extrinsic evidence that is known and accessible to this small sub-community—such as legislative history, established norms of construction, and other evidence about the context in which the legislation arose—is more likely than linguistic analysis to help an outside judge shed light on what Congress meant and how the statute is to be understood.<sup>3</sup> Rather than serving as the principal means of interpretation, a statute's ordinary meaning should be a weak, tie-breaking default factor in most cases, to be used only when the judge

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1. I discuss federal criminal statutes below. Because my thesis is that ordinary meaning is significantly less relevant than legislative history, my argument has considerably less force when there is no legislative history and thus ordinary meaning is the *only* way to interpret statutory language—as may often be the case when interpreting state and local legislation.

Of course, most statutory interpretation is based on ordinary meaning—it is done by lawyers and people subject to specific legal regulations every day, and there are no interpretive disputes that arise. In these contexts, of course, the use of expert linguists to tell people what they already know is superfluous.

2. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381, 383 (1989).

3. The Conference Proceedings show some support for this view among the linguists. See, e.g., *Law and Linguistics Conference*, 73 WASH. U. L.Q. 800, 854 (1995) (Prof. Sadock) (most "artifact words" have "built into them some kind of purpose," which is must be determined using extra-textual, pragmatic mechanisms); *id.* at 931 (Prof. Geis) (arguing that contract language should be understandable by ordinary people because woman signing pre-nuptial agreement was not a member of the "community" of lawyers who understood meaning of linguistically "incompetent" text); *id.* at 951-52 (Prof. Sadock) (discussing ability of all people "in all uses of language" to impute significance to an utterance that is different from that which is carried solely by the conventional meanings of the language used).

cannot confidently interpret the statute based on extrinsic indicia of the legislation's meaning as understood by legislators and those actually subject to the legislation.

I confess to heresy because ordinary meaning is so heavily emphasized by interpreters of all the leading schools of statutory interpretation—whether they are textualists like Holmes, who purported to be concerned only about what Congress said, and not what it meant;<sup>4</sup> or intentionalists like Hart and Sacks, who attempt to effectuate the legislature's purpose for acting *pro bono publico* unless doing so would result in an interpretation that the text “cannot bear;”<sup>5</sup> or dynamic interpreters like Eskridge, who believes that interpretation requires a “fusion” of the perspectives of the original drafters and the current-day interpreters, but that “rule of law values” preclude interpretations completely contrary to ordinary meaning.<sup>6</sup>

These so-called “rule of law values” seem to underlie the emphasis placed on ordinary meaning by all three dominant modes of statutory interpretation prevalent today. Finding a precise definition of this oft-cited phrase in judicial opinions or the legal literature is quite difficult. Most often, the phrase seems to be used in two related but discrete contexts. The first one is a call for judicial objectivity. Justice Scalia distinguishes the “general rule of law” from a judge's “personal discretion to do justice.”<sup>7</sup> Justice Holmes, in the same vein, opined that a government of law requires legal standards external to the decisionmaker.<sup>8</sup> This goal is accomplished by a jurisprudence of rules that provides “legal certainty, predictability, and

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4. See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

5. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

6. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 650 (1990); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483, 1543 (1987).

7. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989). Cf. Mark Tushnet, *Book Review: Metaprocedure?*, 63 S. CAL. L. REV. 161, 172-73 (1989) (*Reviewing Procedure by Robert M. Cover, Owen M. Fiss & Judith Resnick*) (“[T]he standard version of the rule of law is that it is designed to create a ‘government of laws, not of men, which is to say that lawmakers should subordinate their personal and (therefore, at least implicitly) emotional reactions to the case at hand to the more general requirements of constructing a viable social order.’”).

8. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41, 44 (1963). See also *Heckler v. Chaney*, 470 U.S. 821, 849 (1985) (Marshall, J., dissenting) (unreviewability of certain HHS decisions is “fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint”).

objectivity.”<sup>9</sup> To the extent that courts consistently use extrinsic aids in a predictable and objective fashion, there is nothing about this version of “rule-of-law values” that suggests the primacy of ordinary meaning. Indeed, while others have developed sophisticated analyses designed to promote the use of legislative history in an objective fashion,<sup>10</sup> the supposed objectivity of ordinary meaning as an interpretive technique is generally asserted rather than demonstrated. Actually, as Peter Strauss has observed, history teaches “that judicial refusals to consider the political history of legislation easily turns into the substitution of judicial pleasure to that of the legislative body.”<sup>11</sup>

Second, the concept of the “rule-of-law” is also frequently employed to describe the proposition that “citizens ought to be able to read the statute books and know their rights and duties.”<sup>12</sup> Today, of course, as Ed Rubin notes, legal rules are not communicated to the ordinary citizen “by their verbal formulation in the statute books.”<sup>13</sup> Indeed, most statutes are, in Rubin’s lexicon, intransitive: they do not apply to ordinary citizens. Where non-criminal statutes do apply to the citizenry, they usually do so via administrative regulations (which probably should be written in understandable English)<sup>14</sup> or concern special areas of law that no ordinary citizen would attempt to comply with without legal advice. Lawyers, unlike ordinary speakers of English, are likely to be familiar with the usual means of communication in the sub-community—the statute’s background and legislative history.

For these reasons, on both normative and descriptive grounds I must

9. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 534 (1992).

10. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 42-47 (1994); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43 (1988).

11. Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI. KENT L. REV. 321, 322 n.3 (1990). See also Hatch, *supra* note 10, at 43 (“Text without context often invites confusion and judicial adventurism . . . . In today’s era of renewed substantive due process and free-wheeling statutory interpretation, reliable forms of legislative history can once again serve as additional strands to tie judges to the law itself”).

12. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990). See also Rubin, *supra* note 2, at 404 (discussing Professor Lon Fuller’s exposition of rule-of-law values as all “derive[d] from the single, underlying norm that people should understand the legal rules they are expected to obey”).

13. Rubin, *supra* note 2, at 404.

14. *Id.* at 405-06.

respectfully disagree with Bill Eskridge and Phil Frickey's view that "statutory text should be the key source of statutory meaning" because it "is the primary means by which citizens, agencies, and courts coordinate their understandings."<sup>15</sup>

One illustration of this point is *Train v. Colorado Public Interest Research Group*.<sup>16</sup> The case involved an interpretation of the Federal Water Pollution Control Act (the "Act"), which required water polluters to use the "best practicable" equipment to clean up water. The issue was whether the Act applied to the discharge of radioactive effluents from two nuclear power plants subject to pre-existing regulation by the Nuclear Regulatory Commission, which required polluters to try to keep releases "as low as is reasonably achievable." A unanimous Supreme Court held that the Act did not apply to radioactive discharges from NRC-regulated nuclear plants, even though the statute required that anyone discharging a pollutant obtain a permit from the Environmental Protection Agency using the higher standard, and defined pollutant to include "radioactive materials." Reversing the court of appeals' judgment that the plain meaning of the statute compelled the conclusion that radioactive discharges were "pollutants" and thus subject to the Act, the Supreme Court held that, "however clear the words may appear on 'superficial examination,'" the legislative history demonstrated that Congress did not intend to subject nuclear power plants to overlapping scrutiny by both the EPA and the NRC.<sup>17</sup> This history included unequivocal language in the House Committee Report excluding these plants from EPA jurisdiction, a Senate floor colloquy which is best read to suggest that the NRC's traditionally exclusive jurisdiction over nuclear power plants would not be affected by the Act, defeat on the House floor of an amendment that would have undercut exclusive NRC jurisdiction, an unequivocal statement from the ranking minority member among the House conferees that the bill did not affect NRC-regulated polluters, and the subsequent House defeat of a proposal to shift regulatory authority for nuclear pollution to the EPA. The Court concluded that it was "abundantly clear after a review of the legislative materials that reliance on the 'plain meaning' of the words 'radioactive materials' contained in the definition of 'pollutant' in the [Act] contributes little to our understanding of whether Congress intended the Act to encompass the regulation of . . .

