

## LAW'S "WAY OF WORDS": PRAGMATICS AND TEXTUALIST ERROR

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## I. INTRODUCTION

*"[T]here is often a divergence between what a person says and what she means, between the meaning of the linguistic expression she uses and the meaning she seeks to communicate by using it."*

—Robyn Carston<sup>1</sup>

*"Meaning is inevitably dependent on context."*

—Restatement (Second) of Contracts<sup>2</sup>

*"Pure applesauce."*

—Justice Scalia<sup>3</sup>

Two priests fluent in English and Latin live in a jurisdiction where wild horses may be legally seized and sold. The first priest emails the second priest: "If you seize the wild horse known as Sind,

1. ROBYN CARSTON, THOUGHTS AND UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATION 15 (2002).

2. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (AM. LAW INST. 1981).

3. *King v. Burwell*, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting). In its context, Justice Scalia no doubt gives "pure applesauce" the slang meaning of "pure nonsense" rather than the standard meaning of "[a]pples stewed to a pulp and sometimes sweetened or spiced." *Applesauce*, AMERICAN HERITAGE COLLEGE DICTIONARY 66 (3d ed. 1993).

hold him for me, and send me notice that you have him, I'll pay you \$1000.00." The second priest promptly seizes Sind, promptly puts him in a holding pen for the first priest, and promptly emails the first priest: "Peccavi," which is gibberish in English but means "I have sinned" in Latin.<sup>4</sup> Does the first priest now owe the second priest \$1000.00? Neither an English nor a Latin dictionary provides the answer. Instead, we would look for the answer in how we use (and even make sport of) language. Is the answer meant as a phonetic equivalent (after translation) of "I have Sind"? If so, does that count as meeting the notice requirement? Is it perhaps an even richer answer of "I have sinned and have Sind"? Each of these possibilities shows us that speaker meaning can differ from linguistic meaning. Since such divergence can occur, text alone is not going to give us any kind of real-world answer to our contract question here.

Three lawyers have graduated from the same law school. The first lawyer emails the second lawyer asking whether he would recommend the third lawyer's firm to handle a certain complex legal matter. He emails her back a one-sentence reply: "Well, that firm generally has pretty easy client parking for a downtown firm." In interpreting this one-line answer as a proficient language user would, the second lawyer does not limit herself to the text of the unasked parking question. She knows it would be a waste of her time to parse the words of that text or look them up in a dictionary. Instead, she notes the obvious failure to address the competence of the firm and takes this as a polite non-recommendation of the firm. She understands that in real-world communication we value both relevance *and* politeness, i.e., that we want to be relevant but we also do not want to offend a mutual friend.<sup>5</sup> By grasping the interplay of these values, she makes sense of this facially-irrelevant response. In other words, she also realizes that speaker meaning can diverge from linguistic meaning.

One person pens a letter to another. The letter contains various statements communicating the writer's love for the addressee. The letter is mailed in an envelope covered with drawings of hearts and the word "love." The sender uses a postage stamp picturing cupid and mails the letter from a place called Great Love. The envelope therefore bears a "Great Love" postmark. In evaluating the "text" of the letter, do we also include the envelope? The postage stamp? The postmark? As this example shows, in addition to looking for meaning in text, we must also look for and agree upon the extent of the text in any

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4. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 36 (Harv. U. Press 1991). This example is a twist of one cited by Grice "the British General who captured the province of Sind and sent back the message: *Peccavi*." *Id.* The use of "Way of Words" in the title of this article is in homage to Grice.

5. See *infra* notes 77-83, 153-172, and accompanying text.

case. Do we look for the text first and then turn to interpretation? Or can we really agree on the text without some understanding of the meaning? Would the question of including the stamp and the postmark arise if we did not consider this a love letter? All this again brings us back to what people do and find acceptable in the real world of language use.

Turning to that real world, Congress has passed the Affordable Care Act<sup>6</sup> (the “ACA”) hoping to expand healthcare and lower costs.<sup>7</sup> Among other provisions, Section 1311 of the ACA provides that states “shall” set up “Exchanges” although Section 1321 recognizes that a state may elect not to do so.<sup>8</sup> Additionally, Section 1321 provides that if a state does not elect to set up an Exchange, the Department of Health and Human Services “shall . . . establish and operate such Exchange within the State[.]”<sup>9</sup> Finally, Section 1401(a) of the ACA provides subsidies for coverage “enrolled in through an Exchange established by the State under Section 1311[.]”<sup>10</sup> Since no express mention is made of federal Exchanges in the last provision, are subsidies therefore available only for Exchanges set up by the states themselves? Is the relevant text here just Section 1401 or are Sections 1311 and 1321 also part of the relevant text? In any case, can text alone give us an answer to this question or must we, as in the previous examples, look beyond text to context and the way we actually use language in the real world? The Supreme Court has recently ruled that subsidies are available for federal Exchanges.<sup>11</sup> But does this result square with how language works in the real world? We will return to this ACA example at various points throughout this article.<sup>12</sup>

As I have maintained in *Exercising Common Sense*,<sup>13</sup> good legal skills require knowledge of the humanities; the linguistic and philoso-

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6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

7. *Key Features of the Affordable Care Act*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca/index.html>. (Nov. 18, 2014).

8. Patient Protection and Affordable Care Act §§ 1311, 1321, 42 U.S.C. §§ 18031, 18041 (2010).

9. Patient Protection and Affordable Care Act § 1321, 42 U.S.C. § 18041 (2010).

10. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

11. *See Burwell*, 131 S. Ct. at 2480.

12. *See infra* notes 203-214 and accompanying text. I will provide a pragmatic analysis (as that term is defined in Section II below) of the result rather than an analysis of the reasoning involved in the opinion. I hope to explore the opinion itself in a later article.

13. Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014).

phy of language issues raised here provide a good example.<sup>14</sup> Lawyers and judges cannot adequately address the nature of text, meaning, or interpretation without reference to the vast insights provided by linguists and philosophers of language. I hope this article will help move more opinion in that direction and as a result lead to more sensible lawyering and judging.

To this end, I will explore what linguists and philosophers of language call "pragmatics" (i.e., how language works in use as more particularly defined below).<sup>15</sup> I will provide an overview of the highlights of such pragmatics thereby hoping to outline a basic toolbox needed to perform pragmatic analysis of legal texts. Not all the tools will be needed in any particular case but knowledge of all such basic tools is needed for any general fluency in pragmatics. When I speak of "interpretation" in the overview that follows, I speak of the process of determining meaning.<sup>16</sup> As we will see time and again as we try to determine meaning, speaker meaning can differ from linguistic meaning and thus from the literal or more limited meaning of text.

## II. "PRAGMATICS" DEFINED

By "pragmatics" I mean the study of how language users actually use and interpret words and other signs in communication.<sup>17</sup> Pragmatics thus focuses on "word-user relations" rather than upon the "word-word" relations involved in syntax or the "word-world" relations involved in semantics.<sup>18</sup> Instead, pragmatics studies speaker performance and success in communication rather than a speaker's grammatical or terminological competence.<sup>19</sup> In doing so, it focuses on how language is used in context "to communicate a speaker's messages."<sup>20</sup> By "context" in general I mean "all the circumstances

14. See *Linguistics*, AMERICAN HERITAGE COLLEGE DICTIONARY 789 (3d ed. 1993). Linguistics is "[t]he study of the nature and structure of human speech." *Id.*; see also THE OXFORD COMPANION TO PHILOSOPHY 458 (Ted Honderich ed., 1995). Philosophy of language "explores the relationships between ourselves and our language, and our language and the world." *Id.*

15. See *infra* notes 17-21 and accompanying text. Section II below.

16. See WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 136 (Carolina Acad. Press 2006). In the context of statutes, interpretation "is the process by which judges determine statutory meaning." *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. a (AM. LAW INST. 1981) (stating "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.").

17. Jacob. L. Mey, *Pragmatics: Overview*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 786, 786 (Jacob. L. Mey & Keith Brown eds., 2009); Andries Bezuidenhout, *Semantics-Pragmatics Boundary*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 875, 875 (Jacob. L. Mey & Keith Brown eds., 2009).

18. See Bezuidenhout, *supra* note 17, at 875.

19. See *id.*

20. See Mey, *supra* note 17, at 786; Bezuidenhout, *supra* note 17, at 913. Following Charles Morris, pragmatics and semantics are considered by many to be two of the

that go into defining the backgrounds and goals of the interactants” with the further understanding that context is dynamic and subject to constant adjustment.<sup>21</sup> I also introduce in Section VI of the Article more specific types of context such as cognitive context; physical and temporal context; social, cultural, and human context; discourse context; textual or internal context; and purpose context.

For example, a speaker may not know how to conjugate a verb or to use commas but may still effectively communicate. Thus, the addressee of the love letter above might respond with this: “I, ain’t never lovin, you.” Though a grammatical and syntactical mess, the phrase is easily understandable, and parsing wording, double negatives, and comma placement here would at best just lead to wasted time or confusion. Similarly, the attorney seeking advice in the law firm recommendation example should understand the response as “not recommended” even though “not recommended” is never said. Exploring instead the truth or falsity of the statement about parking would also at best be either a waste of time or lead to confusion.

The pragmatic insight in both cases is that good communication can happen with bad syntax, grammar, and even statements of questionable facial relevance. The pragmatic challenge is both to grasp how this happens and to resist the formalist temptation to force communication into “proper” modes that change the communication’s meaning. It would be foolish, for example, to use a dictionary and grammar book to render “I, ain’t never lovin, you” into an affirmation of love. An out of touch formalist could do that: a double negative is no negative at all since “not not” must mean the absence of a not and thus a negative. I hope to avoid such foolish formalism and help others do the same by first looking in more detail at discourse and text pragmatics in general in Section III and by then turning to legal pragmatics in more detail beginning with Section IV.

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three subfields of semiotics (the study of signs) which also includes syntactics “which studies the relations between a given sign vehicle and other sign vehicles.” *Id.* A “sign vehicle” is “that which acts as a sign.” See WINFRIED NOTH, *HANDBOOK OF SEMIOTICS* 50 (Ind. U. Press 1990). Charles Morris also defines syntactics as “the formal relations of signs to one another.” *Id.* at 51. I would further refine this to hold that syntactics studies the formal relations of signifiers, i.e., of those things which intentionally represent something else. See Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 *FIRST AMEND. L. REV.* 237, 247 (2013) [hereinafter *Crushing Animals and Crashing Funerals*].

21. See Mey, *supra* note 17, at 786.

## III. DISCOURSE AND TEXT PRAGMATICS

"[W]ords, no matter how well chosen and correctly joined and pronounced, do not convey the entire message, or even the major portion of what we intend to say."

—J. L. Mey<sup>22</sup>

"How every fool can play upon the word!"

—Shakespeare, Merchant of Venice<sup>23</sup>

Since law often involves discourse and since much of modern pragmatics began with the discourse analyses of Paul Grice,<sup>24</sup> it is both useful and interesting to look at pragmatics in discourse before focusing more purely on legal pragmatics. I will thus briefly explore how discourse, discourse meaning, and discourse interpretation work in practice.

## A. MESSAGE CONSTRUCTION AND RECONSTRUCTION

## 1. Discourse Stages

"Words are used as conventional symbols of mental states . . . ."

—Restatement (Second) of Contracts<sup>25</sup>

"I'll show my mind  
According to my shallow simple skill."

—Shakespeare, Two Gentlemen of Verona<sup>26</sup>

Building upon ideas of Alan Cruse, we can identify up to nine "components or stages" of "a typical act of linguistic communication involving a speaker and an addressee" and a text:

- (i) The speaker normally has a *purpose* in communicating.
- (ii) The speaker constructs a *message* to be communicated.
- (iii) The speaker constructs an *utterance* with which to convey the message.
- (iv) The speaker transforms the utterance into a [*text*].
- (v) The speaker *transmits* the [*text*].
- (vi) The addressee *receives* the [*text*].
- (vii) The addressee *decodes* the [*text*] to recover the utterance.

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22. See *id.* at 787.

23. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 3, sc. 5, line 39 (New Pelican 313).

24. See generally GRICE, *supra* note 4.

25. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. a (AM. LAW INST. 1981).

26. WILLIAM SHAKESPEARE, TWO GENTLEMEN OF VERONA act 1, sc. 2, lines 7-8 (New Pelican 117).

- (viii) The addressee *reconstructs* the message from the utterance.
- (ix) The addressee *infers the purpose* [and relevant full meaning and effect] of the communication.<sup>27</sup>

To clarify a few points addressed or related to the above, by “message” I mean that which the speaker wishes to communicate. This includes not only the proposition(s)<sup>28</sup> the speaker wishes to communicate but also “propositional attitudes” (such as whether the speaker believes the proposition to be true or means it as a command, complaint, warning, or some other sort of speech act<sup>29</sup>) and “expressive meaning” which conveys “attitudes, or emotions with regard to the things, people, or events, and so on referred to[.]”<sup>30</sup> The message will also communicate various levels of meaning about which I have written elsewhere.<sup>31</sup> By “utterance” here I mean “a piece of language produced on a particular occasion with a particular intent. It may or may not express a proposition[.]”<sup>32</sup>

To return to our law firm recommendation example, the questioned attorney and his response could fit these stages as follows: (i) *Purpose*. The questioned attorney wants to convey with tact his disapproval of the law firm. (ii) *Message*. His message is therefore that he does not recommend the firm. (iii) *Utterance*. He believes that an indirect response will convey his message with tact, and he thinks that mentioning no more than the firm’s parking availability will work as

27. ALAN CRUSE, *MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS* 5 (2011) (emphasis added).

28. *Proposition*, *THE OXFORD COMPANION TO PHILOSOPHY* 724 (Ted Honderich ed., 1995). By “proposition” I mean “what is asserted when a sentence . . . is used to say something true or false, or what is expressed by such a sentence.” *Id.* (quotations omitted). By “sentence” I mean “a string of words constructed in accordance with the grammatical rules of some language and . . . [lacking] a truth value.” CRUSE, *supra* note 27, at 24. Countless sentences can thus be used to express a single proposition: “It is snowing,” “*Il neige*,” and so on. By “statement” I mean “a sentence that is used to express a proposition . . . [that] is presented as being true.” *Id.* at 24-25. A sentence expresses a proposition once the sentence actually refers to something real or hypothetical, i.e., if “referring expressions in the sentence have been assigned referents[.]” *Id.* at 24.

29. Language serves more purposes than mere communication and is thus capable of other “speech acts.” For example, we can declare a meeting closed, and we can promise to pay \$1000.00 for the capture and tender of the wild horse known as Sind. Austin and others have explored in great detail these additional functions of words. *See, e.g.*, J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J. O. URMSON & Marina Sbisa eds., 2d ed. 1975).

30. *See* CRUSE, *supra* note 27, at 6-7. Utterances are “token-level” entities while sentences are “type-level” entities. *Id.* at 25. For example, if in referring to the same cat and mat fifteen people say “The cat is on the mat,” there are fifteen utterances but only one sentence. *Id.*

31. *See, e.g.*, Harold Anthony Lloyd, *Plane Meaning And Thought: Real-World Semantics And Fictions of Originalism*, 24 S. CAL. INTERDISC. L. J. 657, 669-70 (2015) [hereinafter *Plane Meaning And Thought*].

32. CRUSE, *supra* note 27, at 25.



such an indirect response. He therefore constructs this utterance in his head: "Well, that firm generally has pretty easy client parking for a downtown firm." (iv) *Creation of Text*. To put his utterance in tangible and transmissible form, he types on his laptop "Well, that firm generally has pretty easy client parking for a downtown firm." (v) *Transmission of text*. He emails that text. (vi) *Receipt of text*. The other lawyer receives the email. (vii) *Decoding the text*. By reading the text, she "recover[s] the original form of the utterance as intended by the speaker."<sup>33</sup> Since she can read and write, understanding this clear text is not difficult. However, there can be difficulties at this stage such as textual ambiguity or transmission damage to text.<sup>34</sup> (viii) *Reconstructing the full message*. This is a key stage recognized by pragmatics. As Cruse puts it, "[a]rguably the central task for the addressee is to work out the speaker's message on the basis of the utterance, taken together with relevant features of the context."<sup>35</sup> The receiving lawyer here knows that the sending lawyer would not want to offend their classmate and can see how tangential talk about parking could convey disapproval in a safer way than an outright utterance of disapproval. She thus concludes the full message is one of disapproval. (ix) *Determining the purpose, full meaning, and effect of the communication*. This is also a key stage in pragmatics. The addressee now understands that the communication has succeeded in its purpose of conveying disapproval in a safe and inoffensive way. The focus here is of course on the speaker meaning rather than on the literal meaning of the text.

## 2. *Beyond Mere Code and Structure*

*"Gonzalo: You have spoken truer than you purposed.*

*Sebastian: You have taken it wiselier than I meant you should."*

—Shakespeare, *Tempest*<sup>36</sup>

*"—I was just going to throw it away, Mr. Bloom said . . .*

*—What's that? [Bantam Lyons'] sharp voice said.*

*—I say you can keep it, Mr. Bloom answered. I was going to throw it away . . .*

*—I'll risk it, [Bantam Lyons] said."*

—James Joyce, *Ulysses*<sup>37</sup>

33. *Id.* at 9.

34. *See id.* at 9-10.

35. *Id.* at 10.

36. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1, lines 19-22 (New Pelican 743)

37. JAMES JOYCE, *ULYSSES* 70 (Gabler ed., 1986). Though Mr. Bloom refers to a newspaper here, Bantam Lyons famously mistakes Bloom's words to be a recommendation to bet on an underdog horse ("twenty to one . . . rank outsider"), Throwaway, in the

Rather than simply being a process of coding and decoding, human communication is thus achieved by a speaker giving evidence of an intention to inform the hearer of something, and the hearer hopefully correctly inferring a conclusion from this evidence.<sup>38</sup> For example, in the Joyce quotation above, the speaker intends to inform the hearer that hearer can keep a newspaper that the speaker plans to throwaway. In this case the hearer unfortunately infers the wrong message that the speaker is recommending a bet on the horse Throwaway.<sup>39</sup> At stage (viii) of the discourse, the hearer has improperly focused on the similarity of “throw it away” to “Throwaway” to the exclusion of other evidence such as “you can keep it” and the fact that “throw it away” is not the same as “Throwaway.”

