Washington University Law Review

Volume 73
Issue 3 *Northwestern University / Washington University Law and Linguistics Conference*

January 1995

Faithful Interpretation

Philip P. Frickey
University of Minnesota

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Part of the Legal Writing and Research Commons

Recommended Citation

Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L. Q. 1085 (1995).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol73/iss3/17

This Conference Proceeding is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

FAITHFUL INTERPRETATION

PHILIP P. FRICKEY*

Upon examining the dialogue among scholars of law and of linguistics, I was struck by the apparent agreement that, to use Paul Campos's term, there is no such thing as an "autonomous text."[1] Texts are not self-evident repositories of meaning, but instead can make sense only in context.[2]

Just what context, though? And who decides? On my reading, the linguists at the conference saw their scholarly task as assessing "language," including statutory language, descriptively based on conventional usage. Because this is an empirical and discoverable inquiry, it is a more sophisticated and scientific method of identifying textual meaning than that promoted by "new textualists" such as Justice Scalia, in that it engages in the empirical investigation of testable hypotheses rather than fireside intuition and an utterly undue reliance on dictionaries.[3] Nonetheless, Justice Scalia and other new textualists are not attempting something far off this mark, at least in those situations where they have stressed ordinary meaning by reference to what speakers of American English would generally conclude.[4] After all, the new textualists purport to be searching

---

* Faegre & Benson Professor of Law, University of Minnesota. B.A. University of Kansas (1975); J.D. University of Michigan (1978). Thanks to Paul Campos, Jim Chen, Bill Eskridge, Dan Farber, and Holly Brod Farber for helpful comments. In this essay, I have accepted the welcome invitation of the Washington University Law Quarterly to jettison most of the formal requirements for a law review article, including citations in support of most propositions. I should also hasten to add that many of the points I raise in this essay were developed by the participants at the symposium as well and, in any event, are not novel.

1. *See* Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).

2. For example, even though there was apparent agreement at the symposium that the "no vehicles in the park" hypothetical would be somewhat different if the prohibition said "no bicycles in the park," the same problems of context would arise. Illustratively, in many cities, police officers patrol on bicycles. Would the prohibition apply to such a police officer attempting to apprehend a criminal who had fled on foot into the park? To take another example, would the prohibition apply to unicycles? Tricycles? A bicycle built for two? A bicycle with a two-wheeled child carrier attached to it, so that the "peddled person-propelled vehicle" had four rather than two wheels? In all of these and countless other practical examples, the textual commandment cannot be sensibly understood by members of the citizenry subject to the primary duty created, as well as by primary enforcement officials such as the police and by ultimate interpreters such as judges, without the contextual backdrop.

3. *See, e.g.*, Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

4. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).

Washington University Open Scholarship

for some "objective" word meaning that cannot be circumvented by willful judges. From that perspective, the more scientific and empirical the inquiry, the better.

In contrast, the legal scholars saw the interpretation of legal language as a stylized use by legally trained professionals of conventions linked to normative conclusions about the role of law in society. Even the new textualists seem to concur, at least insofar as they would allow "established canons" of statutory interpretation to play a role in their attribution of meaning to statutory language.[5] One central reason is that the law is attempting to accomplish two rather contradictory things. It is attempting, first, to communicate duties to the citizenry in general and to officials in particular, a use of language perhaps substantially captured in the linguist's focus on conventional understandings.[6] Simultaneously, the law seeks to channel the discretion of enforcement officers and judges to maximize justice in widely divergent circumstances. Accordingly, the law superimposes on ordinary meaning all manner of canons of interpretation, maxims, and exceptions (*e.g.*, purpose trumps plain meaning; avoid absurd results). It is this superimposition of normatively rooted interpretive directions that, for the legal scholars, makes legal interpretation a specialized treatment of a specialized language—that is, the work of an interpretive community. For the linguists, however, as I understand it, the move toward normativity is simply not the use of language at all, but instead is the subordination of language to other goals.

To me, a broader concern seemed to surround this dialogue: that of fidelity to the mission of interpretation. If "interpretation" is defined in a strictly empirical and verifiable sense, what the legal system does with the language of positive law hardly qualifies. The division between "is" and "ought" is, of course, a familiar one in the legal community itself. Every traditional theory of statutory interpretation wants to have it both ways: some "objective" limits, usually tied to "the text" or to "established canons," that promote predictability and inhibit interpretive willfulness, and some "normative" qualifications that promote justice and fairness.

To illustrate, the literature is replete with references that can only be understood as supposing that "the text" itself sets boundaries for interpretation. It is widely recognized that the older forms of "plain meaning"

5. *See id.* at 404.