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15. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 57 (1994).

16. 426 U.S. 1 (1976).

17. *Id.* at 10 (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940)).

nuclear materials.”<sup>18</sup>

I would add to the Court’s conclusion that it is also abundantly clear to anyone who understands how regulated industries work that Congress’ intent was most certainly obvious to lawyers and regulators from the EPA, the NRC, the nuclear power industry, and environmental organizations, all of whom were familiar with the historical context of a strong, if controversial, policy of exclusive NRC jurisdiction over the nuclear power industry and the easily accessible legislative history. The Court’s ruling was predictable, and congressional intent was clear. Because the legislation was completely intransitive, no citizen was ever in doubt as to how to conduct her affairs. (The EPA disclaimed jurisdiction by rulemaking, so operators of nuclear power plants knew they need not obtain a permit from that agency.) Thus, the decision fully comports with “rule-of-law” values.<sup>19</sup>

The Court’s approach in *Train* is superior to one based on the way the text alone would be understood by ordinary speakers of English. Because the drafters intended, and the readers affected by the statute understood, that when Congress passed a bill that told the EPA to regulate “all pollutants,” but in clear legislative history excepted pollutants regulated by the NRC, “all pollutants” actually *meant* “all pollutants other than those regulated by the NRC.” My point is not quite the same as the one frequently made by Conference participants, who suggested that lawyers, judges, and other public officials often disregard the ordinary meaning of words not because of dispute about meaning but rather because laws are sometimes intended to be “regulatory variables” to be ignored in appropriate situations, rather than literal commands (the surgeon should proceed with a lifesaving tracheotomy rather than obey the ordinance barring any “bloodletting in the street”).<sup>20</sup> Rather, my claim is that ordinary speakers of English understand a text that says “all pollutants” differently from those intimately involved with creating and implementing policy in Congress—lawyers, at the EPA, the NRC, the regulated firms, and environmental groups—all of whom are familiar with the legislative history that creates an exception for pollutants regulated by the NRC, in the same way that a

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18. *Id.* at 23-24.

19. Indeed, the Supreme Court’s recent insistence on imposing its view of ordinary meaning, at the expense of the probably shared meaning of the linguistic sub-community, has resulted in many cases where the law is unclear and unstable. See Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1995 SUP. CT. REV. (forthcoming).

20. See, e.g., *Law and Linguistics Conference*, *supra* note 3, at 842-43 (Prof. Levi); *id.* at 847, 944 (Prof. Schauer).

sign that says “no ads on the subway” is understood differently by the ordinary American (who thinks of a subway as a subterranean rapid transit system) and the ordinary Briton (to whom a subway is a subterranean pedestrian walkway).

Bankruptcy law is “transitive” under Rubin’s methodology, but rule of law values do not suggest that plain meaning ought to prevail in that area either. Consider *Shine v. Shine*.<sup>21</sup> In that case, the plaintiff had been awarded monthly alimony payments in an “action for separate maintenance” commenced when she and the defendant separated. The parties were subsequently divorced; the divorce decree made no provision for alimony or support. When the plaintiff finally brought suit to enforce the judgment for past-due alimony, the defendant declared bankruptcy. The issue before the court was whether the debt was non-dischargeable under Section 523(a)(5) of the Bankruptcy Code, a provision amended in 1978 which excepted from discharge debts “to a . . . former spouse . . . in connection with a separation agreement, divorce decree, or property settlement agreement.”<sup>22</sup>