Similarly, as stage (viii) of the law firm recommendation example, interpreting a text must involve more than merely “decoding” it. It involves looking at all of the relevant evidence, not just the words. If the addressee in the above example had stopped with merely recovering the utterance from the text (stage (vii)), she would have misunderstood the message. She would have wrongly interpreted the message as positive review of a parking lot when in fact it was a negative review of a law firm. Instead of committing such a literalist error, she looked at other relevant evidence beyond the words. She considered the fact that the three lawyers were classmates, the fact that the recommender would therefore not wish to hurt their classmate’s feelings, and the likelihood that the parking lot reference was nonetheless relevant to her inquiry despite its facial lack of great if any relevance. Looking at all such evidence, she could reasonably conclude that by dodging the direct question the parking lot statement was in fact a polite vote of no confidence. Beginning with Section IV below, we will explore in more detail possible specific pragmatic rules supporting such a conclusion.

Though we will explore these pragmatic rules in more detail below, one can draw at least a couple of conclusions at this point. First, any structuralist theory holding that “[words] only acquire meaning by virtue of their contrast with other [words] within a structure” must be wrong.<sup>40</sup> In our example, “Well, that firm generally has pretty easy

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1904 Gold Cup. *See id.* at 192, 267, 274-75. Throwaway actually won the race. *See* Anthony Braime & Colin Younger, *The Racing Stables at Westcourt*, BURBAGE, WILTSHIRE, ENGLAND (Nov. 2, 2015), <http://www.burbage-wiltshire.co.uk/historic/WestcourtBraime.htm>.

38. Tim Wharton, *Evolution of Pragmatics in* CONCISE ENCYCLOPEDIA OF PRAGMATICS 253, 255 (Jacob L. Mey & Keith Brown eds., 2009).

39. *See* JOYCE, *supra* note 37.

40. BRONWEN MARTIN & FELIZITAS RINGHAM, *DICTIONARY OF SEMIOTICS* 125 (Cassell ed., 2000) (I substituted “word” for “element”). “Structuralism” is an umbrella term covering much more than what I have indicated and I do not mean to suggest otherwise.

client parking for a downtown firm" carries meaning that has nothing to do with the contrast of these words with other words within the structure of the English language. To the extent a literalist falls into this kind of structuralist error, she also commits error. To the extent she refuses to look beyond words and consider non-linguistic matters (such as politeness, which drives the response in the law firm recommendation example), she will err.

Additionally, by focusing too much on the words before her, the structuralist or literalist can have a false sense of security that she has the real text. As we saw above with our law firm and "Peccavi" examples, determining the text in any case requires looking beyond the words. Furthermore, as Cruse notes:

Every mode of communication has a channel through which the signal travels: for speech, we have the auditory channel, for normal writing and sign language, the visual channel, for Braille, the tactile channel, and so on. As the signal travels from sender to receiver, it alters in various ways, through distortion, interference from irrelevant stimuli, or loss through fading. These changes are collectively referred to as noise. As a result, the signal picked up by the receiver (the received signal) is never precisely the same as the transmitted signal.<sup>41</sup>

I would also consider potential transmitter error (in language or in transmission) as a form of such potential noise. Although efficiencies in a communication system and the fact that language might be "50 per cent redundant" can reduce the dangers of noise interference,<sup>42</sup> such noise exists. Thus, a structuralist's or literalist's ignoring such noise necessarily results in miscommunication in at least some cases.

### 3. *Discourse Rules and "Implicature"*

*"Dear Sir, Mr. X's command of English is excellent, and his attendance at tutorials has been regular. Yours, etc."*

—Paul Grice<sup>43</sup>

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*See, e.g.,* PAUL BOUISSAC, *ENCYCLOPEDIA OF SEMIOTICS* 598-601 (Oxford U. Press 1998). Instead, I focus on this particular formulation because of its parallels with textualism. *See infra* Section IV(A).

41. CRUSE, *supra* note 27, at 9.

42. *See id.*

43. GRICE, *supra* note 4, at 33. A hypothetical "writing testimonial about a pupil who is a candidate for a philosophy job" which Grice believes conveys through its indication the "implicature" that "Mr. X is no good at philosophy." *Id.* The law firm example given earlier of course parallels this example.

*“There is no surer way to misread any document than to read it literally . . . .”*

—Judge Hand<sup>44</sup>

Background rules also include rules governing the nature of discourse itself. As we saw in the law firm recommendation example, the addressee has taken as a negative recommendation the facially-complimentary statement, “Well, that firm generally has pretty easy client parking for a downtown firm.” She does this by assuming that the speaker gave a relevant answer notwithstanding its facial deviance from the specific question, and by assuming that the speaker wanted to respond in a polite way that did not insult their fellow former classmate. In making the assumptions, she presupposes (in the sense of background belief) that people in such discourse contexts try to be both relevant and polite. She also recognizes that relevant meaning can differ from literal meaning. In other words, she interprets the language here as a non-recommendation to square the language with her belief that the speaker would be both relevant and polite.

Like the lawyer in the example above, Grice recognizes that “speaker meaning” (i.e., what a speaker actually means by his words) may differ from the literal meaning of the words used.<sup>45</sup> To account for this difference, he analyzes speaker meaning both in terms of “linguistic meaning and meaning in use.”<sup>46</sup> When we look at meaning in use, we consider what he calls “implicatures” arising from such use. Speaker’s meaning involves both linguistic meaning (or “what is said”) and “what is implicated.”<sup>47</sup> What is “implicated” (called the “implicature”) is “what is required to assume a speaker to think in order to preserve the assumption that he is observing [the rules of discourse] . . . if not at the level of what is said, at least at the level of what is implicated.”<sup>48</sup> In examining conversational implicature, Grice, like the lawyer above, recognizes the role of relevance in implicature.<sup>49</sup> He also recognizes the role of politeness in implicature.<sup>50</sup> However, he also sets out a more complex background for implicature that contin-

44. *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

45. See STOBHAN CHAPMAN, PAUL GRICE: PHILOSOPHER AND LINGUIST 185 (Palgrave Macmillan 2005).

46. *Id.*

47. See Jörg Meibauer, *Implicature in* CONCISE ENCYCLOPEDIA OF PRAGMATICS 365, 365 (Jacob. L. Mey & Keith Brown eds., 2009).

48. See GRICE, *supra* note 4, at 86. For purposes of the example, I have replaced his reference to “the Cooperative Principle (and perhaps some conversational maxims as well).” *Id.*

49. *Id.* at 27.

50. *Id.* at 28.

ues to drive debate today.<sup>51</sup> Because much of the debate in pragmatics has been about how to simplify Grice's approach,<sup>52</sup> a brief overview of Grice's thought is useful before we proceed further.

Grice begins with his "Cooperative Principle" and derives several "Maxims" from it. The Principle and the Maxims are set out as "rules of rational behavior, not ethical norms."<sup>53</sup> The "Cooperative Principle" provides: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."<sup>54</sup> That is, respond in a way that advances the goal of the conversation at the particular stage involved. Grice bases this principle upon his observation that discourse is not ordinarily "a succession of disconnected remarks" and that conversations are generally "cooperative efforts" where "each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction."<sup>55</sup>

Grice supplements his Cooperative Principle with several maxims which relate to the notion of cooperation. The Maxim of "Quantity" requires making "your contribution as informative as is required" for "current [ ] purposes of the exchange" but not "more informative than is required."<sup>56</sup> Being under or over-informative is of course not the most efficient form of cooperation. The other maxims similarly relate on their face to efficient and good faith cooperation. The Maxim of "Quality" requires trying to make your contribution true. This requires not saying "what you believe to be false" and not saying something "for which you lack adequate evidence."<sup>57</sup> The "Maxim of Relation" requires that one be relevant to the matter at hand.<sup>58</sup> The Maxim of "Manner" requires being "perspicuous" and thus avoiding "obscurity of expression[,] avoid[ing] ambiguity[,] be[ing] brief[,] . . . [and being] orderly."<sup>59</sup> Grice also recognizes that there are "all sorts of other maxims (aesthetic, social, or moral in character), such as 'Be Polite,' that are also normally observed in talk exchanges, and these may also generate non[-]conventional implicatures."<sup>60</sup>

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51. See, e.g., CHAPMAN, *supra* note 45, at 185 (noting the wide and frequent citation of Grice's work).

52. See *id.* at 205. "[M]ost responses to Grice have been reductive in tendency." *Id.*

53. Meibauer, *supra* note 47, at 365; see also GRICE, *supra* note 4, at 30.

54. GRICE, *supra* note 4, at 26.

55. *Id.* at 26.

56. *Id.*

57. *Id.* at 27.

58. *Id.*

59. *Id.*

60. *Id.* at 28.

Implicatures can be generated both by following and by flouting the Principle and the various Maxims.<sup>61</sup> For example, Grice believes that the following exchange involves implicature though there is no violation of the Principle or Maxims: “A: I am out of petrol. B: There is a garage around the corner.”<sup>62</sup> If one assumes B follows the Maxim of relevance, then in Grice’s sense B “implicates that the garage is, or at least may be[,] open[.]”<sup>63</sup> If being relevant, why else would he have mentioned the garage?

On the other hand, the following implicate by flouting<sup>64</sup> the Principle and one or more of the various Maxims: A says: “Our country has sacrificed too much in that war.” B then says: “War is War.”<sup>65</sup> On its face a tautology, B’s response literally non-informatively says that something is itself. Since that is “totally noninformative” it “cannot but infringe” the Maxim of Quantity.<sup>66</sup> Grasping the implicated meaning here is dependent upon the hearer’s “ability to explain the speaker’s selection of this particular patent tautology.”<sup>67</sup> Perhaps, for example, the speaker meant, “There is nothing one can do about it.”<sup>68</sup> As another flouting example:

A and his audience both know [that B has betrayed A] . . . . A says *X is a fine friend* . . . . [U]nless A’s utterance is entirely pointless, A must be trying to get across some other proposition than the one he purports . . . . This must be some obviously related proposition; the most obviously related proposition is the contradictory of the one he purports to be putting forward.<sup>69</sup>

As noted earlier, much of the debate in pragmatics has been about how to simplify Grice’s approach.<sup>70</sup> In our law firm example, the addressee considered only politeness and relevance. This suggests that simplification is possible; “Relevance Theorists” similarly question why Grice’s Principle and Maxims cannot be reduced and need to be

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61. *Id.* at 30-37.

62. *Id.* at 32 (italics omitted).

63. *Id.*

64. *See id.* Maxims can be justifiably violated. For example, A wants to visit his friend in France and the following conversation ensues. “A: Where does C live? B: Somewhere in the South of France.” *Id.* (italics omitted). B’s answer is not sufficient for B’s travel plans and would thus seem to violate the maxim that one be as informative as is required. However, if B has no more precise answer than the one given, B would violate the lack of evidence maxim if B gave a more precise answer. *Id.* at 32-33.

65. *Id.* at 33.

66. *Id.*

67. *Id.*

68. *See* Meibauer, *supra* note 47, at 366.

69. GRICE, *supra* note 4, at 34. Grice gives a number of other flouting examples. *See, e.g., id.* at 33-37.

70. *See* CHAPMAN, *supra* note 45, at 205. Stating that “most responses to Grice have been reductive in tendency.” *Id.*

“maximally relevant on all salient parameters.”<sup>71</sup> They also see the notion of flouting maxims as paradoxical “when in every case a relevant message ensues.”<sup>72</sup> How can there be flouting when something relevant results? Additionally, Grice himself noted the importance of politeness<sup>73</sup> and others have gone on to explore and develop a “Politeness Principle.”<sup>74</sup> Our law firm recommendation example would seem to echo all these points. Was the example not driven by relevance and politeness? In the end was anything really flouted? The recommender gave what he felt was the most relevant response possible given his politeness desires. For purposes of exploring these questions further, I shall use “relevant” in its ordinary sense of “[h]aving a bearing on or connection with the matter at hand.”<sup>75</sup> Relevance theorists develop the term in much greater detail but I avoid that here out of space concerns.<sup>76</sup>

#### B. PRINCIPLES OF RELEVANCE, POLITENESS, AND BALANCE

*“[T]here is a single property—relevance—which makes information worth processing for a human being.”*

—Robyn Carston<sup>77</sup>

*“The truth you speak doth lack some gentleness,  
And time to speak it in. You rub the sore  
When you should bring the plaster.”*

—Shakespeare, *The Tempest*<sup>78</sup>

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71. CRUSE, *supra* note 27, at 433.

72. *Id.*

73. GRICE, *supra* note 4, at 28.

74. CRUSE, *supra* note 27, at 426-31. This principle has been supplemented with such suggested maxims as the “Tact Maxim,” the “Generosity Maxim,” the “Praise Maxim,” the “Modesty Maxim,” the “Agreement Maxim,” the “Sympathy Maxim,” and the “Consideration Maxim.” *Id.* These maxims may well have application beyond linguistics and philosophy of language studies. Those who have difficulty with their social skills might do well to study them. Psychologists dealing with patients suffering from Asperger’s syndrome, for example, might find these guidelines useful material for instruction and for their patients. Such psychologists might also have additional useful insight into the maxims.

75. *Relevant*, AMERICAN HERITAGE COLLEGE DICTIONARY 1152 (3d ed. 1993).

76. See CRUSE, *supra* note 27, at 434. For example, relevance theorists have explored a “cognitive principle of relevance” including two areas of inquiry: (i) context such as adding or strengthening information and (ii) considerations of “processing effort” where “the less effort it takes to recover a fact, the greater the relevance of the fact.” *Id.*

77. CARSTON, *supra* note 1, at 45.

78. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1, lines 137-39 (New Pelican 745).

*“[W]e must maximize the self-consistency we attribute to [others], on pain of not understanding [them].”*

–Donald Davidson<sup>79</sup>

This article will therefore take the working positions that, at the most general level, (i) relevance and politeness are principal drivers of conversational or discourse interpretation, and (ii) other principles such as Grice’s Cooperative Principle can be seen as capturing narrower aspects of these broader principles. Grice’s Cooperative Principle requires one to contribute to conversation in such manner “as is required[ ] at the stage at which [the contribution] occurs, by the accepted purpose or direction of the talk exchange in which [one is] engaged.”<sup>80</sup> On their face, relevance and politeness together address both what is required at the stage of discourse as well as the “accepted purpose or direction” of the discourse.<sup>81</sup> We can also note that the relevance principle generally entails a principle of balance: if we assume that a speaker means to be relevant, we by definition assume that he does not generally mean to speak wrongly, irrationally, or incoherently even if his language can be interpreted as wrong, irrational, or incoherent.<sup>82</sup> This therefore means that we should generally prefer a rational, and coherent meaning where possible unless we have strong reasons to believe otherwise.<sup>83</sup> As we go on to explore pragmatics in legal texts, we will explore what light these principles of discourse may shed upon interpretation of legal texts.

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79. DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 27 (Oxford U. Press 1984).

80. GRICE, *supra* note 4, at 26.

81. *Id.*

82. *See* DAVIDSON, *supra* note 79, at 27. Where language on its face does not seem to permit a rational, and coherent meaning, one should always consider context as well as the possibilities of indirect encoding or encoding error. *See infra* Sections III(D), VII(A); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. a (AM. LAW INST. 1981) (stating that “an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.”).

83. KENT GREENAWALT, *LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS* 82 (Oxford U. Press 2010). As Kent Greenawalt elegantly puts it:

What I would hope from an interpreter [who has found statements that seem contradictory or at odds with the remainder of a piece] is that if she could figure out which statement did fit my overall position best and which reflected a lapse in how I have expressed myself, she would say, Greenawalt probably means X (or would think X) though one of his sentences points in a different direction.

*Id.*



## C. MESSAGE CLARIFICATION AND ELABORATION

*"We need more light to find your meaning out."*

—Shakespeare, *Love's Labor's Lost*<sup>84</sup>

In addition to cases where the relevant meaning differs from what is actually said (as in the law firm hypothetical), the words used in a given case may not fully capture what is actually said.<sup>85</sup> Take the following exchange: A: "I'll draft the brief." B: "The file is on the top shelf." A: "I can't see it."<sup>86</sup> We can clarify from the context that "file" refers to "case file" rather than a nail file or some other kind of file. Though the phrase "case file" is not used, it is part of what is said since it is subsumed under the word "file." Additionally, the "it" is ambiguous: does it refer to the case file or to the shelf? Though we will need further clarification, the resulting answer is again part of what the speaker said since it is subsumed under the use of the word "it." Take another example: "The deposition transcripts were heavy and he dropped them."<sup>87</sup> Presumably the speaker means to convey something like, "The deposition transcripts were heavy and because of that he dropped it."<sup>88</sup> Such elaboration of what is actually said is important because it will avoid potential misunderstanding. Perhaps the speaker simply meant to conjoin two facts with no opinion on any connection. If so, elaboration will flesh this out: "I'm not sure why he dropped those heavy deposition transcripts."

## D. DIRECTION AND COMPASS

*"[T]hey did perform  
Beyond thought's compass . . . ."*

—Shakespeare, *Henry VIII*<sup>89</sup>

*"But it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent."*

—Justice Ginsburg<sup>90</sup>

84. WILLIAM SHAKESPEARE, *LOVE'S LABOR'S LOST* act 5, sc. 2, line 21 (New Pelican 236)

85. CRUSE, *supra* note 27, at 435. Cruse uses the term "explicature" to cover "all the propositions that are explicitly communicated by the speaker through [an] utterance." *Id.* Three aspects of explicature include resolving ambiguities, assigning references, and "enrichment" or "fleshing out." *See id.* at 435-38.

86. *See id.* at 436.

87. *See id.* at 438.

88. *Id.*

89. WILLIAM SHAKESPEARE, *HENRY VIII* act 1, sc. 1, lines 35-36 (New Pelican 1172).

90. *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015) (Ginsburg, J., majority).

Up to this point, among other things, we have seen that speaker meaning includes both what was said and what Grice would call “implicatures” or “the implicated,” that interpreters should consider all relevant evidence in determining what is said and what Grice would say is implicated, that principles of relevance and politeness help in such determinations in the case of discourse, that what is said can need clarification and elaboration, and that relevant entailments also need consideration.

In the spirit of plainer English, of greater precision, and of not making what I see as a possible category mistake, I will drop the use of “implicature” going forward. Instead, I will use the plainer English terms of “direct” and “not direct” in the case of coding and decoding and “compass/encompass” in the case of meaning or message to capture two very different linguistic matters which I believe Grice would cover with “implicature.”