6. I say "substantially captured" because law assumes that when legal terms of art opaque to the public but clear to the lawyer are used, the terms clearly convey their technical legal meaning.

interpretation,[7] as well as the "new textualism,"[8] are rooted in the notion that "the text" sets strict limits on legal interpretation. Less well understood is that the purposive approach of Hart and Sacks[9] and at least some theories rooted in hermeneutics[10] also treat the text as having a confining impact on interpretation. There is no reason why the findings of linguistics cannot inform what "the text" means in these circumstances. Replacing any reliance upon "literal meaning" or "plain meaning" with the "conventional usage," as demonstrated by linguistics, would surely be a welcome development. After all, both "literal meaning" and "plain meaning" often look like either what the judge intuits or, worse yet, what the judge instinctively (if subconsciously) knows best suits her desired result.

Intriguingly, although neither the linguists nor the legal scholars, or for that matter the legal interpretive theories mentioned thus far, consider statutory text "autonomous" in a naive way such as acontextual "plain meaning" or "literal meaning," all of them consider "text" as having some component (*i.e.*, conventional usage) potentially independent of the meaning intended by the speaker. This conclusion is hardly inevitable. Campos, for example, considers any autonomy of text from speaker to be fallacious. For him, to interpret the text is equivalent to ascertaining the intention of its author(s).[11] In this conclusion he stands in good company with several prominent analysts of literary interpretation[12] and returns to a theme once prominently developed by a renowned legal scholar.[13] The text, as an intentional communicative act, is governed by the communication its utterer intended it to contain.

---

7 *See, e.g.*, Caminetti v. United States, 242 U.S. 470 (1917).

8. For examples of cases that employ "new textualism," see Chisom v. Roemer, 501 U.S. at 404 (Scalia, J., dissenting); Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (Scalia, J., concurring in the judgment). For general discussion, see, *e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

9. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (court should not give statutory words "a meaning they will not bear").

10. *See, e.g.*, William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990), analyzed in Campos, *supra* note 1.

11. That is, the meaning of the text is completely governed by authorial intent, no matter how difficult to discover, and not merely influenced by the reader's natural speculations about utterer's intent as part of a pragmatic assessment of the message.

12. *See* STEVEN KNAPP & WALTER B. MICHAELS, AGAINST THEORY, CRITICAL INQUIRY 723 (1982), *reprinted in* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11 (W.J.T. Mitchell ed., 1985).

13. *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907).

Washington University Open Scholarship

One obvious difficulty with this conclusion, of course, is that it can lead into the "private language" problem often attributed to Wittgenstein.[14] Campos acknowledges as much when he concludes that the phrase "the red fish swims at dawn" must be "interpreted" as equivalent to the intention of its utterer, whether that be an angler's advice that red snapper is best caught in the early morning or a spy's secret message that a submarine sails at sunup.[15]

At first blush, it would seem incomprehensible to suggest that a statute can have the quality of a private language. Statutes that establish primary duties for the citizenry, are enforced by police agencies, and are interpreted by publicly accountable judges must communicate by their text messages that inform ordinary people what they may not do, officials what discretion they have in enforcing those duties, and judges what equitable authority they have in handling prosecutions. The enterprise of statutory creation, enforcement, and interpretation necessarily must be a public one.[16]

But public in what sense? Linguists might find it troubling that a community of lawyers would not only understand English words written on paper in a way inconsistent with conventional usage, but also that they would then insist that this was the proper interpretation of those words. Linguists could charge the lawyers with developing a private language (which, as I understand the linguistic perspective, is an oxymoron) and foisting it upon an unsuspecting public.

This hypothesized complaint would misunderstand the special way in which statutory interpretation is "public." To the extent that statutory interpretive conclusions disagree with conventional (*i.e.*, public) usage of statutory words, the disagreement is, or at least should be, animated by other "public" concerns, those rooted in our "public" law. The most basic and obvious one is the Constitution. For example, if the most likely conventional usage of statutory words would violate the Constitution, under traditional dogma the interpreter should prefer a different interpretation, at least so long as the saving construction is also plausible from the perspective of conventional usage. Our "public" law also includes longstanding traditions, such that, among other things, law should be functional, should avoid absurd results, and should promote justice.

14. *See, e.g.*, SAUL A. KRIPKE, WITTGENSTEIN, ON RULES AND PRIVATE LANGUAGE (1982).

15. *See* Campos, *supra* note 1, at 1089.