A distinguished panel of the First Circuit<sup>23</sup> refused to follow the plain meaning of the statute, reasoning that doing so would be contrary to the long-standing congressional policy excepting spousal and child support from discharge in bankruptcy. Consulting the legislative history, the court concluded that the drafters’ intent was to expand the area of non-dischargeability beyond the support and alimony obligations that had traditionally been included and to encompass lump-sum property settlements agreed to in connection with a divorce settlement as well. The court took note of the “harried and hurried atmosphere” in which the bill was finally enacted, observing that the committee reports made no mention of any intended change in policy, and that, subsequent to the filing of the complaint in *Shine*, Congress corrected the statute to make clear that alimony awarded was a non-dischargeable debt regardless of the precise form of the judicial order.<sup>24</sup>

If we were to assume that Mr. Shine made plans to avoid paying alimony, considered filing for bankruptcy, made a trip to the public library, read Section 523(a)(5), and was an ordinary speaker of English, we might well conclude that “rule-of-law values” required the court to find the debt

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21. 802 F.2d 583 (1st Cir. 1986).

22. 11 U.S.C. § 523(a)(5) (Supp. II 1978).

23. The panel consisted of Judges Coffin, Bownes and Breyer.

24. 802 F.2d at 587.

dischargeable because it was not made in connection with either a separation agreement, a divorce decree, or a property settlement agreement. But, in fact, it is extremely improbable that Mr. Shine did any such thing. To the extent that Mr. Shine thought about the statute at all, he no doubt consulted a bankruptcy attorney. The attorney would have been familiar with the historical background of the provision (these types of debts were clearly non-dischargeable, prior to the 1978 Bankruptcy Act amendments)<sup>25</sup> and the purpose of section 523(a)(5) (as spelled out in the committee reports and the report of the Commission on the Bankruptcy Laws). And if the interpretive regime were, as I propose, to strongly favor reliance on extrinsic aids, the result would be predictable and clear.

The one area where the foregoing analysis suggests that plain meaning *does* matter involves penal and criminal statutes. Here, the “rule of lenity” requires that statutory ambiguities be resolved in favor of the defendant.<sup>26</sup> But the policies underlying the rule of lenity suggest that, here too, plain meaning may be less important than might initially appear. The rule of lenity is based on two important principles: providing clear notice to the defendant, and protecting against the government’s arbitrary prosecution of vague crimes.<sup>27</sup> Where neither concern is present, the rule of lenity ought not apply, and a defendant may properly be convicted of violating a statute containing a lexical ambiguity.

Consider *People v. Soto*,<sup>28</sup> an appeal of a conviction for grand larceny, which the state’s criminal code defined to include larceny when “the property taken is a bicycle, horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog.”<sup>29</sup> The court rejected the defendant’s contention that, because the animal stolen was in fact a heifer, the evidence was at variance with the indictment and the defendant had not violated the statute. Had Soto’s attorney secured the services of professional linguists to engage in the type of empirical study of “cow” and “heifer” that was undertaken for “enterprise” in the *Yale Law Journal*, I suppose that the study would have demonstrated that many did not think the word cow included the younger heifer, especially in the context of a list of

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25. *Id.* Even a relatively unsophisticated practitioner not personally familiar with the legislative history would surely be familiar with leading specialty treatises, whose authors certainly would have read and included the background and history into their own analysis.

26. *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

27. *See, e.g.*, 3 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (Norman Singer, ed. 1992); Rubin, *supra* note 2, at 397.

28. 49 Cal. 67 (1874).