In our law firm recommendation example, the speaker’s real meaning or message is not directly encoded in, “That firm has pretty easy client parking for a downtown firm.” Instead, the speaker’s real message (more directly encoded as “I do not recommend that firm”) must be inferred as discussed above from the context and from assumptions of relevance and politeness. In other words, the real message is indirectly encoded in the text. In drawing our indirect inferences, we are thus at stages (vii) and (viii) of Cruse’s outline discussed in Section III(A) above, i.e., we are at the stages of decoding and reconstructing the message.

Grice’s “implicature” also covers situations arguably categorically different from the decoding and message reconstruction discussed above. Take again, the following example of Grice’s “implicature”: “A: I am out of petrol. B: There is a garage around the corner.”<sup>91</sup> If one assumes the response is relevant, then B probably meant to direct the addressee to “an open or likely-open garage.”<sup>92</sup> However, unlike the law firm example where the real message is certainly not directly encoded, here one could reasonably maintain that it is. Perhaps the message is directly encoded in the phrase and the question thus becomes what is encompassed within the meaning of the message. Perhaps the speaker meant no more than garage though he knew that that garage was open or likely open. If so, then the question is categorically different from a question that involves coding and decoding. It is instead a question about the scope of a part of the speaker’s message, i.e., it involves stage (ii) of Cruse’s outline rather than stages (vii) and (viii).

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91. GRICE, *supra* note 4, at 32.

92. *See id.*

Of course, the speaker might also have meant to convey the express message, "There is an open or likely-open garage around the corner" which he then imprecisely encoded in, "There is a garage around the corner."<sup>93</sup> If so, that would involve stages (vii) and (viii) of Cruse's outline. The point is, regardless, that good theory must be able to differentiate these categorically different possibilities.

Dispensing with "implicature," I will therefore speak of "direct" and "indirect" in the case of decoding and message reconstruction, and I will speak of compass in the case what the speaker's message means, embraces, or refers to.<sup>94</sup> (The pointing sense of "compass" as well as its sense of range or scope make "compass" a better term for use here than "scope" or "range" alone.)<sup>95</sup> As for the notion of indirect coding, such indirection can be quite extreme even to the point of contradiction of the literal text—irony would be an example of such an extreme.<sup>96</sup>

#### IV. INTERPRETING LEGAL TEXTS: STARTING POINTS

##### A. "TEXTUALISM" DEFINED

*"I pray thee understand a plain man in his plain meaning."*

—Shakespeare, *The Merchant of Venice*<sup>97</sup>

*"It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context."*

—Restatement (Second) of Contracts<sup>98</sup>

By "textualism" I mean the "interpretive theory that requires the judge to rely on the text to the exclusion of other interpretive criteria, if the meaning is 'plain.'"<sup>99</sup> Though we can dispute whether meaning is ever "plain," like Popkin, I will use "plain" to mean "common understanding."<sup>100</sup> Though we can also dispute whether there is a common understanding in any case, this approach at least requires us to consider the "[a]uthor and audience" of a text and how they interrelate in

93. *Id.*

94. *See supra* Section III(B); *see infra* Section VI. Because, for example, context as well as relevance and politeness principles play a large role in reconstructing messages, cases of direct encoding may not be as common as one might first imagine.

95. *Compass*, OXFORD ENGLISH DICTIONARY (Oxford U. Press 2015).

96. *See* RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 92 (2d ed. 1991). Irony is "[i]mplying a meaning opposite to the literal meaning." *Id.*

97. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 5, lines 50-51 (New Pelican 313).

98. RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b (AM. LAW INST. 1981).

99. POPKIN, *supra* note 16, at 263.

100. *Id.* at 264.

practice.<sup>101</sup> Under such “textualism,” one takes a “linear” approach to interpretation. One starts with the text and only considers matters outside the text if the text is unclear.<sup>102</sup> In other words, one should proceed as follows: (1) One must attempt to follow the plain meaning of the text.<sup>103</sup> (2) However, if the meaning is not plain (because of ambiguity, vagueness or perhaps some other reason), one must attempt to apply canons of construction “that are intrinsic to legal texts.”<sup>104</sup> These are canons that turn on the text itself such as the canons that “Every word must be given effect,” “A specific provision controls a general one,” and “Grammar and punctuation are assumed to follow approved usage.”<sup>105</sup> (3) If the steps above have not clarified the text, then one may turn to “evidence outside of the text itself.”<sup>106</sup> Such evidence includes evidence involving the “social context of the document, writing of the document, and implementation.”<sup>107</sup> For example, customary trade usage can provide context in contract disputes, legislative committee reports can provide evidence relating to the drafting of a statute, and performance can provide evidence of contract implementation.<sup>108</sup>

In applying these three steps, the interpreter must be guided by reason and not reach an unreasonable result.<sup>109</sup> Thus, textualism in the sense discussed above should not be confused with literal or “grammatical” interpretation “based exclusively on the words themselves,”<sup>110</sup> “without adequate attention to the way authors write and audiences understand language,”<sup>111</sup> and without adequate attention to rationality itself.<sup>112</sup> Though a literal approach might interpret, “I, ain’t never lovin, you” as an affirmation of love due to the double negative, the textualist would not because she would consider the common meaning of “ain’t never” and because she knows her interpretation must be reasonable.

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101. *Id.* at 38.

102. *Id.* at 193.

103. ROBERT BENSON, *THE INTERPRETATION GAME 5* (Carolina Acad. Press 2008).

104. *See id.* at 11-12.

105. *Id.* at 11 (italics omitted). These are only three of the canons from a more exhaustive listed cited by Benson. *Id.* However, as Benson also notes, competing canons can arguably apply in given situations so that their real guidance, if any, can be questionable at best. *See id.* at 37-39. For example, as noted above, “Grammar and punctuation are assumed to follow approved usage;” however, it is also recognized that “Courts are not bound by grammatical rules.” *Id.* at 37 (internal quotes omitted). Benson provides a very useful table of such conflicting canons. *Id.* at 37-39

106. *Id.* at 12.

107. *Id.*

108. *Id.* at 12-16.

109. *Id.* at 16-18.

110. *Grammatical Interpretation*, BLACK’S LAW DICTIONARY (7th ed. 1999).

111. POPKIN, *supra* note 16, at 194.

112. BENSON, *supra* note 103, at 16-18.

Why be a textualist? If we can, starting with the text of course makes sense. If we are going to review a contract or a statute, how do we begin that review without starting with the applicable text? Additionally, to the extent we deviate from the text are we not changing the text rather than interpreting it? Put another way, are we not changing the likely meaning of what someone said if we do not stick to the general understandings of terms at the time the person has used the word?<sup>113</sup>

Interestingly, these questions upon a bit of further thought actually make us question textualism. First, as we shall see in Section IV(B) below, delineation of text cannot be clearly separated from its interpretation. As such, one cannot sensibly say text clearly precedes interpretation so that we can ever truly simply start with text. Second, as discussed in Section IV(B)(2)(a), the "text" we have in a given case may not be the true text and we are changing the true text if do not make a change in the faulty "text" that we have. How can we make this change if we can only look at the text before us? Third, as noted in Sections III(D), VI, and VII(A), the real message (because of, for example, context or indirect or improper encoding) may indeed differ from the literal textual language and we would be changing the message if we did not deviate from that literal language. As Popkin notes: "Textualism does not tell you how broadly or narrowly to define the text; who is the author or audience; whether the author's or the audience's understanding prevails in the case of disagreement; and (most important of all) what context helps to decide textual meaning."<sup>114</sup>

Addressing Popkin's first point above, how do we determine the operative text? In private law, for example, we might ask whether a contract includes correspondence or emails permitting as amendments some variation of the terms provided in the initial contract.<sup>115</sup> In the letter example given above, we might similarly debate, again, whether the envelope is part of the text. Following up on Popkin's first question, once we determine the operative text, how do we deter-

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113. POPKIN, *supra* note 16, at 267. There are also other reasons one might give. For example, in the case of judging, one might believe that departing from plain meaning: "discourages legislative responsibility for making decisions and for drafting carefully," "unsettles the law, discouraging private planning and encouraging too much administrative and judicial discretion," and "gives judges more discretion than they can intelligently handle." *Id.*

114. *Id.* at 264.

115. See, e.g., *Stevens v. Publicis, S.A.*, 854 N.Y.S.2d 690 (N.Y. App. Div. 2008) (holding that an employee's email accepting a proposed modification to an employment contract constituted a "signed writing" and thus satisfied the contract's "No Oral Modification" Clause). In response, some attorneys have begun using so called "No Email Modification" Clauses. See Stephanie Holmes, *Stevens v. Publicis: The Rise of "No Email Modification" Clauses?*, 6 WASH. J. L. TECH. & ARTS 67 (2010).

mine the relevant part of the text? Again, in the ACA example above, we might ask whether the relevant text is just Section 1401 or whether it includes Sections 1311 and 1321 as well. In neither of these contract or ACA cases is the text simply given to us to review. We first have to determine what constitutes the text and then determine which part is relevant to our current inquiry. To do either such thing, we must have a general understanding of what “text” means.

## B. FINDING OPERATIVE TEXT

### 1. *Defining “Text”*

For purposes of this article, I define text as “the original wording of written works, including without limitation, constitutions, statutes, regulations, orders, contracts, wills, and other documents and instruments.”<sup>116</sup> I would also consider the term to cover, without limitation, literary and religious works as well as drawings or diagrams within works.<sup>117</sup> This broad definition of text will be more useful than narrower ones for the discussions that follow. Such narrower definitions might, for example, distinguish between the text of a book and “its immediately surrounding material” such as footnotes.<sup>118</sup> Though this narrower definition can be useful when distinguishing parts of a page, it misses the deeper commonality that such narrower “text” and footnotes share. As explored below, they are a cohesive set of words and phrases to be read and understood together.

Though this broader definition provides a start, it still does not fully address part of the love-letter problem. Where does a text begin and where does it end? What do we include and what do we exclude? Is some text included but qualitatively different from other text? If so, how do we make that determination? For example, although the Preamble of the Constitution is written with the body of the Constitution,

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116. I have synthesized this definition from definitions provided by legal works such as Popkin and from common usage. See POPKIN, *supra* note 16, at 263 (stating, “In the context of statutory interpretation, ‘text’ means the language of a statute whose meaning the judge must interpret”); see, e.g., *Text*, AMERICAN HERITAGE COLLEGE DICTIONARY 1403 (3d. ed. 1993) (defining as “[t]he original words of something written or printed, as opposed to a paraphrase, translation, revision, or condensation,” and “[a] passage from a written work used as the starting point of a discussion”).

117. For purposes of this article, I wish to keep “text” narrow in the sense of having some connection to a written work. However, I recognize that texts often include, for example, drawings and diagrams that are integral to their meanings. Outside the context of this article, I take no position on whether paintings or other non-written matters can be considered a text. See, e.g., G. J. Stein, *Metaphor: Stylistic Approaches in CONCISE ENCYCLOPEDIA OF PRAGMATICS* 610-11 (Jacob. L. Mey & Keith Brown eds., 2009) (discussing whether a text might be anything that can be interpreted). I also fully recognize that signifiers need not be words. See *Crushing Animals and Crashing Funerals*, *supra* note 20, at 282-83.

118. Stein, *supra* note 117, at 609.

it is generally said that the Preamble has less if any weight as law.<sup>119</sup> Similarly, contract recitals are often said to be not binding.<sup>120</sup> In trying to answer these questions, it will help to focus on the role "work" plays within the definition of "text." What is a work?

In its ordinary sense here, a "work" involves "[s]omething . . . produced or accomplished through the effort, activity, or agency of a person or thing."<sup>121</sup> Producing or accomplishing something suggests activity to some end. This is consistent with the Latin root of text, *texere* (to weave).<sup>122</sup> Weaving, too, generally has a purpose (creation of a blanket or a sweater for example), and this is also consistent with the first stage of Cruse's nine stages of discourse: "the speaker normally has a purpose in communicating."<sup>123</sup> If we think of a text as a work woven together for some purpose, we can ask ourselves what defining characteristics might exist for a text. Since the parts of something woven are intertwined, interrelatedness or internal cohesion provides a good first textual characteristic to examine. That can be followed by examining in more detail the notion of purpose that work and weaving suggest.

## 2. *Finding Possible Text Through Cohesion*

*"One cannot rest content with 'deconstructing' a will to show that it lacks meaning or contains contradictory meanings; one needs to decide what the will does and does not do."*

—Kent Greenawalt<sup>124</sup>

Taking interrelatedness first, if threads lying beside a blanket are not woven into the blanket, they are not part of the blanket. If threads of words are not woven into a text, they are not part of the text. Of course, it is easy to see unwoven threads in the case of blankets but what does it mean for words to be "unwoven" in the case of a text? For purposes of this article, I shall consider words not to be woven into the text if such words lack intentional, structural, conceptual, context, or other background "cohesion" with the text.<sup>125</sup> In this

119. See *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905) (stating, "Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power . . . [s]uch powers embrace only those expressly granted in the body of the Constitution[.]").

120. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 218(1) (AM. LAW INST. 1981) (stating, "A recital of a fact in an integrated contract may be shown to be untrue").

121. *Work*, AMERICAN HERITAGE COLLEGE DICTIONARY 1544 (3d ed. 1993).

122. *Text*, AMERICAN HERITAGE COLLEGE DICTIONARY 1403 (3d ed. 1993).

123. See CRUSE, *supra* note 27, at 5; see *supra* Section III(A).

124. GREENAWALT, *supra* note 83, at 73.

125. Others would take a somewhat more complex approach. For example, Robert de Beaugrand would, in Winfried Noth's words, have at least seven (7) criteria: "(surface

sense, cohesion is “the process whereby sentences or utterances are linked together to form a text.”<sup>126</sup> For purposes of this article, I do not exclude “background knowledge and context” from “cohesion”; I find it confusing to use “coherence” to cover such cases since, among other things, a writer’s background knowledge might not be fully consistent with the text but she still might intend inclusion in the text.<sup>127</sup> For example, I know that my car is not a horse but I can intend that the metaphorical sentence, “My car is a workhorse” be included as a part of a text about my car.

I will briefly examine here each of the five types of cohesion. A number of the notions briefly addressed here will be more fully developed as the article progresses. As the following examples show, a given text may have multiple types of cohesion. Also, as will be seen in the last example, cohesion may both exist and be ruled out depending upon the standard used.

a. Intentional Cohesion

An intentional mental state is a mental state that represents or is otherwise directed at something else.<sup>128</sup> For example, if I believe “that the King of France is bald,” my belief is intentional because it is directed beyond itself to a real or fictional king.<sup>129</sup> In addition to belief, intentional states include, among many other things, desire.<sup>130</sup> Taking this understanding of intentionality, I use “intentional cohesion” to refer to an author’s belief or desire (or both) that certain of his written words constitute a singular text. Thus, if Thomas Hardy delivers a manuscript entitled “Jude the Obscure” to his publisher and indicates his belief or desire (or both) that these pages constitute a singular text, that manuscript has intentional cohesion as I use the term. One can also approach intentional cohesion from a performative angle since functions of language include directives (trying to get people to do things) and declarations (trying to “bring about changes in the world with our utterances”).<sup>131</sup> Along these lines we might thus speak of the author’s directing us to treat a manuscript as one text or as declaring that a manuscript is one text.

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structural) *cohesion*, (conceptual) *coherence*, *intentionality*, *acceptability*, *situationality*, *intertextuality*, and *informativity*.” NOTH, *supra* note 20, at 333.

126. MARTIN ET AL., *supra* note 40, at 35.

127. *See id.* at 36 (noting the distinction between “coherence” and “cohesion”).

128. *See* JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF THE MIND*, 1, 24 (Cambridge U. Press 1983).

129. *See id.* at 4.

130. *Id.*

131. *See id.* at 166.



Intentional cohesion can prove both difficult and easy to determine. If there is clear authorial intent and a clear chain of transfer of clear pages from author to publisher, intentional cohesion can easily weave together into one text language that might fail to have other sorts of cohesion discussed below. For example, many may find it difficult to see any surface cohesion in language such as, "Send us bright one, light one, Horhorn, quickening and wombfruit" from Joyce's *Ulysses*,<sup>132</sup> but will not find it difficult to find the language part of a text if they know that Joyce wished or believed it to be part of such a text.

However, such intentional cohesion can also be difficult to prove and can in fact generate much controversy. Keeping with *Ulysses*, because of uncertainty in manuscripts, scholars debate (among many other passage debates) whether one passage should read, "Yes. No." or "Nes. Yo." and whether a passage involving a telegram should read, "Mother dying come home father" or "Nother dying come home father."<sup>133</sup> (These particular examples also involve potential encoding errors discussed in Section VII(A) below.) The mechanics and theories of how one might determine and hold "stable through time" "the actual words" or the "original" words<sup>134</sup> of Joyce or other authors go beyond the scope of this article.<sup>135</sup>

#### b. Referential Cohesion

Referential cohesion occurs where the language used across a text refers to the same thing.<sup>136</sup> Such reference can be general or specific. General reference involves overarching reference that unifies a text. For example, on its face a will can be said to have textual unity in the sense that it generally refers to the distribution of a certain estate. Specific reference, on the other hand, involves "smaller linguistic units" with the same "referent throughout the text."<sup>137</sup> Such specific reference would include, for example, pronouns that refer back to previously used nouns.<sup>138</sup> Specific reference is discussed in more detail below in Section VII(E) on anaphora and cataphora.

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132. JOYCE, *supra* note 37, at 314.

133. *Id.* at xi.

134. *See* BOUISSAC, *supra* note 40, at 609.

135. *See, e.g.*, THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 708-14 (Michael Groden, Martin Kreiswirth, & Irme Szeman eds., 2nd ed. 2004) (laying out an overview of "principles for the scholarly editing of the texts of the cultural heritage.").

136. T. Sanders & J. Sanders, *Text and Text Analysis*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 1075, 1077 (Jacob. L. Mey & Keith Brown eds., 2009)

137. *Id.* at 1077.