16. This point may be less supportable with respect to statutes or rules that are not aimed at the public at large. For example, leaving pro se litigants aside, it seems less important whether the Federal Rules of Civil Procedure or the Federal Rules of Evidence embody conventional usage.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss3/17

To be sure, this endangers what Pound called "spurious interpretation" and what Campos called "reauthoring," which happens if the interpreter, say a judge, rewrites the statute for some reason (*e.g.*, to promote justice, to reach a practical outcome, to let off persons who have bribed the judge, to promote personal political agendas, or whatever) in the guise of merely "interpreting" it. For Pound and Campos, the reauthoring is deviating from original authorial intent; for linguists, a similar charge could be made about deviating from conventional usage. Both the "intentionalists" and the linguists could raise legitimate complaints about interpretive abuse, albeit they would define it differently.

While admittedly hard to identify and define but nonetheless obviously a real danger, I would suggest that it is this quality of faithlessness in *statutory* (as opposed to literary or other nonlegal) interpretation that animates the anxieties of statutory interpretation. If, as the participants at this conference seem to agree, and in which I concur, statutes are simultaneously somewhat self-defining (so that persons know their duties and so that official discretion is cabined), yet also instruments of practical contextual communication (so that the duties and discretion can react functionally to circumstance) and of social governance (so that larger issues of public law, such as the Constitution, come into play as well), it becomes difficult to identify the line separating faithful and faithless enforcement and interpretation.

Hypotheticals about domestic employees instructed to fetch soupmeat,[17] however informative about communication in nonlegal contexts, do not seem to me fully to capture the heart of the problem when the coercive power of law is involved. A trusted domestic employee, given the task of long-term maintenance of children, has essentially been delegated the responsibility to act appropriately in the circumstances, at least in the absence of absolutely clear and inviolate narrowing instructions.[18] It is far more debatable whether a legal system could operate with that much flexibility when primary duties for the general citizenry, and enforcement and interpretive responsibilities for countless police and judges, are at stake. My point is that the "faithful" domestic employee may have a good deal more freedom than the "faithful" police officer or judge, not because of

17. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-22 (1880). This hypothetical was imaginatively reconceptualized by Bill Eskridge both at the conference and in WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 53, 56-57, 125-28, 246-47 (1994).

18. Of course, this conclusion is rooted in all sorts of debatable normative and empirical assumptions.

Washington University Open Scholarship

anything inherent in language or even necessarily in the actual or presumed intentions of the author of the instructions, but because of the differences between life in general and law in particular. This is so even though both the employee on the one hand and police and judges on the other are in some sense agents of a principal (the head of the household, the legislature or, more grandly, "the law"). Literary interpretation seems much further afield, for I think it hard to justify the conclusion that in that context the reader is the "agent" of the author in any meaningful sense at all.

If statutory interpretation is a specialized endeavor with the concept of "faithful interpretation" at its heart, and if such interpretation attempts simultaneously to reach contextual and functional yet predictable and nonsubjective conclusions, then we ought to encounter efforts to mediate these tensions in all theories of statutory interpretation. I think we do, although some mediating approaches are surely superior to others.

A current formula for textualism is "first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies."[19] At first glance, step one of this formulation looks almost entirely acontextual, asking only whether other language in the same text helps us understand the words at issue. This first glance may well be deceiving. The term "ordinary meaning" is deeply ambiguous in this "textual context." It could mean what the linguists call "conventional meaning," a richly contextual understanding of language usage. That conclusion is supported in part by noting that new textualists enthusiastically examine dictionaries on the assumption that they reflect conventional usage. Moreover, we know lots of contextual information about the statute: it is written in English; Congress enacted it; it is part of the law of the United States, and presumably is subject to all manner of background assumptions American lawyers make about our law; and so on. Indeed, step two confirms that background context is crucial, for it directs the interpreter to the "established canons of construction," which are merely interpretive guidelines that, through dint of sheer judicial repetition, take on the label of "canon." The more one accepts canons aimed at promoting functional and practical interpretation, the more this kind of textualism begins to merge with other theories of interpretation.[20] The faithful

19. Chisom v. Roemer, 501 U.S. at 404 (Scalia, J., dissenting).

20. A fundamental question is, of course, what is an "established" canon? Any truly limiting and "objective" answer to this question seems to me quite hopeless once it is recognized that the Court makes up new canons and applies them to pending cases, with the consent of the "new textualists." *See,*

https://openscholarship.wustl.edu/law_lawreview/vol73/iss3/17

interpreter, then, is not merely a literal reader, but faithful to the many broader concerns wrapped up in the established practices of the legal interpretive community. These established practices, more than literal statutory text or even empirically verified conventional usage, may provide some promise of predictability and certainty mediated by some search for justice.[21]