29. CAL. PENAL CODE § 487 (1872).

bovine animals that included cows, steers, and bulls. The court thought it significant that the legislature intended to make it a felony to steal a cow, and concluded that the enumeration of other bovines was not intended to exclude heifers. Although the decision relied on a specific provision of California law overturning the common law mandate that criminal statutes be strictly construed, there is no reason to suspect that federal courts would reach a different result today under current interpretations of the rule of lenity.<sup>30</sup>

Committed textualists may continue to insist that the meaning which ordinary speakers of English attach to statutory text is important, either because of their controversial and formalistic view that the Constitution proscribes authoritative reference to legislative history,<sup>31</sup> because of the arguable but unprovable empirical claim that extrinsic aids like legislative history are so unreliable that ordinary meaning will lead interpreters to the accurate result over a greater range of cases<sup>32</sup> (although linguists have cast considerable doubt on textualists' favorite extrinsic aid—dictionaries),<sup>33</sup> or because, acting like national nannies, judges believe that an insistence on plain meaning will improve the clarity of legislative drafting and thereby make their own jobs easier.<sup>34</sup> Others may argue that ordinary meaning is

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30. *Consider Nat'l Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994). There, the Court unanimously reversed a court of appeals holding that anti-abortion activists could not be found liable under RICO because the absence of a profit motive precluded a finding that the defendants' alleged conspiracy was an "enterprise." While the case was on appeal, several of the linguists participating in the Conference presented empirical research concluding that "English speakers divide into two groups as to how they understand the word *enterprise*"—one group looking at whether the activity in question is organized for the achievement of a common goal, and another group focusing on whether the entity is like a business. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561, 1595 (1994). Still, the Court had no problem finding the statute clear. Conceding that Congress had not anticipated RICO's coverage of non-profit enterprises, the Court concluded that this demonstrated breadth rather than ambiguity. 114 S. Ct. at 806. Heifer thieves are unlikely to fare better than anti-abortion protesters under this type of analysis.

31. *See, e.g.*, *Thompson v. Thompson*, 484 U.S. 174, 192 (Scalia, J., concurring in the judgment). For criticisms of this view, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION*, 230-34 (1994); Brudney, *supra* note 10, at 42-47.

32. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). For contrary views, see note 10 *supra*.

33. *See* Cunningham et al., *supra* note 30, at 1614-16.

34. In *Chisom v. Roemer*, 111 S. Ct. 2354, 2376 (1991) (Scalia, J., dissenting), for example, non-textual interpretations are decried because they "depriv[e] legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning." There is no evidence, however, that legislators have ever sought or prefer this assurance. *See, e.g.*, Hatch, *supra* note 10. Moreover, as Dan Farber asks, where does Justice Scalia derive his authority to tell Congress how to write laws? Farber, *supra* note 9, at 550 n.89. This approach seems inappropriate in a government of supposedly co-equal branches. Strauss, *supra* note 19, at (manuscript at 89).

a useful interpretive tool for judges who lack the expertise and/or interest in delving into a statute's background and legislative history to determine how the words are understood by the particular linguistic sub-community affected by the legislation.<sup>35</sup> Recent scholarship by three colleagues suggests, however, that as a normative matter this justification for ignoring background and legislative history results in incoherent law and bad doctrine.<sup>36</sup> None of these claims strike me as particularly persuasive, although an in-depth analysis is beyond the scope of this short essay.

My analysis also suggests that "rule-of-law values" do not require judges using purposive or dynamic modes of interpretation to give great weight to the meaning that statutes have for ordinary speakers of English either. Where statutes are intransitive or addressed to a narrow subject unlikely to be acted on by ordinary citizens absent legal counsel, an interpreter faithful to Hart, Sacks, or Eskridge need ask only if the interpretation is one that would be understood by others in the linguistic sub-community.

Although, in my ideal world of statutory interpretation, the contributions of linguistics would be relatively modest, linguists can serve an extremely positive role in the real world, where courts still maintain that plain meaning is very important. In my view, the most important role is to demonstrate that many statutes actually do not have a single meaning to ordinary speakers of English. This is the conclusion arrived at in most of the cases discussed in Solan's book<sup>37</sup> and the Yale article.<sup>38</sup> There will be another large sample of cases, however, where the legislative history is silent, opaque, or where an interpreter suspects legislative shenanigans that deprive the history of its probative value. (Suppose, for example, that the Senate and House floor debates in *Train* yielded conflicting answers to the EPA's jurisdiction, or, alternatively, that the sole piece of legislative history to contradict the text's ordinary meaning was one floor speech by a leading advocate of the nuclear industry with no confirmation from the bill's

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35. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231. Of course, linguistics might not aid judges in these cases; presumably, a judge who is not inclined to explore the political history of a dry statute will not perk up at the prospect of undertaking a serious linguistic analysis of the same text.