138. *See id.*

c. Relational and Formal Cohesion

Relational cohesion occurs where “text segments” are related by “connectives and (other) lexical markers of relations.”<sup>139</sup> Such relations include “cause-consequence,” “problem-solution,” temporal connection, and conjunction.<sup>140</sup> Words suggesting such relational cohesion include “because, so, however, although,” “for that reason, as a result, [and] on the other hand”<sup>141</sup> as well as “and,” “but,” “nevertheless,” “however,” “firstly,” “then,” “next,” and “while.”<sup>142</sup> I use formal cohesion to refer to titles, headings, sections, numbering, and other devices that suggest textual unity.<sup>143</sup>

d. Contextual Cohesion

Contextual cohesion occurs when the context suggests unity.<sup>144</sup> For example, a novelist may have two boxes on his desk: one labeled “finished chapters” and one labeled “rejected chapters.” If the novelist dies before completion of the novel, his executor could make some reasonable contextual conclusions about the text. In the absence of contradictory evidence (such as the house cleaner’s jumbling the boxes), the executor could reasonably consider those chapters in the box labeled “finished chapters” to be chapters of the novel in progress, and he could reasonably reject those chapters in the box labeled “rejected chapters.” Context is discussed in more detail in Section VI below.

e. Other Background Cohesion

I use “other background cohesion” to include cohesion coming from other background criteria brought by the interpreter not covered in the previous four types of cohesion. For example, in determining whether an appendix is part of a brief filed before a court, a careful lawyer will read the applicable rules of court. If the rules provide that briefs may not have appendices or that appendices cannot use the specific font used by the appendix under analysis, the appendix will not be part of the text of the brief under those rules and will thus lack that background cohesion if filed in that court. This is true even though an author who has not read the rules intends that the appendix be part of his brief and even though the brief has formal cohesion such as includ-

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139. *Id.*

140. *See id.*; *see also* MARTIN ET AL., *supra* note 40, at 35-36, 41.

141. Sanders & Sanders, *supra* note 136, at 1077 (emphases omitted).

142. MARTIN ET AL., *supra* note 40, at 41.

143. Such items expressly “enable the writer/speaker to establish relationships across sentence or utterance boundaries and . . . help link the different parts of the text together.” *Id.* at 35.

144. Various types of context are discussed in detail. *See infra* Section VI.

ing the appendix in the table of contents. Other forms of background are discussed in more detail in Section VI below.

f. Purpose as Arbiter When Cohesion Factors Conflict

As the brief and appendix example above shows, where purpose can be ascertained,<sup>145</sup> it can determine the limits of text where various cohesion criteria conflict. If the writer's purpose is to prepare and file a brief the court will accept, then the background rules of court will trump authorial intent and the appendix will not be part of the brief. However, if the writer's purpose is to draft a brief for his own enjoyment or for some other purpose, then the background rules would not trump authorial intent and the appendix would be part of the brief. This example demonstrates two points. First, purpose and intent can diverge. Second, purpose (where ascertainable) is a powerful arbiter of textual disputes.

g. Simply Starting With Text Is Thus Impossible Unless Arbitrary

*"That man was not a thinker, he felt no need of getting beyond faith."*

—Søren Kierkegaard<sup>146</sup>

Since, as just discussed, we use intent, reference, relation, form, context, other background, and purpose to define text; we therefore cannot simply begin with "the text" unless we just take it as a matter of faith or dogma that we have "the text." We cannot, for example, determine that a particular contract comprises only four pages unless we have already to some degree interpreted the text by looking at any intent, reference, relation, form, context, other background, and purpose that make it a text. Any such "text" handed to us may comprise four pages but review might well show that one page is an unrelated invoice or that a number of pages are actually missing. Not only must interpretation involve more than text: text itself cannot be determined unless we look beyond the words for the necessary cohesion.

3. *Finding Relevant Text Through Cohesion*

The second initial question that textualism ignores is just which part of the text is relevant. In private law, for example, we may have parties debating whether a lease "implies" an obligation for the tenant to operate continuously even though the lease does not expressly con-

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145. Determining purpose involves both the questions of whose purpose governs and what that purpose might be. These questions are of course not always easily answered.

146. SØREN KIERKEGAARD, *FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH* 36 (Walter Lowrie trans., 2013).

tain such a provision.<sup>147</sup> Since the text is silent on this issue, which part of the text should govern the possible implication of a covenant? Should it be the use provision where no such obligation is set forth? Should that end the matter? Or should we look at other provisions such as base and other forms of rent to see what the parties might have intended to the extent use might be tied into these matters? Nothing in the text tells us what is relevant here. Instead, we must look at the underlying factors discussed in Section IV(B)(2) above that make the lease a text: its purpose and its intentional, structural, conceptual, and contextual cohesion. This will include looking at the applicable law and at what we think the parties may have intended.

The ACA provides a public law example. In determining whether subsidies are available in states without state exchanges, the words alone do not tell us what parts of the Act are relevant and what parts are not, a fact that the Supreme Court wrestled with in *King v. Burwell*.<sup>148</sup> Again, Section 1311 of the ACA provides that states “shall” set up “Exchanges” although Section 1321 recognizes that a state may elect not to do so.<sup>149</sup> Additionally, Section 1321 provides that if a state does not elect to set up an Exchange, the Department of Health and Human Services “shall . . . establish and operate such Exchange within the State.”<sup>150</sup> Finally, Section 1401 of the ACA provides subsidies for coverage “enrolled in through an Exchange established by the State under Section 1311 . . . .”<sup>151</sup> Do we look just at Section 1401 where no express mention is made of subsidies where federal exchanges are involved? Or must we also consider Sections 1311, 1321, and perhaps other sections (as well as the ACA’s goals of expanding healthcare access and decreasing costs<sup>152</sup>) to determine the entire context for the question? The mere words of the Act do not answer this question. Instead, we must look at the underlying factors discussed above in this Section IV(B) that make it a text: its purpose, reference, relation, form, context, and other background. In other words, to find answers we cannot simply “start with the text.”

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147. See *Lippman v. Sears Roebuck & Co.*, 280 P.2d 775, 779 (Cal. 1955) (citing *Cousins Inv. Co. v. Hastings Clothing Co.*, 113 P.2d 878, 882 (Cal. Dist. Ct. App. 1941)) (laying out the factors for implying a duty of continuous operation on the tenant when a retail lease is silent).

148. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015). Again, I do not explore the Court’s reasoning in this article but rather address the general pragmatics of the problems raised in the case.

149. Patient Protection and Affordable Care Act §§ 1311, 1321, 42 U.S.C. §§ 18031, 18041 (2010).

150. Patient Protection and Affordable Care Act § 1321, 42 U.S.C. § 18041 (2010).

151. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

152. See Patient Protection and Affordable Care Act §§ 1311, 1321, 42 U.S.C. §§ 18031, 18041 (2010); see also *Key Features of the Affordable Care Act*, *supra* note 7.

4. *Interpretation As Both Precedent and Subsequent to Text and Considerations of Text*

Interpretation thus precedes both text itself and considerations of any purported relevant textual provisions. To determine whether we even have a text we must, again, search for any cohesion of intent, reference, relation, form, context, other background, and purpose that might indicate the existence of a text.

V. INTERPRETING LEGAL TEXTS: STAGES, RELEVANCE, POLITENESS, AND BALANCE

A. STAGES AND VARIATIONS

Once we have determined the extent of a text and its relevant provisions, we can go on to interpret these provisions. In doing so, as discussed in Section III above, we must remember to consider all the relevant stages involved in formulating and conveying a message or other meaning. Setting out these stages in prototypical individual, corporate, and legislative form will provide helpful insights as we go forward.

In the case of text created by an individual, we can work with the variation of Cruse's stages set out in Section III above. For example, in examining a holographic will, we can assume the following stages from testator to us:

- (i) The testator has a purpose in communicating.
- (ii) The testator constructs a message to be communicated.
- (iii) The testator constructs an utterance with which to convey the message.
- (iv) The speaker transforms the utterance into a will.
- (v) The speaker transmits the will.
- (vi) The addressee receives the will.
- (vii) The addressee decodes the will to recover the utterance.
- (viii) The addressee reconstructs the message from the utterance.
- (ix) The addressee infers the purpose and relevant full meaning and effect of the communication.<sup>153</sup> This will focus on a determination of the testator's meaning.

In the case of text created by a corporation, we would either use the form of the above nine stages or a variation. If a single agent makes a determination and acts on behalf of the corporation, the form of the above nine stages should work since an individual is performing the communication:

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153. See CRUSE, *supra* note 27, at 5.

- (i) The corporation through its agent has a purpose in communicating.
- (ii) The corporation through its agent constructs a message to be communicated.
- (iii) The corporation through its agent constructs an utterance with which to convey the message.
- (iv) The corporation through its agent transforms the utterance into a text.
- (v) The corporation through its agent transmits the text.
- (vi) The addressee receives the text.
- (vii) The addressee decodes the text to recover the utterance.
- (viii) The addressee reconstructs the message from the utterance.
- (ix) The addressee infers the purpose and relevant full meaning and effect of the communication.<sup>154</sup> This will focus on a determination of the agent's meaning.

However, if the board of directors, for example, communicates on behalf of the corporation, we no longer have an individual action that fits in the above model. We would therefore need to tweak the model to give it real-world application:

- (i) The corporation through its board of directors considers a matter.
- (ii) The corporation through its board of directors considers a message related to the matter.
- (iii) The corporation through its board of directors considers an utterance with which to convey the message.
- (iv) The corporation through its board of directors transforms an utterance into text.
- (v) The corporation through its board of directors publishes the text.
- (vi) A third party receives the text.
- (vii) A third party decodes the text to recover the utterance.
- (viii) A third party reconstructs the message from the utterance.
- (ix) A third party infers the matter addressed by the message and the message's relevant full meaning and effect.<sup>155</sup>

This approach avoids use of any common purpose of the board members. Since the board members may have divergent purposes to a common end, any such approach is at best problematic.<sup>156</sup> However,

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154. *Id.*

155. *See id.* (setting out a discourse model from which this is adapted).

156. For example, each member of a three-member board may have different reasons for approving a change to the name of the corporation: the name has negative connotations, the name is great but is easily confused with a competitor's, and the new

the term "consider" has a procedural meaning which avoids such problems. To "consider" something, the board must follow a process recognized by its charter, bylaws, and applicable law—in other words, it must take objective action.<sup>157</sup> Because of the lack of a single speaker meaning here, I would suggest that we seek a "best reading" of a text so generated.

In the public law context, we would need to do something similar to the board of directors' situation with a corporation. For example, in the case of a legislature we can look at the following stages:

- (i) The legislature considers a matter.
- (ii) The legislature considers a message or rule (or both) related to the matter.
- (iii) The legislature considers an utterance with which to convey the message or rule (or both).
- (iv) The legislature legislates an utterance into text.
- (v) The legislature publishes the text.
- (vi) A third party receives the text.
- (vii) A third party decodes the text to recover the utterance.
- (viii) A third party reconstructs the message or rule (or both) from the utterance.
- (ix) A third party infers the matter addressed by the legislation and the legislation's relevant full meaning and effect.<sup>158</sup>

This approach again avoids use of any common purpose of the individual legislators. Since they, too, may have divergent purposes to a common end, any such approach is also at best problematic.<sup>159</sup> However, the term "consider" has a procedural meaning which avoids such problems. To "consider" something, the legislature must also follow the process recognized by law.<sup>160</sup> Again, because of the lack of a single speaker meaning here, I would also suggest that we seek a "best reading" of a text so generated.

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name is shorter and easier to market. In such a case, one cannot find any common, consistent purpose among the board members that could be imputed to the corporation.

157. See, e.g., MODEL BUS. CORP. ACT §§ 8.20-8.24 (AM. BAR ASS'N 2002).

158. See CRUSE, *supra* note 27, at 5 (setting out a discourse model from which this is adapted).

159. Legislators, too, can have different reasons for voting for legislation. For example, one may support legislation to widen a road because he believes the widening needs to occur while another may doubt the need for the widening but may support the road as a trade for another's vote on another matter of perceived greater importance.

160. For example, those voting to impeach a president may have various motives. However, they must follow the procedure set out in the Constitution: impeachment must occur in the House and conviction must occur in the Senate by a two-thirds vote to convict. See U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6. These processes are objective unlike the various motivations the individual legislators may have.

## B. REMEMBERING STAGE EIGHT: RECONSTRUCTION

As discussed in Section III above, in all such cases, stage (viii) is critical and cannot be ignored. We leave the job unfinished if we simply decode and stop with stage (vii). We must also go on to reconstruct the message. As seen in Section III above, such reconstruction in discourse requires consideration of relevance, balance and politeness, other background considerations, compass, and direct or indirect encoding.

## C. INDIVIDUAL AND CORPORATE LEGAL TEXTS

In understanding individual legal texts, we would assume a principle of relevance as well as we would in discourse.<sup>161</sup> In examining a will, for example, we would assume that the document relates to the testator's estate and the testator's wishes as to the disposition of the testator's estate. The document should thus be read in such a light. Similarly, unless we had evidence to the contrary, we would assume politeness<sup>162</sup> given the solemn nature of the document. Such politeness, for example, might explain why an heir is left out of a will by omission rather than by a public airing of unpleasantness.

Additionally, in examining a contract drawn up by two individuals, we would assume that the document relates to the recordation and implementation of the deal they struck and that it should be read accordingly. Furthermore, we would assume some degree of politeness not only because of the solemnity of contracts but also because offending a party upfront will not likely facilitate performance of the contract. Parties may therefore be circumspect in their language on delicate matters and interpretation should take account of this where there has been a clear meeting of the minds.

For example, a dog breeder might have suspicions that a purchaser is lazy and might not properly exercise a dog being sold. The breeder does not note these suspicions in the contract or its recitals. Instead, the breeder orally stresses the importance of exercise including at least three walks a week, gets the buyer's verbal acknowledgement of the importance of all this, and adds provisions allowing the breeder to inspect the buyer's home from time to time and retrieve the animal if the breeder "reasonably elects to do so." A year later, the breeder learns that the dog has never been walked, and the breeder demands return of the dog. The reasonableness of this demand should turn upon the mutually-acknowledged importance of thrice-weekly walks, not upon the absence of any such requirement in the text. Nor

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161. See *supra* Section III(B).

162. See *supra* Section III(B).



should we be confounded by dictionary definitions of "reasonable" or by various "reasonable person" understandings. No doubt reasonable persons could disagree about the need for three walks per week. Both parties have clearly acknowledged the reasonableness of such walks, and this sense of reasonableness should stand regardless of whether the agreement contains a merger clause.<sup>163</sup>

The same points would also apply to corporate legal texts. One would assume specific corporate texts are relevant to the matter at hand and that, for practical reasons at least, they are often polite to the extent possible. For example, a letter terminating a problem at-will employee may simply say, "You are hereby terminated effective immediately. We appreciate your service and wish you well." Though a good lawyer can of course improve this language, an employer in the real world will sometimes use this language rather than setting out a litany of wrong doings that might provoke retaliatory litigation. If such litigation comes, the textualist would be wrong to take "We appreciate your services" as an affirmation of good work performance. It should be interpreted in light of the principle of politeness.

A very interesting area of pragmatic inquiry is whether there are other common background principles besides relevance and politeness in the context of individual and corporate legal texts. For example, in contracts is there a common background purpose of maximizing gain or assuming enforceability? If so, should contracts be read in ways that maximize gain or enforceability?<sup>164</sup> Except for Section IX below on implementives, it is beyond the scope of this article to explore such questions. However, I hope to return to them at some future point.

#### D. PUBLIC LAW TEXTS

One has no less reason to believe that public law texts also follow relevance and politeness principles. To be enforceable, laws must at the very least be rationally related to a legitimate state interest.<sup>165</sup> This relevance standard is heightened as the issues involved become more important: laws impacting certain constitutionally-protected rights must be necessary for a compelling state interest.<sup>166</sup> As we try to assume relevance when interpreting discourse,<sup>167</sup> why would we

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163. See STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 67 (Oxford U. Press 2009); see also RESTATEMENT (SECOND) OF CONTRACTS § 214 (AM. LAW INST. 1981) (stating, "Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . (c) the meaning of a writing, whether or not integrated . . .").

164. See Richard Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2004).

165. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934).

166. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n. 4 (1938).

167. See *supra* Section III(B).

not do the same when interpreting legislation? If one statutory interpretation survives the applicable relevance scrutiny while another does not, why would we not default toward the satisfactory reading? Relevance and balance have no less importance in public than in private law and pragmatics thus support such canons as “the avoidance of unconstitutionality canon” (favoring “the interpretation of a statute which avoids the risk of an unconstitutional statute”)<sup>168</sup> and “the absurdity canon” (avoiding “interpretations producing an absurd result”).<sup>169</sup> Similarly, pragmatics also tells us that it is wrong to take a literal reading that politeness would explain otherwise. To take an awful example from our past, the original Constitution and Bill of Rights do not mention “slavery.”<sup>170</sup> Even so, a textualist would be wrong to deny that slavery was not Constitutionally protected before passage of the Thirteenth Amendment.

As with contracts, very interesting further pragmatic questions exist here as well as to whether there are other common background principles besides relevance and politeness in the context of public law. For example, as with contracts, is there also an assumption that laws maximize economic benefits in certain ways<sup>171</sup> or that they generally imply certain remedial rights?<sup>172</sup> Except for my brief discussion of implementives in Section IX below, it is also beyond the scope of this article to explore such questions but I also hope to return to them at some future point.

## VI. INTERPRETING LEGAL TEXTS: CONTEXT AND ITS TYPES

*“The meaning of words and other symbols commonly depends on their context.”*

—Restatement (Second) of Contracts<sup>173</sup>

*“[I]t frequently happens that one person does not understand what the other is saying, not because the words are not clear or the phrasing ambiguous, but simply because the one interlocutor does not see what the other is talking about, or because she or he inter-*

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168. POPKIN, *supra* note 16, at 14-15.

169. *Id.* at 3-9.

170. See U.S. CONST. art. I, § 2, *repealed by* U.S. CONST. amend. XIV, § 2 (referring to “persons bound to Service for a Term of Years” in establishing the three-fifths compromise).

171. See, e.g., POPKIN, *supra* note 16, at 144-49 (discussing law and economics).

172. See, e.g., *id.* at 113-21 (discussing implied causes of actions and remedies).

173. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b (AM. LAW INST. 1981).

*prets that which the other is talking about as something entirely different."*

—J. L. Mey<sup>174</sup>

*"Textual interpretation can easily degenerate into a word game, cut off from the background that helps us understand . . . language."*

—William D. Popkin<sup>175</sup>

It is not difficult to understand why context must matter. A word in a vacuum is at best a marker of certain possible meanings that dictionaries lay out. As such, we need more information to determine whether any of those dictionary meanings might apply in a given case. For example, we need the context of Justice Scalia's "applesauce" remark noted above<sup>176</sup> to determine its likely slang sense of "nonsense." Understanding the types and flux of context is thus critical to understanding meaning in use.