In contrast to textualism, intentionalism contends that the interpreter should be the faithful agent of the intentions of the enacting legislature. Pound captured this idea in what he called "genuine interpretation," and more recently Campos simply defined "interpretation" as containing only this inquiry. Both scholars recognized, however, the hydraulic pressure to engage in what they called, respectively, "spurious interpretation" and "reauthoring." Indeed, Campos has noted that many legal documents are not "interpreted" in his sense at all, but rather are treated as "canonical texts" that, within boundaries established essentially by notions of faithfulness to a shared enterprise, are reauthored over time by their interpretive communities.[22] On this reading, intentionalism could be seen as merely a dispute over definitions. To me, it has more important lessons. It serves simultaneously as a warning against acontextual ascription of textual meaning and against faithless rewriting in the guise of mere interpretation.

Under the purposive approach, all law, including statutory law, is a human, purposive endeavor.[23] Statutes should be interpreted to promote their overall organizing purposes, with two basic limitations.[24] First, judicial policies of clear statement, derived from the Constitution, require that ambiguities in criminal statutes be interpreted favorably to the accused and that, if one construction of a statute would render it unconstitutional,

---

e g, Gregory v. Ashcroft, 501 U.S. 452 (1991). The *Gregory* majority, with the agreement of Justices Scalia and Kennedy, applied a new clear-statement requirement to congressional attempts to regulate core state functions. In any event, even canons that everyone assumes are "established" go beyond providing supposedly objective answers and serve functional goals. *See, e.g.*, McNally v. United States, 483 U.S. 350 (1987). The *McNally* court, with the agreement of Justice Scalia, trimmed apparently clear language in the federal mail fraud statute to cut off prosecution of state government political corruption. This interpretation avoided federal interference with state political processes and limited federal prosecutorial discretion. It was hardly "predictable," much less "objective," however; the dominant view in the lower federal courts had used a more expansive approach.

21. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27 (1994).

22. *See* Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279, 303-10 (1992).

23. *See* HART & SACKS, *supra* note 9, at 148.

24. *See, e.g., id.* at 1374, 1376-77.

Washington University Open Scholarship

the interpreter should prefer an alternative interpretation that saves the statute so long as the latter is a permissible one. Second, the interpreter should avoid any construction that gives the words of the statute "a meaning they will not bear."[25] All of this seems consistent with the attempt to mediate the goals of certainty and predictability, on the one hand, with the goal of functionality, on the other. That it can serve neither goal perfectly is neither surprising nor objectionable.

If faithfulness is the key concept, it is a pity that it is so hard to measure. I am reminded of an anecdote presented to me in a paper a former student wrote on statutory interpretation. The paper illustrates well the difficulties faced by the lawgiver in communicating duties and even the faithful interpreter in making contextual sense of them:

> * * * When I was a student in Hebrew school I was told this joke by a favorite teacher named Earl Schwartz regarding the commandment to keep kosher:
>
> The biblical language requires followers to "not cook a calf in its mother's milk." So when G-d give this commandment to Moses he replied, "I understand, the people must have separate dishes for milk and meat and they must never touch." And G-d answered, "No, I said 'Do not cook a calf in its mother's milk.'" Moses replied, "Ah, now I understand, the people must wait one-half hour after eating milk to eat meat and six hours after eating meat to eat milk." And G-d repeated, "I said, 'Do not cook a calf in its mother's milk." Moses nodded his head and said, "What you mean is that pepperoni pizza and cheeseburgers are out of the question." This exchange continued for awhile until finally G-d, exasperated, surrendered to Moses, saying "I give up. Have it your way."[26]

What I especially enjoy about this anecdote is that it demonstrates three crucial aspects of interpretation. First, even when the lawgiver and the interpreter must, in the circumstances, be conclusively presumed to be acting in good faith and with optimal effort, lawmaking and subsequent interpretation are difficult endeavors. The second is that the anecdote makes sense only when it is assumed—as every reader subconsciously does—that the interpretation in this setting is part of a larger enterprise, in this instance the enterprise of the Jewish faith. Interpretation is a method by which a community—an interpretive community—goes about part of its business.

---

25. *Id.* at 1374.

26. Holly B. Farber, The Red Fish Swims at Dawn: A Response to THAT OBSCURE OBJECT OF DESIRE: HERMENEUTICS AND THE AUTONOMOUS LEGAL TEXT 7 (Spring 1993) (on file with the author). I thank Ms. Farber for permission to reprint this story.