36. See Charles J. Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYR. L. REV. 823 (1991); Stephen M. Bainbridge, *Securities Act Section 12(2) After the Gustafson Debacle*, 40 BUS. LAW. (forthcoming 1995).

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

38. Cunningham et al., *supra* note 30.

sponsor.)<sup>39</sup> In such cases, the use of accepted linguistic techniques to inform the court about the meaning ascribed to the text by the members of the linguistic sub-community may be useful.

Linguistics can also make an important contribution in those bizarre cases where courts closely divide on the interpretation of a statute's ordinary meaning. Consider *Regan v. Wald*,<sup>40</sup> a challenge to an executive order issued by President Reagan barring ordinary travel to Cuba. The President had chosen not to follow the procedures required by then-current law for issuing such an order, relying instead on a grandparent clause that authorized the President to continue exercising "the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act which were being exercised with respect to a country on July 1, 1977."<sup>41</sup> The controversy arose because, although President Kennedy had initially ordered the Cuban embargo pursuant to section 5(b) in 1963, President Carter had issued an order in March and May of 1977, permitting some economic dealings with Cuba, including ordinary travel.<sup>42</sup> Five Supreme Court Justices held that the plain meaning of the grandparent clause allowed Reagan to add additional restrictions to the embargo in effect in July of 1977; four Supreme Court Justices and three First Circuit Judges (including one future Supreme Court Justice) concluded that the plain meaning of the clause meant that Reagan could not add additional restrictions to Carter's pre-existing embargo. Based on the accepted linguistic methodology employed in the *Yale Law Journal* article, one would think that the Justices would agree that the very fact of their own disagreement concerning the clause's ordinary meaning would itself suggest that the meaning was not ordinary. Unfortunately, there seem to be few cases thus far where the Justices have reached this conclusion.<sup>43</sup> Hopefully, a greater understanding of linguistic techniques would facilitate such reasoning on their part.

In their invitation to participate in this symposium, Professors

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39. One of the unfortunate effects of the New Textualism may be to make legislative history somewhat less reliable, if legislators are less inclined to respond to manufactured and inaccurate legislative history under the mistaken notion that Justice Scalia's jurisprudence is typical.

40. 468 U.S. 222 (1984).

41. Pub. L. No. 95-223, § 101(b).

42. 42 Fed. Reg. 16621, 24599 (1977).

43. The only example with which I am familiar is *United States v. Granderson*, 114 S. Ct. 1259, 1262 n.2 (1994), where Justice Ginsburg's majority opinion criticizes the reliance on plain meaning in Justice Kennedy's dissent on the ground that no other judge that had "essayed construction of the prescription at issue has come upon the answer Justice Kennedy finds clear."

Cunningham and Levi sought to provoke comment by asking what would happen if laws were applied based on the way the average citizen understood them. My response is to “fight the hypo” by suggesting that laws are not written for, nor need they be understood by, the average citizen speaker of English. Rather, most federal statutes are written for a narrower linguistic sub-community of specialists and lawyers. Those outsiders called upon to resolve disputes among members of this sub-community should, like outside arbitrators resolving disputes under the Uniform Commercial Code, place much greater significance on the statute’s background and history, as such is understood by those “in the trade,”<sup>44</sup> rather than on the “plain meaning” of the black textual letters written on the pieces of paper bound together as the United States Code.

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44. *See, e.g.,* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981) (despite contract language setting price at “Shell’s Posted Price at time of delivery,” court applies trade usage that waived price increases for sales needed to complete projects that Nanakuli had already bid and won).