#### A. COGNITIVE CONTEXT

I use cognitive context to mean "the store of knowledge and remembered experiences which forms a background against which utterances are processed . . . , and which can affect how meanings are construed."<sup>177</sup> For example, a teenager writes a district attorney that a bully assaulted her at school. Although lawyers can take "assault" to mean a threat of physical harm, the district attorney should know that the teenager may lack the necessary cognitive background for this sense and should consider the likelihood of actual battery.<sup>178</sup>

#### B. PHYSICAL AND TEMPORAL CONTEXT

I use physical context to mean the shared physical background of a given communication. As Cruse puts it, physical context "refers to things that the participants can see, hear, and so on, and each participant can assume is accessible to the other(s)."<sup>179</sup> Similarly, I use "temporal context" to mean the time background of a communication.

An easy example of the importance of physical context is, "Approaching bank. Hold up there." Does "bank" mean a financial institution or does it mean a river bank? If someone texts this to another

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174. MEY, *supra* note 17, at 787.

175. POPKIN, *supra* note 16, at 45.

176. *See supra* note 3.

177. CRUSE, *supra* note 27, at 121.

178. *See Assault*, BLACK'S LAW DICTIONARY (7th ed. 1999); *Battery*, BLACK'S LAW DICTIONARY (7th ed. 1999).

179. CRUSE, *supra* note 27, at 8.

fully-sentient person on the deck of a boat in the middle of a river, he can reasonably assume the other person will know he is referring to stopping at a river bank. Thus, any “textualist” prosecutor prosecuting the sender and recipient of this message for conspiracy to rob a bank would fail to grasp the importance of physical context.

Temporal context can operate in ways that blend with physical context and in ways that do not. For example, if a group is sitting on a beach in a location where one can usually see two kinds of “stars” (i.e., celebrities and astronomical objects), the statement, “I’m counting stars” can also be clarified by time of day and year in which it is uttered. If it is noon at a time of year when it is daylight, star in the astronomical sense can reasonably be considered unlikely. However, this could also be explained in terms of physical context: it is light and no one can see the stars. An example removed from physical context would be the following: A person generally takes his nightcap (drink) at 9 p.m. and puts on his nightcap (sleep hat) at midnight. If he tells his partner at 9 p.m. that he is having his nightcap, the partner can reasonably assume that “nightcap” means drink. The textualist who misses the role of context here also risks missing the meaning of the terms involved.

In the case of statutes, temporal context can also involve both legislative history and the history of a statute—two quite different things. Legislative history is: “written materials generated by the legislature in the process of writing a statute—most often committee reports, and sometimes legislative debates.”<sup>180</sup> Legislative history could thus also be seen as part of the discourse and textual or internal context discussed in Sections VI(D) and VI(E) below. On the other hand, “[t]he history of a statute refers to the historical environment from which legislation arose, which can be demonstrated by conventional legislative history or other sources of information.”<sup>181</sup> Under the ordinary definition of “history,” the term could also refer to the “chronological record” of a statute.<sup>182</sup> In the first sense at least, the history of a statute could also be considered part of social, cultural, and human context discussed next in Section VI(C). Legislative history provides invaluable context for statutes. Imagine, for example, a statute which simply provides: “Any person may hold up a failing bank.” How can we possibly understand this without looking at the legislative history?

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180. POPKIN, *supra* note 16, at 165. Because it is careful not to encompass “history of a statute” as defined below, this definition is usefully narrower than other definitions of “legislative history” such as “the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates.” *Legislative History*, BLACK’S LAW DICTIONARY (7th ed. 1999).

181. POPKIN, *supra* note 16, at 110.

182. See *History*, AMERICAN HERITAGE COLLEGE DICTIONARY 664 (3d ed. 1993).

History of legislation also provides invaluable context. Since history of legislation would include the way courts have interpreted that legislation, again, how could we possibly understand the meaning of such legislation without looking at its history?

### C. SOCIAL, CULTURAL, AND HUMAN CONTEXT

As Judge Easterbrook points out, "You don't have to be Ludwig Wittgenstein or Han-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."<sup>183</sup> As Cruse also notes, speakers "will formulate an utterance differently according to their assessment of such matters as the addressee's age, intelligence, and relevant knowledge."<sup>184</sup> For example, the question, "What is a birdie?" can mean something quite different when addressed to an adult or a two-year-old child. Since "birdie" is informal and more childlike talk for a bird, without more, the adult's question likely involves golf or badminton or a possible host of other "adult" things while the child's likely involves birds.<sup>185</sup>

Human context also involves "the social and power relations" between the parties.<sup>186</sup> A clear indicator of this would be forms of address tied to status.<sup>187</sup> For example, a lawyer indicates the power difference between herself and a judge by referring to the judge as "Your Honor." A dying if not dead more general English example of status language is the distinction between "thou" and "you." As Schmidt puts it, "thou" is the "personal pronoun of the second person in the singular number; oftener used than at present, as being the customary address from superiors to inferiors, and expressive, besides, of any excitement of sensibility; of familiar tenderness as well as of anger; of reverence as well as of contempt."<sup>188</sup>

As modern English has generally replaced "thou" with "you,"<sup>189</sup> modern readers can easily misinterpret or even be baffled by authors who embraced the distinction. For example, without understanding "thou" as a function of status and social relationships, how could a

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183. POPKIN, *supra* note 16, at 13 (quoting *Cont'l Can Co. v. Chi. Truck Drivers*, 916 F.2d 1154, 1157 (7th Cir. 1990)).

184. CRUSE, *supra* note 27, at 8.

185. *See Birdie*, AMERICAN HERITAGE COLLEGE DICTIONARY 141 (3d ed. 1993).

186. CRUSE, *supra* note 27, at 121; *see also infra* Section XI(F)(5) discussing Social Deixis.

187. *See id.* at 405-06 discussing the "tu-vous" distinction in French where among other things "tu indicates intimacy" and "vous indicates lack of intimacy, or distance." The French distinction generally parallels the thou-you distinction discussed in the text. *See id.*

188. ALEXANDER SCHMIDT, SHAKESPEARE LEXICON AND QUOTATION DICTIONARY 1214 (Dover Publ'n., Inc. 3d 1971).

189. *See id.*

modern reader meaningfully analyze the following: “Thou me, thou my dog; if thou thouest me, I’ll thou [your] teeth down [your] throat.”<sup>190</sup> Understanding the status and relationship meanings of the term also helps the reader see clever nuances the reader will otherwise miss. For example, in Shakespeare’s *Twelfth Night*, Sir Toby Belch tries to persuade Sir Andrew Aguecheek to use “thou” with Viola: “if thou thou’st him some thrice, it shall not be amiss.”<sup>191</sup> In addition to the suggested insult to Viola, is Sir Toby also cleverly insulting Sir Andrew as well by the use of “thou”? One might also now ask why the first quotation did not end with “thy teeth down thy throat” instead of “your teeth down your throat.”<sup>192</sup>

#### D. DISCOURSE CONTEXT

In one sense, discourse context means the relevant preceding discourse.<sup>193</sup> For example, “It is on the top shelf” can have widely different meanings depending on what was said before. The endless possible meanings could involve a brief, a case reporter, a law dictionary, or even a cat depending upon whether the following questions preceded it: “Where is the brief?”, “Where is the case book?”, “Where is the Black’s Law Dictionary?”, or “Where is Tom?”

Though the example given above is a simple one, determining discourse context can be much more complex. If the parties have been speaking at length over the course of hours, days, or even years, where does the discourse context begin and where does it end? If the parties refer to discourse of others, is that discourse incorporated by reference into the discourse context? Determining the extent of discourse context can thus be no less complex than the determination of the extent of a given text as discussed above in Section IV(B). A detailed discussion of determining the extent of discourse context is beyond the scope of this article. However, it is easy to see the importance of discourse context in matters of law. For example, in William Smith’s libel proceeding based on the published text “John Jones rightly orally condemned William Smith yesterday,” we must know what John Jones said. That is, we must know the discourse context.

In another sense, discourse context means the type or kind of discourse involved.<sup>194</sup> As Cruse puts it, “A word may well be construed differently according to whether it occurs in a poem, a medical consultation, a casual conversation, or a police interrogation[,]” as well as

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190. WILLIAM PENN, *Preface to the Seventh Edition of GEORGE FOX, JOURNAL OF GEORGE FOX* 14 (Glasgow 1694).

191. WILLIAM SHAKESPEARE, *THE TWELFTH NIGHT* act 3, sc. 2, line 45 (2015).

192. See PENN, *supra* note 190.

193. CRUSE, *supra* note 27, at 8.

194. *Id.* at 121.

“whether the [discourse] is formal or informal, and what the field of discourse is (for instance, whether it is legal, political, medical, or sporting, and so on).”<sup>195</sup> This sort of discourse context is also of legal importance. For example, a manager overhears another employee stating in a crowded workplace lunchroom: “Cassandra is a bitch.” The manager is offended and reports what he has overheard. Upon investigation, human resources determines that the employee is a Sheltie breeder who was answering another breeder’s question about Cassandra’s, his dog, gender. In this breeder discourse context, the speaker thus presumably meant no offense.<sup>196</sup>

#### E. TEXTUAL OR INTERNAL CONTEXT

*“A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole.”*

–Restatement (Second) of Contracts<sup>197</sup>

*“In law as in life, however, the same words, placed in different contexts, sometimes mean different things.”*

–Justice Ginsburg<sup>198</sup>

*“We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.”*

–Justice Ginsburg<sup>199</sup>

*“Our duty, after all, is to construe statutes, not isolated provisions.”*

–Chief Justice Roberts<sup>200</sup>

Textual or “[i]nternal context refers to the text surrounding the [text which is] the most obvious focus of the interpreter’s attention.”<sup>201</sup> Since, as discussed in Section IV(B) above, text is defined in terms of its overall cohesion and purpose, it contradicts the very no-

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195. *Id.*

196. See *Bitch*, THE NEW WEBSTER ENCYCLOPEDIA DICTIONARY 82 (1980) (defining bitch alternatively as “the female of the canine animals” and “a term of reproach for a woman”).

197. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. d (AM. LAW INST. 1981).

198. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

199. *Id.* (citing numerous examples).

200. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted).

201. See POPKIN, *supra* note 16, at 135. (internal quotation marks omitted).

tion of text to interpret parts without reference to the whole. As Popkin puts it, “The entire text (that is, including internal context) is the subject of interpretation, with the interpreter moving back and forth among various elements of the text to decide what the text means.”<sup>202</sup>

Turning again to our ACA example, Section 1401 of the ACA provides subsidies for coverage “enrolled in through an Exchange established by the State under [Section] 1311[.]”<sup>203</sup> Since no express mention is made of federal Exchanges in the last provision, are subsidies therefore available only for Exchanges set up by the states themselves? Can we decide this question by looking only at Section 1401? Given the cohesion necessary for text to exist in the first place, we contradict ourselves in claiming we have a text and yet deny we can look beyond Section 1401. Again, Section 1311 of the ACA provides that states “shall” set up “Exchanges” but Section 1321 recognizes that a state may elect not to do so. Additionally, Section 1321 provides that if a state does not elect to set up an Exchange, the Department of Health and Human Services “shall . . . establish and operate such Exchange within the State.” Taken as a cohesive whole, why can this “Exchange” not be an “Exchange” for purposes of Section 1401?

#### F. PURPOSE CONTEXT

*“Determination that the parties have a principal purpose in common requires interpretation, but if such a purpose is disclosed further interpretation is guided by it. Even language which is otherwise explicit may be read with a modification needed to make it consistent with such a purpose.”*

—Restatement (Second) of Contracts<sup>204</sup>

*“We cannot interpret federal statutes to negate their own stated purposes.”*

—Chief Justice Roberts<sup>205</sup>

*“A fair reading of legislation demands a fair understanding of the legislative plan.”*

—Chief Justice Roberts<sup>206</sup>

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202. *Id.*

203. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

204. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. c (AM. LAW INST. 1981).

205. *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) (internal quotation marks omitted).

206. *Burwell*, 135 S. Ct. at 2496 (internal quotation marks omitted).



Purpose means the author's "objective, goal, or end"<sup>207</sup> or "general rationale"<sup>208</sup> for the text. Since purpose helps one identify the very text itself,<sup>209</sup> it is not surprising that purpose (to the extent purpose can be determined) helps one "resolve ambiguity," resolve other "cases of textual uncertainty," and "figure out how to apply a statute to changing circumstances."<sup>210</sup>

Turning once more to our ACA example, Section 1401 of the ACA provides subsidies for coverage "enrolled in through an Exchange established by the State under [Section] 1311[.]"<sup>211</sup> Purpose not only helps us address whether subsidies are available only for Exchanges set up by the states themselves. We would in fact contradict ourselves on whether we have a text to interpret if we deny we can consider such purpose. Again, Congress has passed the ACA hoping to make health-care more affordable.<sup>212</sup> Since this common purpose helps define the text of the act, it makes no sense not to consider it—especially when a reading that would deny subsidies to those in states with federal exchanges might defeat the very purpose the ACA.<sup>213</sup> Cohesion concerns would also point us to other provisions of the text.<sup>214</sup>

#### G. POLICY CONTEXT

*"Considerations of justice and public policy play a significant part in the ways courts should understand legal texts."*

—Kent Greenawalt<sup>215</sup>

As several basic argument types demonstrate, policy or value considerations no doubt play a role in interpretation. Among other things: textual arguments can advance the value of objectivity of words upon a page; intent-based arguments can advance the value of respecting the will of the public or private law entity whose action is

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207. *Purpose*, BLACK'S LAW DICTIONARY (7th ed. 1999).

208. See POPKIN, *supra* note 16, at 188.

209. See *supra* Section IV(B)(2)(f).

210. See POPKIN, *supra* note 16, at 189.

211. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

212. See *Burwell*, 135 S. Ct. at 2485 (stating, "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market . . . [and] the act gives tax credits to certain people to make insurance more affordable.").

213. See *Burwell*, 135 S. Ct. at 2493-94 (stating, "Under [this] reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply . . . . It is implausible that Congress meant the Act to operate in this manner.").

214. See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.); see also *Burwell*, 135 S. Ct. at 2484 (stating, "[t]he structure of Section 36B itself suggests that tax credits are not limited to State Exchanges.").

215. GREENAWALT, *supra* note 83, at 15.

under investigation; precedent-based arguments can advance predictability and stability of the law; tradition-based arguments can advance the value of social coherence; and policy-based arguments on their face advance the role of policy in deciding how to interpret a text.<sup>216</sup>

Thus, for example, given the importance of *stare decisis*, the Supreme Court has reaffirmed decisions that it may have doubted were correctly decided.<sup>217</sup> Additionally, for example, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”<sup>218</sup> The rule of lenity is a policy-driven rule that ensures criminal statutes provide “fair warning [of] conduct rendered illegal.”<sup>219</sup> A detailed examination of how far and when policy and value contexts should be considered is beyond the scope of this article. However, as these examples show, value and policy contexts can and do impact determinations of meaning.

#### H. CONTEXT FLUX

*“[T]he context of words and other conduct is seldom exactly the same for two different people, since connotations depend on the entire past experience and the attitudes and expectations of the person whose understanding is in question.”*

—Restatement (Second) of Contracts<sup>220</sup>

In exploring the importance of context, the importance of context flux cannot be overstated. Failure to appreciate context flux easily causes what I would call the fallacy of *context equivocation*, i.e., improperly treating one context as equivalent to another. This could include, without limitation, improperly treating one temporal context as equivalent to another temporal context (such as improperly treating a past context as equivalent to a present one) or improperly treating one physical context as equivalent to another. It could also involve improperly equating any of the other different types of context identified in this Section VI. For example, I find a diary with the following entry: “I have now visited every county in the State of North Carolina!” If I tell you of my find and ask you how many counties would that be if the statement is true, your first response should not be to look up the

216. See WILSON HUHNS, *THE FIVE TYPES OF LEGAL ARGUMENT* 15-16 (Carolina Acad. Press 3d ed. 2015).

217. See *id.* at 42 (discussing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

218. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (internal quotation marks omitted).

219. *Yates*, 135 S. Ct. at 1088 (internal quotation marks omitted).

220. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. (b) (AM. LAW INST. 1981).

number of counties in North Carolina and give me a number. Your first response should be: "When was the statement made?" State and county boundaries change over time and the number of counties in North Carolina has greatly changed over time.<sup>221</sup>

We should not only guard against context equivocation among ourselves. We should also guard against imputing that fallacy to previous generations. Unless we have good reason to believe otherwise, we should not think that reasonable people of any era would equate difference and would thus equate different community standards. An educated and intelligent founding father, for example, would have known that notions of "cruel and unusual punishment" have evolved over time as community standards have evolved.<sup>222</sup> An educated and intelligent founding father would therefore have reason to believe that such standards could continue to evolve over time thereby generating potentially different answers from those generated in 1791 when the Bill of Rights was ratified.<sup>223</sup> Do we not insult his intelligence by imputing to him a different understanding?<sup>224</sup> Additionally, in determining whether the meaning of an intentionally vague term such as "cruel and unusual punishment" can evolve over time, good interpreters must also apply the principles of balance and relevance. They must also assume that drafters generally mean to be relevant and thus do not generally mean to draft wrongly, irrationally, or incoherently. How could the phrase "cruel and unusual" be relevant if it does not prohibit what is cruel and unusual at the time in question in addition to what might have been cruel and unusual in the past?

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221. See, e.g., DAVID L. CORBITT, FORMATION OF NORTH CAROLINA COUNTIES 1663-1943, at 283-294 (N.C. Div. of Archives and History 1996).

222. For example, at least by the late eighteenth century, persons would have noticed that burning at the stake was no longer a "usual" mode of execution. See Hon. William Renwick Riddell, *Judicial Execution by Burning at the Stake in New York*, 15 A.B.A. J. 373, 373-74 (1923) (burning at the stake was permissible under the Common Law for acts of "petit treason," although only for women. The practice was abolished in England in 1790, and disappeared in the United States roughly concurrently). The Bill of Rights was "ratified by the requisite number of states" in 1791. MICHAEL KENT CURTIS, J. WILSON PARKER, ET AL., CONSTITUTIONAL LAW IN CONTEXT xxvii (Carolina Acad. Press 3d ed. 2011); see also *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, J., plurality opinion) (declaring "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

223. See Stein, *supra* note 117, at 609.

224. *Plane Meaning And Thought*, *supra* note 31, at 677-79 (discussing how Queen Anne's possible different understanding of "awful" must be recognized and yet does not rule out flexibility of future application of statutes involving such a word); see also Harold Anthony Lloyd, "Original" Means Old, "Original" Means New: An "Original" Look at What "Originalists" Do, 67 NAT'L LAW. GUILD REV. 3 (2010) [hereinafter *Original*].