That business might be sacred, aesthetic, regulatory, or otherwise. It is only by capturing the broader assumptions about the enterprise that we can make sense out of the lesser included function to be performed by interpretation for that enterprise. If the religious enterprise aims at sacredness, the literary enterprise aims at aesthetic pleasure or insight, and the legal enterprise aims at governing a secular society in a functional and humane manner, we ought not be surprised that interpretive techniques across these different communities are far from identic or that within each community the appropriate technique is subject to debate. Third, if, as in the cases of religion, literature, and law, once the text is produced it takes on a perpetual quality and there is no easy method by which the interpreters have recourse to further instructions, the interpreters must make what they can of the text in its varying social contexts through faithful implementation of the enterprise.

Sophisticated legal scholars have never doubted these propositions. For example, although the new textualism is sometimes condemned for reliance upon ridiculous assumptions about texts having acontextual meaning, the more sophisticated practitioners of that craft are innocent of any such crime. Consider the perspective of Judge Easterbrook. For him, textualism "rests not on a silly belief that texts have timeless meanings divorced from their many contexts, not on the assumption that what is plain to one reader must be plain to any other (and identical to the plan of the writer), but on the constitutional allocation of powers."[27] The concern, in short, "'is political rather than epistemological or hermeneutic.'"[28] Similarly, Hart and Sacks developed an elaborate theory of purposive statutory interpretation based on normative (or, if you wish, political) assumptions about all law being purposive, legislatures presumed to be made up of reasonable people pursuing reasonable purposes reasonably, short-term political currents being essentially irrelevant to interpretation, and the like. Although they, too, have sometimes been criticized for being naive, the better understanding of their work is that their assumptions were mostly normative rather than empirical.

The evaluation of faithfulness, then, must be in relation to the enterprise

---

27. *In re* Sinclair, 870 F.2d 1340, 1344 (1989) (Easterbrook, J.).

28. Herrmann v. Cencom Cable Associates, Inc., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) (quoting Central States Pension Fund v. Lady Baltimore Foods, Inc., 960 F.2d 1339, 1346 (7th Cir. 1992) (Posner, J.)). In an interesting and as-yet unpublished manuscript, George Taylor carefully demonstrates that the only plausible defense for textualism turns on political, rather than empirical, assumptions. *See* George Taylor, Textualism at Work (unpublished book manuscript, on file with the author).

Washington University Open Scholarship

in question, not faithfulness to some "autonomous" text, or conventional usage, or authorial intent, or other construct. Just what that enterprise entails can be, and, in the context of statutory interpretation, has been, hotly contested.

Linguists are not normativists, and this is useful in evaluating the enterprise of statutory interpretation. What linguists can do, at a minimum, is help those of us interested in statutory interpretation to keep our "ises" and our "oughts" straight, to avoid making grand claims of objectivity in the guise of empiricism when, in fact, our conclusions are rooted in deeply debatable normative propositions. Illustratively, linguists can usefully deflate any practitioner of "plain meaning" as "acontextual" meaning. Linguists can also usefully educate legal interpreters about the breadth and complexity of "conventional meaning." In addition, linguists could assess the canons of statutory interpretation, particularly the "intrinsic canons" based on word meaning and relationship, in light of conventional usage.[29] Perhaps most usefully, linguists might consider making their own normative move, one similar to what apparently animated Campos: don't disguise the legal interpretive community's complex and normatively driven attribution of meaning to a statute with the identification of either a "conventional meaning" in general or with any conventional meaning of "interpretation" in particular. In other words, those attributing meaning to a statute should not hide behind the term "interpretation" when, in fact, they are doing something that Campos would call "reauthoring" and that linguists might call "making law" as opposed to "discovering conventional meaning." To the extent that legal scholars and judges hide the normative ball under the guise of mere interpretation, they do deserve our criticism and, if the delusion continues, our scorn.

In short, linguists can perform a useful role in policing the practices and excesses of legal "interpretation." But once the empirical questions are analyzed with their help and the issues turn more overtly normative, their assistance to us ends.[30] To whom legal interpreters should turn for assistance in examining law's normativity is a strikingly different question that, thankfully, is beyond the scope of this essay.

---

29. The relationship between these canons and Gricean linguistic pragmatics is developed in Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179.

30. Indeed, whether conventional usage should be adopted as a side constraint in legal interpretation is, itself, a normative rather than empirical question. Thus, although a legal interpreter might make this choice and find value in the linguists' empirical expertise, this and all the other choices that the interpreter makes are normative. As Dan Farber and Paul Campos said independently to me in their comments on this essay, legal interpretation is "normative all the way down."

https://openscholarship.wustl.edu/law_lawreview/vol73/iss3/17