## VII. INTERPRETING LEGAL TEXTS: CODING AND COMPASS IN MORE DETAIL

As discussed in Section III(D) above, the “compass” of a term turns on the degree of precision or abbreviation of what is said or referred to. I will examine how pragmatics can shed insight in several areas of compass: encoding error, vagueness, ambiguity, anaphora, cataphora, ellipsis, and, as discussed in the Appendix, deixis.

### A. ENCODING ERROR

—*Who made those allegations? says Alf.*  
—*I, says Joe. I’m the alligator.*”

—James Joyce, *Ulysses*<sup>225</sup>

*“The Affordable Care Act contains more than a few examples of inartful drafting. (To cite just one, the Act creates three separate Section 1563s . . . .)”*

—Chief Justice Roberts<sup>226</sup>

An encoding error occurs when “some specific element of the meaning encoded in the linguistic form the speaker employs falls outside any intention she has in producing [it].”<sup>227</sup> Encoding errors can include unintended vagueness (i.e., cases where it is difficult to ascertain the meaning or application of a word or words<sup>228</sup>) and unintended ambiguity (i.e., cases where it is difficult or impossible to tell “which of a number of [ ] meanings is intended in that context”<sup>229</sup>). However, for at least two reasons, I will not treat vagueness and ambiguity here as subsets of encoding error but will address them in their own right below. First, vagueness and ambiguity can also occur at the message level before any encoding into an utterance or text. For example, the speaker may not have a clear notion that she is trying to articulate. Second, vagueness and ambiguity can be intentional. For example, a speaker may intentionally wish to be vague to leave her options open. I will thus, again, discuss vagueness and ambiguity in their own right below.

Returning to encoding errors, consider the following example. Mary mistakenly believes that “hoi polloi” means the upper class and says “I’m of the hoi polloi” intending to communicate her upper-class

225. JOYCE, *supra* note 37, at 276.

226. *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015).

227. CARSTON, *supra* note 1, at 18.

228. *See Vague*, AMERICAN HERITAGE COLLEGE DICTIONARY 1489 (3d ed. 1993).

229. WALTER SINNOTT-ARMSTRONG & ROBERT FOGELIN, UNDERSTANDING ARGUMENTS: AN INTRODUCTION TO INFORMAL LOGIC 333 (Wadsworth Cengage Learning 8th ed. 2009).

status.<sup>230</sup> Literally she has failed to do this since “hoi polloi” means “common folk” in ordinary language.<sup>231</sup> She may thus successfully communicate only if the audience similarly misunderstands the term, or if the audience “recognizes the disparity between its meaning and the speaker’s intention and, consistent with the principle of balance, makes the appropriate adjustment.”<sup>232</sup> If the remark is put in the context of Mary’s perceived upper-class status, it is not a very difficult balancing adjustment to make.<sup>233</sup> (In addition to misunderstanding common meanings of terms, common encoding errors also include “malapropisms, so-called Freudian slips, and various articulatory errors, such as spoonerisms, which are temporary malfunctions . . . [due to] performance factors such as tiredness or emotional strain”<sup>234</sup>).

Since humans are imperfect, encoding errors occur, and it is hard to see how strict refusal to recognize the real meaning of any encoding error whatsoever could work in the real world. Put another way, it is hard to see how imperfect humans could operate without the principle of balance discussed in Section III(B) above. Thus, we have such notions as clerical error (“[a]n error resulting from a minor mistake or in advertence”<sup>235</sup>) and scrivener’s error (“a mistake in drafting the text of a statute”<sup>236</sup>). For example, most would likely consider the following an easy case of such error needing correction: “imprisonment for not less than 10 years nor more than 20 years *and both*.”<sup>237</sup> This seems easy because “the text itself makes no sense.”<sup>238</sup> The Restatement (Second) of Contracts thus also sensibly recognizes the need to correct encoding errors: “To fit the immediate verbal context or the more remote total context particular words or punctuation may be disregarded or supplied; [and] clerical or grammatical errors may be corrected[.]”<sup>239</sup>

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230. See CARSTON, *supra* note 1, at 18.

231. *Id.*

232. *Id.*

233. Again, if we assume a speaker means to be relevant, we by definition assume she does not generally mean to speak wrongly, irrationally, or incoherently even if her language can be interpreted as wrong, incomplete, irrational, or incoherent. See *supra* Section III. This, therefore, means that we should generally prefer a rational, and coherent meaning where possible unless we have strong reasons to believe otherwise.

234. CARSTON, *supra* note 1, at 19.

235. *Clerical Error*, BLACK’S LAW DICTIONARY (7th ed. 1999).

236. POPKIN, *supra* note 16, at 234. “Scrivener’s error” can also apply to private law documents. See, e.g., *Wells Fargo Bank v. Sovereign Bank*, 44 F. Supp. 3d 394, 407 (S.D.N.Y. 2014) (citing *In re Am. Home Mortg. Inv. Trust 2005-2*, 2014 WL 3858506, at \*23 (S.D.N.Y. July 24, 2014)) (stating, “Under New York law, the doctrine of scrivener’s error allows contracts to be reformed when there is a mistake in the writing that memorialized the contract.”).

237. POPKIN, *supra* note 16, at 235 (emphasis in original).

238. *Id.*

239. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt (d) (AM. LAW INST. 1981).

Similarly, it is hard to see how the principle of balance would not require reading “enrolled in through an Exchange established by the State under Section 1311”<sup>240</sup> to include federally established exchanges. Because that principle requires us to generally prefer a rational, and coherent meaning where possible unless we have strong reasons to believe otherwise, how can we reasonably refuse that reading in favor of a reading that would threaten not only the health coverage of millions but threaten the very ACA itself?<sup>241</sup> Such a destructive reading would not rationally cohere with the purpose of the ACA to expand coverage and decrease its costs.<sup>242</sup> Thus, the principle of balance weighs in favor of correcting encoding errors and adopting a reading that does not conflict with the statute’s purpose.

## B. VAGUENESS

### 1. *Vague as Ill Defined*

“When do we have a heap? When does a man become bald?”<sup>243</sup>

Imagine that a contract calls for the delivery of one thousand “green bananas” at 5 p.m. EST on January 2, 2016. Since both the words “green” and “banana” have clear dictionary definitions,<sup>244</sup> the textualist might well find nothing vague about this phrase. After all, a word is “vague” only if it is “[n]ot clear in meaning or in application.”<sup>245</sup>

Considering language in use, pragmatics helps us see how this phrase is vague. When we try to use it in practice, we are faced with translating it into what the parties likely meant. Assuming for the sake of argument that we have settled on the type of banana and the acceptable shades of green, must each banana be green “only on its skin,” “all over its skin,” “mostly [‘or a bit’] on a particular patch of skin” or all through the banana?<sup>246</sup>

240. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

241. See *Burwell*, 135 S. Ct. at 2493 (stating, “In 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt [under this reading] . . . . The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral.”).

242. See *id.* at 2496 (stating, “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”).

243. See GREENAWALT, *supra* note 83, at 38.

244. See, e.g., AMERICAN HERITAGE COLLEGE DICTIONARY 596, 106 (3d ed. 1993) (defining “green” and “banana.”).

245. *Vague*, AMERICAN HERITAGE COLLEGE DICTIONARY 1489 (3d ed. 1993).

246. See Emma Borg, *Pragmatic Determinants of What is Said*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 753, 755 (Jacob. L. Mey & Keith Brown eds., 2009).

Pragmatics thus recognizes that boundaries of concepts can be "fuzzy and contextually flexible."<sup>247</sup> Good lawyers recognize this as well. Though "green" and "banana" have standard dictionary definitions, this will not suffice without more for a well-drafted commercial contract involving the purchase of bananas. Given the questions raised above, the well-drafted contract will include more detailed specifications about the products purchased. This would include details beyond just the greenness question raised. What kind of bananas? What size of bananas? (One-inch bananas would presumably be unacceptable.) How freshly picked? And so on.

Pragmatics also recognizes that vague terms do not necessarily mean that the underlying message is vague. As we have seen in the Sections above, terms are evidence but not the only evidence of the underlying message conveyed in the nine-stage process discussed in Section III. As we have seen in the Sections above, the principles of relevance and balance require us to consider such other evidence as purpose and other context in determining message meaning. Such other evidence can of course remove potential vagueness in the underlying message.

That said, pragmatics also recognizes that both terms and the underlying message can be and sometimes should be vague. If, for example, parties are unsure how long it will take to perform a contract for the sale of good, they might decide to provide for a "reasonable" performance time rather than specify the actual number of days.<sup>248</sup> In such a case both the term and underlying message would have loose boundaries.

## 2. *Vague as Lax*

*"[T]here is no exactly straight line in nature, no real circle, no absolute measure."*

—Nietzsche<sup>249</sup>

In addition to this looseness-of-definition component of vagueness, pragmatics recognizes a "laxness" sense of vagueness that is useful to lawyers.<sup>250</sup> This involves cases where terms are "easily defined, but they are habitually applied in a loose way."<sup>251</sup> For example, the definition of "circle" is geometrically precise but often not expected in

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247. See CRUSE, *supra* note 27, at 55.

248. See U.C.C. § 2-309 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

249. FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS (1878) reprinted in *The Nietzsche Reader* 165 (Keith Ansell Pearson & Duncan Large, eds. 2006).

250. See CRUSE, *supra* note 27, at 200.

251. *Id.*

practice as when, for example, we say the audience formed a circle around a speaker.<sup>252</sup>

This laxness component of vagueness can come as a rude shock to the practicing lawyer. A classic example involves performance timing. If we say that the above bananas are due at 5:00 p.m. EST on January 2, 2016, have we not been clear that the seller is in material breach if the bananas do not arrive until the next day? Well, our terms may have been clear as to the expected timing but courts may give the seller some “reasonable” leeway in delivery time where we have not also expressly stated that “time is of the essence.”<sup>253</sup> (I say our terms “may have been clear” but were they at least on their face? For example, does “at 5:00 p.m. EST” mean precisely at that moment, any time up to and including that moment, or some “reasonable” time up to and including that moment?). Thus, laxness can make facially-straightforward terms vague and thereby require the interpreter to move beyond the words themselves to determine meaning.

### C. AMBIGUITY

*“He is in the grip of a vice.”*

—Paul Grice<sup>254</sup>

*“The defendant was arrested for fornicating under a little used [ ] statute.”*

—Richard C. Wydick<sup>255</sup>

*“But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”*

—Chief Justice Roberts<sup>256</sup>

*“Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by*

252. *See id.*

253. *See* U.C.C. § 2-309 (stating, “The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time.”). It is also worth noting that the presence of “time is of the essence” in a contract will not necessarily lead to enforcement of a strict time frame. RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. d (AM. LAW. INST. 1981) (cautioning that “stock phrases such as ‘time is of the essence’ are not dispositive, but rather “are to be considered along with other circumstances in determining the effect of delay.”).

254. GRICE, *supra* note 4, at 25.

255. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 47 (5th ed. 2005). This book is a little masterpiece for the lawyer who would learn to write well.

256. *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (internal quotation marks omitted).



*the specific context in which that language is used, and the broader context of the statute as a whole."*

—Justice Ginsburg<sup>257</sup>

Again, a word or phrase is ambiguous if it is difficult or impossible to tell "which of a number of possible meanings is intended in that context."<sup>258</sup> Without the element of "impossible or difficult to tell" in a given context, "virtually every expression is ambiguous, because virtually every expression admits of more than one interpretation."<sup>259</sup> I thus include this additional element in the definition to limit the scope of the ambiguous. Furthermore, ambiguity can be semantic, syntactic, and pragmatic.<sup>260</sup> As with vagueness, pragmatics recognizes that ambiguous terms do not necessarily mean that the underlying message is ambiguous. Again, as we have seen in the Sections above, terms are evidence but not the only evidence of the underlying message conveyed in the nine-stage process discussed in Section III. Again, as we have seen in the Sections above, the principles of relevance and balance require us to consider such other evidence as purpose and other context in determining message meaning. Such other evidence can well render the underlying message unambiguous.

Before moving to the types of ambiguity, the fact that "virtually every expression admits of more than interpretation" surely does not bode well for textualism.<sup>261</sup> How could "the" meaning of a word be plain on its face if "virtually every expression admits of more than one interpretation[?]"<sup>262</sup> But of course to ask this is to ask how it could ever make sense to hold that one must "rely on the text to the exclusion of other interpretive criteria, if the meaning is 'plain'[?]"<sup>263</sup> Since virtually every word has multiple meanings, how could it make practical sense to hold that the text itself provides sufficient context for a "plain" reading? The difficulty of attempting this would increase dramatically for every additional word of text since more multiple possible meanings would be added with each word and expression added. This overarching problem for textualism applies to each of the specific forms of ambiguity defined below.

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257. *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (internal quotation marks and brackets omitted).

258. *SINNOTT-ARMSTRONG ET AL.*, *supra* note 229, at 333.

259. *Id.* at 334.

260. *See* *POPKIN*, *supra* note 16, at 11; *CRUSE*, *supra* note 27, at 100.

261. *SINNOTT-ARMSTRONG ET AL.*, *supra* note 229, at 333.

262. *Id.*

263. *POPKIN*, *supra* note 16, at 263.

1. *Semantic Ambiguity*

“[Z]ebra’ may refer to a mammal, a butterfly, a lizard, a fish, a type of plant, tree or wood, or merely to the letter ‘Z’ . . . .”

—Restatement (Second) of Contracts<sup>264</sup>

Semantic ambiguity exists where a word or expression can reasonably have different meanings in a given context or contexts.<sup>265</sup> For example, is “a ‘monarch’ . . . a ruler or a butterfly,” and is “a ‘ruler’ . . . a monarch” or a measuring instrument?<sup>266</sup> Is “Consideration” recited in a particular contract, “Careful thought,” or is it, “Something promised, given, or done that has the effect of making an agreement a legally enforceable contract[?]”<sup>267</sup> We of course cannot answer any of these questions sensibly apart from their contexts. Similarly, would it not be reasonable to ask whether in its overall context the phrase “enrolled in through an Exchange established by the State under [Section] 1311”<sup>268</sup> is capable of multiple meanings including one capturing federally-established Exchanges?

2. *Syntactic Ambiguity*

“When workers are injured frequently no compensation is paid.”

—Richard C. Wydick<sup>269</sup>

Syntactic ambiguity occurs “when there is uncertain meaning resulting from unclear grammatical references.”<sup>270</sup> For example, does “Green apples, pears, and jello” mean that all three must be green or is it equivalent to, “Pears, jello, and green apples”? Or is, “He often goes to town, often goes to the pool, and often goes to the beach on Tuesday” equivalent to, “He often goes to town, often goes to the pool, and often goes to the beach, on Tuesday”? If so, does Tuesday only apply to the beach or to town and pool as well?

The answer to the Tuesday question can depend on whether one follows the rule of the last antecedent. Under that rule, “qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing.”<sup>271</sup>

264. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. f (AM. LAW INST. 1981).

265. See POPKIN, *supra* note 16, at 238.

266. *Id.* at 238.

267. *Consideration*, AMERICAN HERITAGE COLLEGE DICTIONARY 297 (3d ed. 1993). My bet would be that most students on their first day of law school would pick the former and not the latter definition.

268. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

269. WYDICK, *supra* note 255, at 48.

270. POPKIN, *supra* note 16, at 258.

271. *Rule of the Last Antecedent*, BLACK’S LAW DICTIONARY (7th ed. 1999).

Thus, "[i]f the text says: 'A, B, and C, [modifying phrase],' the phrase probably modifies A, B, and C; but if the text says 'A, B, and C [modifying phrase] [sic]', the omission of the comma after the reference to C indicates the phrase modifies only C."<sup>272</sup>

Wydick further gives a number of good examples of syntactic ambiguity. Some of my favorites include: "My client has discussed your proposal to fill the drainage ditch with his partners"; "Being beyond any doubt insane, Judge Weldon ordered the petitioner's transfer to a state mental hospital"; and "A trustee who steals dividends often cannot be punished."<sup>273</sup>

The good lawyer is also aware that the beast of syntactic ambiguity exists and takes steps to avoid it. He understands the rule of the last antecedent may be applied to his work, and he takes care, among other things, to: (1) "avoid wide gaps" between his subjects, verbs, and objects; (2) put "conditions and exceptions where they are clear and easy to read"; (3) put "modifying words close to what they modify"; (4) clarify "the reach of modifiers"; and (5) of course punctuate carefully.<sup>274</sup> He also uses the Oxford Comma where appropriate.<sup>275</sup> He does not write, "I dedicate this treatise to my parents, Jane Austen and God." He writes, "I dedicate this treatise to my parents, Jane Austen, and God."<sup>276</sup>

#### D. INDETERMINACY

Vagueness and ambiguity should not be confused with indeterminacy, which can exist on epistemic and metaphysical levels.<sup>277</sup> Epistemic indeterminacy exists where we lack sufficient knowledge to reasonably determine the matter.<sup>278</sup> An obvious case of epistemic indeterminacy would be an encrypted message which we are unable to break. The indeterminacy exists because we lack the knowledge to break the code. Of course, indeterminacy here would disappear were we ever to discover the key to the encryption. Metaphysical indeterminacy exists where a proposition "is neither correct nor incorrect."<sup>279</sup>

272. POPKIN, *supra* note 16, at 258.

273. WYDICK, *supra* note 255, at 47.

274. *Id.* at 41-53, 81-107.

275. See WILLIAM STRUNK & E. B. WHITE, *THE ELEMENTS OF STYLE* 2 (4th ed. 1999).

276. As my research assistant Steven Verez points out, the Oxford Comma is not a cure all. As he notes, tweaking my example in the text to "I dedicate this treatise to my mother, Jane Austen, and God" might create the appearance of an appositive phrase where Jane Austen is my mother.

277. See GREENAWALT, *supra* note 83, at 42-45 (discussing epistemic and metaphysical indeterminacy).

278. See *id.* at 42 (stating "Epistemic indeterminacy may exist if highly reasonable people, as well informed as is practical, have an unresolvable disagreement about whether [something] is correct, or have no idea whether it is correct").

279. *Id.*

Thus, Greenawalt would consider “[a] claim that chocolate ice cream is best is indeterminate in the metaphysical sense” because “there is no correct answer to which flavor of ice cream is best.”<sup>280</sup>

Both senses of indeterminacy raise important points. First, as with vagueness and ambiguity, epistemic indeterminacy of terms does not mean that the message is also epistemically indeterminate. Once again, as we have seen in Sections above, the principles of relevance and balance require us to consider such other evidence as purpose and other context in determining message meaning. Such other evidence can well render the underlying message knowable. This fact should make the textualist approach metaphysical indeterminacy with care. Holding fast to a general belief that there can be no correct answer apart from text is, as these Sections have shown us, simply not true.

#### E. ANAPHORA AND CATAPHORA

Anaphora points backwards to some antecedent<sup>281</sup> as does the pronoun in, “Jane saw John and he saw Jane.” Cataphora, on the other hand, refers forward as with the pronoun in, “It was wonderful, that wedding[.]”<sup>282</sup> Both anaphora and cataphora “produce textual continuity or cohesion through a network of internal references.”<sup>283</sup>

For simplicity’s sake, I shall concentrate on anaphora in the remainder of this Section. Commonly recognized anaphors include pronouns, “reduced proper names,” noun phrases, and “ellipses of various kinds.”<sup>284</sup> However, the antecedent need not be a word. It can also be some preceding “percept or [ ] nonverbal signal[.]”<sup>285</sup> For example, a deponent might make a grimace or snide remark and opposing counsel might instruct her associate “to make a note of it.” Anaphora can also include “lazy” use of definite articles as in, “He’s been to Italy many times but he still doesn’t speak *the* language.”<sup>286</sup> Here the context lets us understand that “the” can mean the pronoun “its” so that the sentence can read “its language” or “Italian.”

Although they may not know the term “anaphora,” good lawyers know the importance of its function in drafting. For example, they know the importance of defined terms that can be used to precisely and economically refer back to even the most complex defined notions.

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280. *Id.*

281. See F. Cornish, *Discourse Anaphora*, in *CONCISE ENCYCLOPEDIA OF PRAGMATICS* 184, 185 (Jacob. L. Mey & Keith Brown eds., 2009).

282. MARTIN ET AL., *supra* note 40, at 33.

283. *Id.*

284. See Cornish, *supra* note 281, at 187.

285. See *id.* at 185.

286. See JACOB L. MEY, *PRAGMATICS: AN INTRODUCTION* 58 (2d ed. 2011) [hereinafter *PRAGMATICS*].

They also know the importance of being clear in their pronoun usage so that one is not left to debate, for example, whether Jane or Mary is the referent of "she."

What I fear many good lawyers do not know, however, is the anaphoric role that other language can play. I do not mean missing the anaphoric role in simple cases such as "John Smith just arrived from London—our man from England is here at last." Instead, I mean the anaphoric role that phrase plays or might play in more complex situations such as the ACA example mentioned earlier.

Again, Section 1311 of the ACA provides that states "shall" set up "Exchanges" while Section 1321 recognizes that a state may elect not to do so.<sup>287</sup> Additionally, Section 1321 provides that if a state does not elect to set up an Exchange, the Department of Health and Human Services "shall . . . establish and operate such Exchange within the State[.]"<sup>288</sup> Finally, Section 1401 of the ACA provides subsidies for coverage "enrolled in through an Exchange established by the State under [Section] 1311 . . ."<sup>289</sup> Since no express mention is made of federal Exchanges in the last provision, are subsidies therefore available only for Exchanges set up by the states themselves?<sup>290</sup>

In attempting to answer this question, should we not consider whether either some part or the whole of the phrase "enrolled in through an Exchange established by the State under [Section] 1311"<sup>291</sup> is an anaphoric abbreviation which means to pick up both state and federal exchanges which were referred to previously? Once we understand the concept of anaphora, it is hard to see how a thorough examination of the language avoids consideration of whether we have anaphora. If we do have anaphora, that can erase any doubt that might have otherwise existed.

Regardless of how we might answer the anaphora question in the case of the ACA, the above example illustrates a problem that must vex the textualist. If we try to focus on any plain meaning of a term or a phrase in a dictionary sense (again assuming "plain meaning" makes sense), we can go astray when we have anaphora. For example, if the phrase "the genius" is used as anaphor to refer back to the person in "John Smith just lost two weeks' worth of data," the diction-

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287. Patient Protection and Affordable Care Act §§ 1311, 1321, 42 U.S.C. §§ 18031, 18041 (2010).

288. Patient Protection and Affordable Care Act § 1321, 42 U.S.C. § 18041 (2010).

289. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

290. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015) (stating "This case is about whether the Act's interlocking reforms apply equally in each State no matter who establishes the State's Exchange. Specifically, the question presented is whether the Act's tax credits are available in States that have a Federal Exchange.>").

291. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

ary is at best going to be of limited use in determining what “the genius” means in this context.

#### F. ELLIPSIS

Ellipsis as I use the term here is the omission of “some essential structural element” that “can only be recovered by referring to an element in the preceding text.”<sup>292</sup> In such a case, the elliptical text cannot be properly understood without referring to that missing element.<sup>293</sup> For example, a lawyer is debating which of two neckties he should wear in court for an important hearing that day. The lawyer emails his associate: “I’m debating whether to wear my yellow, blue, or red tie to the Smith hearing today. I think I prefer the red tie. Which do you think would be best?” His associate emails back: “Blue is best.” The associate’s elliptical statement cannot be properly understood without the applicable discourse context, without referring to the preceding discourse about the hearing and which tie might be preferable. That said, the reply email can be easily understood in the discourse context to apply to ties. “Blue is best” should not thus be taken to mean “blue is the best color,” even though one might argue it has such a “plain meaning” out of context.

Similarly, one would be wrong to ignore possible ellipsis when interpreting other texts. Taking our ACA example again, a careful interpreter would ask whether Section 1401 might involve ellipsis. Again, Section 1401 of the ACA provides subsidies for coverage “enrolled in through an Exchange established by the State under [Section] 1311 . . . .”<sup>294</sup> In light of other Sections allowing the federal government to set up exchanges for a state,<sup>295</sup> why could Section 1401 not be read as elliptical, as including state exchanges set up through the action of the federal government? Of course, however we might answer any ellipsis question in the case of the ACA, the above example also illustrates a vexing problem for the textualist. Ellipsis can exist even where meaning appears to be plain (as in “blue is best”).

#### VIII. FURTHER MEANING BEYOND THE MESSAGE: GAPS AND OMISSIONS

*“Could mortal Lip divine  
The undeveloped Freight  
Of a delivered Syllable –*

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292. MARTIN ET AL., *supra* note 40, at 56.

293. *See Id.*

294. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

295. Patient Protection and Affordable Care Act § 1321, 42 U.S.C. § 18041 (2010).

*'Twould crumble with the weight –'*

–Emily Dickinson<sup>296</sup>

As we saw in Section III above, stage (ix) of Cruse's modified outline involves inferring the purpose and relevant meaning and effect of a communication. This relevant meaning and effect may go well beyond what the speaker had in mind when making a statement. First, meaning may expand through entailment as that term is explored in more detail in the Appendix. Second, if gaps in meaning exist, meaning may expand beyond the author's intended message because of default rules for filling gaps. Third, meaning may expand as texts are applied to the world. For example, we do not know whether a prohibition of motor vehicles in the park prohibits motor-powered wheel chairs until we have a ruling on the matter. Once we have that ruling, the meaning of "motor vehicle" has changed to the extent it either now expressly includes or excludes motor-powered wheel chairs. Fourth, textual meaning can expand simply through our general increase in knowledge over time. Borges, for example, makes this point with his wonderful short story, "Pierre Menard, Author of the *Quixote*."<sup>297</sup> Because of our greater knowledge today, any rewriting of that novel must produce a richer and more meaningful novel.<sup>298</sup> Though all these types of meaning expansion create problems for the textualist who claims meaning is confined to the text, for sake of brevity I will focus a bit further on gaps and omissions, and, in the Appendix, entailments. I use "gap" to mean an unaddressed matter in a context where a reasonable person would ordinarily have addressed the matter. I use the term "omission" to refer any matter not addressed other than a gap. Any text will have an infinite number of omissions (since, except for any gaps, everything not included is an omission) but it may or may not have gaps. For example, "I hereby unconditionally accept your attached offer" has no (at least obvious) gaps.

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296. EMILY DICKINSON, *THE POEMS OF EMILY DICKINSON 1877* (R. W. Franklin ed., Harvard U. Press 2000) (Poem No. 1456).

297. Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, in *COLLECTED FICTIONS* 88-100 (Andrew Hurley trans., 1989); see also Daniel C. Dennett, *Introduction to GILBERT RYLE, THE CONCEPT OF MIND X* (Univ. of Chi. Press 2000) (like in Borges's tale, "*The Concept of Mind* is a much richer text than it was when Ryle wrote it in mid-century.").

298. See *supra* note 297 and accompanying text.

## A. ILLUSORY GAPS

*"[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law."*

—Restatement (Second) of Contracts<sup>299</sup>

Though gaps and omissions may necessarily seem to leave holes in the meaning of a message, our use of language proves more flexible than that. For example, there would be no performance ambiguity in "X must deliver 10 widgets to Y at a price of one dollar per widget, payment due upon delivery" if the parties have previously orally agreed upon acceptable timing, quality, and place of delivery. As discussed in the Sections above, this would simply involve putting the phrase in its discourse context and recognizing the ellipsis involved.

Consistent with this, the Restatement (Second) of Contracts provides that a contract is to be "interpreted in accordance with" any "same meaning" that the parties have attached to an agreement.<sup>300</sup> Additionally, the Restatement (Second) of Contracts also provides that prior agreements and negotiations may be considered to determine "the meaning of the writing, whether or not integrated[.]"<sup>301</sup> The Uniform Commercial Code also recognizes the importance of discourse context in its definition of "agreement": "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade[.]"<sup>302</sup> The Uniform Commercial Code also provides that an agreement may be "explained or supplemented" "by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."<sup>303</sup> Again, given the discourse context here, a court should find no such intention of merger and should recognize the ellipsis involved. This sort of "gap" would thus not expand meaning beyond what the parties intended.

## B. REAL GAPS

Though it may at first seem counterintuitive that real gaps or holes can actually add meaning, they absolutely can. In adding such meaning, such real gaps can be intentional or accidental. For example, contracting parties may decide that it will take them too long to negotiate the timing of delivery for a shipment of nails and are there-

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299. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. b (AM. LAW INST. 1981).

300. RESTATEMENT (SECOND) OF CONTRACTS § 201.

301. RESTATEMENT (SECOND) OF CONTRACTS § 214(c).

302. U.C.C. § 1-201(b)(3) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

303. U.C.C. § 2-202(b).



fore content to have a judge determine the matter should they have a dispute. Other parties may simply overlook or forget to address the matter of such timing.<sup>304</sup> Where the parties have simply failed to address timing (unlike the widget example above where the parties had agreed upon timing though they omitted it in their writing), the Uniform Commercial Code will plug the hole with requiring delivery in a reasonable time.<sup>305</sup> Here the imputed meaning of the text would thus as a matter of law stretch beyond its original meaning to the extent a court assigns specific terms the parties may not have expected.

### C. ADDRESSING POSSIBLE GAPS AND OMISSIONS

If one thus understands a "gap" to be an unaddressed matter in a context where a reasonable person would ordinarily have addressed the matter, apparent gaps on their face require careful review. Since by definition reasonable people would not have ordinarily left the matter unaddressed, the interpreter has good cause to pause when she finds an apparent gap. Additionally, the principles of relevance and balance would require a gapless interpretation if that can be reasonably done. If reasonable parties generally seek to address all relevant matters correctly, rationally, and coherently, then we should approach possible gaps with suspicion unless we have good reason otherwise. The widget contract above is an example of how potential gaps can reasonably be disposed of as illusory. Of course, where it appears from the applicable evidence that parties have intentionally left gaps (such as in the nail shipment example above), the gap should be recognized and any default rules should be allowed to fill the gap.

The principles of relevance and balance also apply to possible gaps in public law texts. Thus, for example, the question of whether subsidies are available under the ACA in states with federal exchanges should not end with merely looking at the language of Section 1401 of the ACA which might appear to contain a gap regarding subsidies for coverage in federal exchanges.<sup>306</sup> The principles of relevance and balance should make us consider whether Section 1401 can be read in light of the purpose and other Sections of the ACA in a way that leaves no gap. As we have seen in the Sections above, understanding the context in which the statute was drafted would in fact find any such gap counterintuitive. The principles of relevance and

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304. Unintentional gaps can come in other ways. A court, for example, may strike a severable provision of a contract thereby leaving that subject matter unaddressed. See RESTATEMENT (SECOND) OF CONTRACTS § 183 cmt. a.

305. See U.C.C. § 2-309; see also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (stating "if no time is specified, a term calling for performance within a reasonable time is supplied.").

306. See *supra* notes 148-52 and accompanying text.

balance thus prevent the gap question from being simply a “word game”<sup>307</sup> restricted to Section 1401.

## IX. IMPLEMENTIVES

*“Qui vult finem vult media.”*<sup>308</sup>

A further category of additional meaning in use includes what I have begun to call (for want of a better term) “implementives.” As far as I know, the use of the term is my own; I know of no others who have brought together, under one such pragmatic concept, both the “micro” and “macro” notions discussed below. Although the subject merits much more space than I can give it here, I wish to address it briefly in the hope that others might expand upon the notion especially at the “macro” level discussed below.

Because we have limited power and knowledge, our pragmatics must recognize the real-world distinction between, for example, forming a contract and implementing a contract, or between legislating a rule and implementing that rule. Though an omniscient and omnipotent being might create light by simply saying, “Let there be light,” we could never accomplish such a thing by mere language. We would also have to figure out how to implement the proclamation.<sup>309</sup> In such a case, it would go without saying that “to will the end, is to will the proper means,”<sup>310</sup> and implementives flow from that principle (which I shall call the “implementive principle.”) As discussed below, implementives can exist at both the “micro” and “macro” levels.

### A. “MICRO-IMPLEMENTIVES”

I use “micro-implementives” to cover, among other things, implementation of the subject matter of discourse, agreements, and rules. Because of our human limitations just noted, this area has received considerable attention though its pragmatic nature may have been often missed. For example, the law of remedies in general and “implied” causes of action can be justified in terms of an implementive principle (i.e., that to grant the right is to grant some way to implement that right) even where the applicable contract or statute may not

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307. See *supra* notes 148-52 and accompanying text.

308. JAMES T. BRETZKE, *CONSECRATED PHRASES: A LATIN THEOLOGICAL DICTIONARY: LATIN EXPRESSIONS COMMONLY FOUND IN THEOLOGICAL WRITINGS* 199 (3d ed. 2013). I would translate this as “One who wishes the end wishes the means.”

309. This is not to say that we can never accomplish things merely by words. A person with the proper authority can of course close a meeting by saying, “I declare this meeting closed.” AUSTIN, *supra* note 29, at 156; see also *id.* at 148-64 (providing a general overview of such “performative” use of language).

310. This is a morally improved version of the maxim cited above. See *supra* note 308 and accompanying text.

address implementation.<sup>311</sup> Because of the considerable development of the law of remedies, for example,<sup>312</sup> I shall not address micro-implemmentives beyond (A) noting the underlying role of pragmatics and the implemmentive principle and (B) noting that remedial gaps like others can be subject to pragmatic closure.<sup>313</sup> However, I would ask in passing why it would not be reasonable to consider whether the phrase, "enrolled in through an Exchange established by the State under [Section] 1311"<sup>314</sup> implemmentively implies inclusion of federally-established Exchanges when failure to do so would likely render the ACA incapable of achieving its goals.<sup>315</sup>

#### B. "MACRO-IMPLEMENTIVES"

I use "macro-implemmentives" to cover implementation of discourse or rules apart from their subject matter. Unlike micro-implemmentives, this area seems lacking both in terms of what has been said and done and in terms of what has not been said and done.

This is not to say that macro-implemmentives have been fully ignored in substance at least (although not of course by this term). Though Lon Fuller unfortunately uses phrases such as "[t]he inner morality of the law,"<sup>316</sup> he has famously recognized what I would consider macro-implemmentives. Fuller recognizes that a legal system's rules "normally serve the primary purpose of setting the citizen's relations with other citizens[.]"<sup>317</sup> In serving that end, Fuller notes that rules (whatever specific subject matter they may address) cannot work if they are (1) ad hoc, (2) not publicized, (3) retroactively applied in abusive fashion, (4) not understandable, (5) contradictory, (6) otherwise beyond a party's power to perform, (7) changed with disorienting frequency, or (8) administered in a way that differs from their announcement.<sup>318</sup>

I shall briefly review each point in turn. (1) The first point is arguably definitional since what is ad hoc is arguably not a rule. However, to the extent rules can be ad hoc, we of course cannot obey them

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311. See, e.g., POPKIN, *supra* note 16, at 113-121 (discussing implied causes of action and remedies in the statutory context).

312. See *id.*

313. See *supra* Section VIII (discussing pragmatics and gaps).

314. Patient Protection and Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2010).

315. See *supra* notes 207, 236, 237, 239 and accompanying text; see also King v. Burwell, 135 S. Ct. 2480, 2485 (2015) (stating, "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market . . . [and] the act gives tax credits to certain people to make insurance more affordable.").

316. LON L. FULLER, *THE MORALITY OF LAW* 42 (Yale U. Press rev. ed. 1979).

317. *Id.* at 207-08.

318. See *id.* at 39.

before they are made, and it is hard to set relations with others if the rules change depending upon the situation. The remaining seven of these eight points are pure pragmatics. They all expressly turn on ways that rules can fail given our human limitations. (2) We are not omniscient and cannot recognize and obey a rule which we cannot know. Thus pragmatics demands publication. (3) At the time we act, we cannot recognize and obey a rule that does not yet exist. Again, perhaps we could if we were omniscient but we are not, and pragmatics thus demands a limit on retroactive rule making. (4) We cannot obey rules we do not understand. Given again our lack of omniscience, pragmatics demands that rules be understandable. (5 & 6) We cannot perform rules beyond our ability to perform. Pragmatics thus demands that rules not be contradictory or otherwise beyond our ability to perform. (The contradictory is also of course incomprehensible and also violates the demand of understandability.) (7) By definition, we cannot follow rules changed with disorienting frequency. Pragmatics thus demands such disorienting changes not be done. (8) Since we rely on the way rules are promulgated, pragmatics demands that rules not be administered in a way that differs from their announcement.

Instead of an “internal morality” (whatever that could mean), what we see here are macro-level pragmatic requirements for workable rules in real-world human day-to-day life. These eight macro-implementives provide inherent restraints that no operative rules can generally ignore. If the macro-implementives are so ignored, the rules cannot operate in the real world of human day-to-day life. These eight macro-implementives thus effectively provide protections (such as prohibitions against ex post facto laws) that would remain under our common notions of rules even if express laws to such effect were repealed.<sup>319</sup> In other words, since to will an operative rule is to will its macro-implementives, to legislate an operative rule is to legislate its macro-implementives.

Additionally, these macro-implementives provide interpretive guidance. If we assume relevance when we interpret, it is difficult to find, for example, relevance if we interpret a rule in a way that violates macro-implementives. For how could a “rule” be relevant to human conduct (except perhaps in some sadistic or tortuous way) if that “rule” is not capable of being followed? Thus, if one interpretation would violate one or more of Fuller’s rules while another would not, then relevance demands the interpretation that would not violate such rules.

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319. See Harold Anthony Lloyd, *Let’s Skill all the Lawyers: Shakespearean Lessons in Law and Rhetoric*, 6 ACTA IURIDICA OLOMUCENSIA 9, 35-43 (2011) [hereinafter *Let’s Skill all the Lawyers*] (discussing what I called a “Semiotic Decalogue.”).

Finally, I would like to see how far we might extend Fuller's list taken as macro-implementives. For example, I believe macro-implementives prohibit at least some restrictions on speech if we are to have operative rules. First, there must be sufficient allowance of speech<sup>320</sup> to convey and implement the rules. Second, speech must be allowed to the extent necessary or expedient to enforce the rules. Third, enforcement of rules involves such empirical questions as how to follow the rules, whether the rules are being followed, and, if so, to what end and effect. We must thus permit sufficient speech to honestly explore these questions, or we have violated the implementive principle and have thus not truly implemented the rules. Put another way, since legislating rules also legislates the necessary macro-implementives, legislating rules legislates at least the necessary allowance of speech to implement the rules. Furthermore, as I have noted elsewhere, the vast actual and potential scope of what intersects with law can result in a sweeping allowance of speech grounded in such pragmatics.<sup>321</sup> As I have also noted elsewhere, the implementive principle can independently ground degrees of allowance of<sup>322</sup> due process and equal protection necessary for rule implementation.<sup>323</sup> Macro-implementives are thus a promising and important area of pragmatics greatly in need of further exploration and elaboration.

## X. CONCLUSION

*"[T]he linguistic meaning . . . falls short of encoding what the speaker means: it merely helps the audience infer what she means."*

—Dan Sperber & Deirdre Wilson<sup>324</sup>

*"[W]ords are chameleons, which reflect the color of their environment."*

—Justice Ginsburg (quoting Learned Hand)<sup>325</sup>

As this survey of pragmatics has shown, the writer's meaning of a text can differ from and even contradict a literal reading. In its proper

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320. To prevent confusion, I use in pragmatics the term "allowance of speech" instead of the Constitutional term "freedom of speech."

321. *Let's Skill all the Lawyers*, *supra* note 319, at 35-43.

322. Again, I use the phrase "allowance of" to distinguish these pragmatic concepts from Constitutional ones. See *supra* note 320 and accompanying text.

323. *Let's Skill all the Lawyers*, *supra* note 319, at 42.

324. DAN SPERBER & DEIRDRE WILSON, *RELEVANCE: COMMUNICATION & COGNITION* 27 (2d ed. 1996).

325. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (quoting *Comm'r v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) (Hand, J., majority) (internal quotation marks omitted)).

context, for example, “Bob is indeed a good man” can ironically mean just the opposite. Additionally, even where coding is direct, most words have multiple possible meanings, and we must therefore examine other evidence to determine the appropriate meaning unless we wish to act arbitrarily. Fortunately, texts exist in contexts that can also serve as evidence of what a writer really intends or what (in the case of texts by a group) might be the best reading of a text.

Good tools exist for interpreters who seek to determine a relevant text and then ascertain its meaning. Good interpreters use the cohesion factors discussed above and the overall purpose of a message and its communication to identify the relevant text. For example, if an Act is passed to increase affordable health care, a defensible selection of “relevant text” in a review of the Act needs, if possible, to be broad enough to avoid a ruling that drastically reduces affordable health care. Otherwise, one absurdly implements the opposite of what was legislated.

After determining a relevant text, good interpreters examine the applicable cognitive, physical, temporal, social, cultural, discursive, textual, purposive, and policy contexts of the text. They consider this evidence in addition to the evidence of the text. As they weigh their evidence, they apply the principles of relevance and balance discussed above. That is, they assume that drafters mean to be relevant and thus do not generally mean to draft wrongly, irrationally, or incoherently even if their language can be interpreted as wrong, incomplete, irrational, or incoherent. Good interpreters also grasp the role of politeness in communication and can thus grasp the indirect encoding politeness may require. They further understand that anaphora, cataphora, ellipsis, and implementives can require looking beyond the immediate text for the complete applicable message. They also understand the same can apply with deixis, presupposition, unstated premises, entailment, and other matters discussed in the Appendix.

Unless good interpreters have strong reasons directing them otherwise, they thus strive to find a rational, and coherent meaning where possible despite any textual encoding errors and despite unintentional textual gaps, vagueness, ambiguity, or indeterminacy. In so doing, they do not confuse defective text with message. Yet, they also understand that text may be intentionally gapped, vague, ambiguous, or indeterminate and they must weigh the available evidence to determine whether the message is gapped, vague, ambiguous, or indeterminate as well. In making any such judgment, they consider the principles of relevance, balance, and politeness, as well as the context and purpose of the text. For example, in determining whether the meaning of an intentionally-vague term such as “cruel and unusual

punishment" can evolve over time, good interpreters not only look at the purpose of the notion but also assume that drafters generally mean to be relevant and thus do not generally mean to draft wrongly, irrationally, or incoherently. They ask themselves how the phrase "cruel and unusual" could be relevant if it does not prohibit what is cruel and unusual at the time in question in addition to what might have been cruel and unusual in the past?

Thus, seekers of the truth do not advance interpretive theories that ignore pragmatics, that ignore how language works in the real world. Nor do they advance interpretive theories that lack relevance to the real world. As seekers of the truth, lawyers should not delude themselves or judges with a textualism "that requires the judge to rely on the text to the exclusion of other interpretive criteria, if the meaning is 'plain.'"<sup>326</sup> As we have seen, meaning of text is never truly "plain" in itself because it always depends upon its context. Additionally, as noted above, relevant text is never simply given but must also itself be interpretively determined. As Popkin notes, "Textualism does not tell you how broadly or narrowly to define the text; . . . [or] what context helps to decide textual meaning."<sup>327</sup> Such textualism does not and cannot work, and seekers of the truth do not pretend otherwise.

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326. POPKIN, *supra* note 16, at 263.

327. *Id.* at 264.

## XI. APPENDIX

## OTHER PRAGMATIC CONSIDERATIONS FOR LEGAL TEXTS

For those wishing to explore pragmatics in more detail, I set out some further important pragmatic concepts below which may not be as clearly tied to the ACA and other examples discussed above. However, they are of no less importance than the pragmatic notions discussed above. In the spirit of trying to provide lawyers with a single initial reference for pragmatics, I outline these additional matters as well.

## A. PRESUPPOSITIONS

1. *Semantic Presupposition*

*Have you stopped beating your wife?*

In ordinary language, to “presuppose” is either “[t]o believe or suppose in advance[,]” or “[t]o require or involve necessarily as an antecedent condition[.]”<sup>328</sup> Semantic presupposition involves the latter sense, and is a “relation between two propositions, such that the presupposing proposition can be denied, whereas the presupposed one (the antecedent) is immune to negation[.]”<sup>329</sup> For example, if I answer a traffic citation by saying “my broken taillight did not make my driving dangerous,” that answer must presuppose “I had a broken taillight,” or I would not be making sense. On the face of things, I could not coherently affirm my driving analysis while denying the broken taillight. I could of course change my mind and negate the presupposing proposition. For example, I could say: “On further thought, I guess driving with that broken taillight was dangerous after all.” However, changing the evaluation of danger would not negate the presupposed broken taillight. I further explore in the next paragraph this important fact about presuppositions.

Though defining “semantic presupposition” might at first seem like mere academic hairsplitting, the concept is of great practical importance. In the case above, I effectively admitted that I had a broken taillight. To raise the stakes, imagine, for example, a paternity proceeding where an alleged father denies paternity. In the course of the proceeding, counsel for the other side alleges that the man “has treated his son very badly.” The alleged father only counters with: “That is not true! I have done him no harm!” Negating the presupposing proposition does not negate the presupposed proposition that the

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328. *Presuppose*, AMERICAN HERITAGE COLLEGE DICTIONARY 1084 (3d ed. 1993).

329. C. Caffi, *Pragmatic Presupposition*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 759, 513 (Jacob. L. Mey & Keith Brown eds., 2009).



man is the father. Without going further to negate the presupposed proposition as well, the alleged father may have thus inadvertently conceded the presupposed paternity.

This all ties into stasis, or issue theory, in rhetoric which recognizes a progressive presuppositional issue line: (1) *Sitne?* ("Does it exist?) (2) *Quid sit?* ("What is it?") and *Quale sit?* ("What [quality] of thing is it?")<sup>330</sup> To ask what something is (such as a certain plant growing in one's yard), on the face of things one concedes that the plant exists. To ask whether that plant is a useful one, on the face of things one concedes that it is a plant and that it exists. Recognizing such a stasis line, a responder must carefully understand what he is conceding when he responds, for example, that he was right to cut down his neighbor's trees because they were a hazard. By making a "*Quale sit?*" assertion he has conceded the "*Sitne?*" and the "*Quid sit?*" questions, i.e., whether he did something and whether that it was cutting down his neighbor's trees.<sup>331</sup>

#### B. PRAGMATIC PRESUPPOSITIONS

Pragmatic presupposition, on the other hand, involves the first sense of "to presuppose," i.e., "to believe or suppose in advance."<sup>332</sup> It is a relationship between two propositions "whose truth/factuality is taken for granted in a given context due to the mutual knowledge of the speaker and the addressee(s)."<sup>333</sup> Pragmatic presupposition in this sense can be a useful umbrella term for context and for other background considerations in general.<sup>334</sup> For example, one neighbor might email another: "Is the Victim alone today?" Though that might raise suspicions of criminal conspiracy in the mind of some textualists, knowledge of the actual pragmatic presuppositions in play can show no intended foul play. If neighbors generally call one of their whiny neighbors "the Victim," they can pragmatically presuppose this use of the term when they speak. Of course, this example brings us back to discourse context and context in general as discussed above in Section VI.

#### C. ENTAILMENTS

*"A word is dead, when it is said  
Some say-*

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330. See LANHAM, *supra* note 96, at 93.

331. *Id.*

332. *Presuppose*, *supra* note 328.

333. Barabara Kryk-Kastovsky, *Legal Pragmatics*, in CONCISE ENCYCLOPEDIA OF PRAGMATICS 513, 514 (Jacob. L. Mey & Keith Brown eds., 2009).

334. I will not explore other proposed definitions of "pragmatic presupposition" or their claimed "short life." See *generally* Caffi, *supra* note 329, at 763-67.

*I say it just begins to live  
That day*

—Emily Dickinson<sup>335</sup>

*“A Word dropped careless on a Page . . . .  
Infection in the sentence breeds . . . .  
At distances of Centuries  
From the Malaria —”*

—Emily Dickinson<sup>336</sup>

Propositions entail other propositions: “Lettie is a wonderful sheltie dog” unavoidably entails that “Lettie is an animal.”<sup>337</sup> It also entails that Lettie is of the genus *Canis*, the family *Canidae*, the Order *Carnivora*, the Class *Mammalia*, the Phylum *Chordata*, and the Kingdom *Animalia*<sup>338</sup> even if the speaker has never heard those terms and cannot have meant to use or mean them. Entailment expands meaning because it can involve propositions and terms the speaker does not know and therefore could not have intended but are nonetheless a part of the “meaning” of the statement. In noting such extended meaning, I accept Cruse’s definition of “entailment”: “To say that [P]proposition P entails [P]proposition Q means that the truth of Q follows logically and inescapably from the truth of P, and the falsity of P follows likewise from the falsity of Q.”<sup>339</sup>

Entailment is not merely an academic point for logicians to explore. Entailment *necessarily* can affect what is said and can even contradict it. For example, Jane Doe who has never read the Constitution says: “I wish to run for Presidency of the United States. We need new blood in that office and I can give it. As someone who is not a natural born Citizen of the United States, no one is more qualified to run for that office than me.” Since she claims to be the best qualified to run, she cannot mean in any way to say that she is disqualified. However, anyone who is not “a natural born Citizen of the United States” falls in the class of persons ineligible to run for president.<sup>340</sup> Her statement on its face thus necessarily entails disqualification in the Constitutional sense notwithstanding any other outstanding qualities that she might have. Though this would be a displaced sense of what she said (since, again, it contradicts her very message), it would be a necessary

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335. DICKINSON, *supra* note 296, at 124 (Poem No. 278).

336. *Id.* at 1872.

337. CRUSE, *supra* note 27, at 28.

338. *Canis lupus familiaris*, 1 MAMMAL SPECIES OF THE WORLD: A TAXONOMIC AND GEOGRAPHIC REFERENCE 2142 (Don Wilson & DeeAnn Reeder, eds., 3d ed. 2005)

339. CRUSE, *supra* note 27, at 28 (emphasis omitted).

340. See U.S. CONST. art. II, § 1, cl. 5.

one nonetheless. Careful lawyers thus take great care evaluating what their propositions entail.

#### D. UNSTATED PREMISES

Unstated premises of arguments can also serve as critical background and can thus be presupposed in the sense of believing or supposing in advance.<sup>341</sup> Since they are not written, they would not be part of any text as I have defined that term in Section IV(B)(1) above.<sup>342</sup> For example, we might commonly say, "Since someone shot the criminal, that criminal must be seriously injured by the bullet." To draw this conclusion, however, we need an initial premise such as "If someone shoots another person, then that person will be seriously injured by the bullet." Like other background matters, such unstated premises can go unchallenged. This presents the danger of incorrect or undesirable conclusions being too quickly drawn from premises that could be disproved if they were only consciously considered. For example, targets of guns are not always seriously injured—they may have been wearing protective gear, an intervening piece of furniture may have slowed the bullet to a non-dangerous speed when it hit, and so on.

Additionally, as the following example shows, the unconscious nature of premises can lead one to commit or not question logical fallacies even if the unstated premise is true. For example, a prosecutor drafting an indictment may say to himself, "The bullet injury leaves no doubt that someone shot him." This will be fallacious reasoning if it is based upon the unstated premise "If someone shoots another person, then that person will be injured by the bullet." In that case, the prosecutor would commit the fallacy of affirming the consequent.<sup>343</sup> Having a bullet injury could be explained in other ways: the person shot himself, a gun accidentally fired of its own accord, or to take a fantastic example perhaps an orangutan pulled the trigger.<sup>344</sup> A care-

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341. A classic example of this is an enthymeme, i.e., "[a] syllogism in which one of the premises or the conclusion is not stated explicitly." *Enthymeme*, AMERICAN HERITAGE COLLEGE DICTIONARY 459 (3d ed. 1993).

342. Again, I define texts as "the original wording of written works, including without limitation, constitutions, statutes, regulations, orders, contracts, wills, and other documents and instruments." See *supra* Section IV(B)(1). Again, I would also consider the term to cover, without limitation, literary and religious works as well as drawings or diagrams within works.

343. See LANHAM, *supra* note 96, at 3. That fallacy has the following form: If A then B. B. Therefore A. The fallacy thus assumes the reverse premises of If B then A. See *id.*

344. It was after all an orangutan that wielded the razor in Poe's *The Murders in the Rue Morgue*. EDGAR ALLEN POE, *The Murders in the Rue Morgue*, in TALES OF EDGAR ALLEN POE 249, 281-83 (Franklin Library 1979) (1841).

ful reasoner will therefore wish to examine unstated premises not only for their own sake but to examine how they are being used as well.

#### E. ADDITIONAL BACKGROUND CONSIDERATIONS

*“Make not your thoughts your prisons[.]”*  
 –Shakespeare, *Antony and Cleopatra*<sup>345</sup>

Additional background matters include the frames we use and what our concepts and metaphors stress, hide, and imply or suggest. As I have written about these matters in detail elsewhere,<sup>346</sup> I more briefly address them below in this Appendix.

##### 1. *Applicable Frames*

For purposes of this article, I give “frame” the ordinary sense of a formulation using either concepts or systematic terms.<sup>347</sup> Framing can occur at multiple levels including delineating the matter(s) discussed (i.e., the reference(s)), formulating the issue(s) involved, and formulating the applicable rule(s) so that we can then attempt to apply the rule(s) and reach a conclusion.<sup>348</sup> For example, if we are talking about who owns a particular car, we will want to frame the car as our reference, attempt to formulate the issues and rules involved, and then attempt to apply the rules and reach a conclusion. A good lawyer will thus grasp a number of points about the importance of framing.

First, to have discourse about a particular thing, the parties must be talking about the same thing, i.e., they must agree on their reference.<sup>349</sup> They can’t be having a conversation about the same car if they are referring to different cars. This may seem an obvious point but it actually can prove a real problem as when, for example, persons fighting over a ring are not actually fighting at all. After wasting much effort, the parties fighting over a “ring” realize that one wants only the band and the other wants only the stone.<sup>350</sup>

Second, frames are man-made, not given. As in the above ring example, the referent could be framed either as a “ring” or as “a band with a stone.”

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345. WILLIAM SHAKESPEARE, *ANTONY AND CLEOPATRA*, act 5, sc. 2, line 186 (New Pelican 1698).

346. See *Plane Meaning And Thought*, *supra* note 31; see also *Original*, *supra* note 224; Lloyd, *supra* note 13.

347. See *Frame*, AMERICAN HERITAGE COLLEGE DICTIONARY 536 (3d ed. 1993); *Id.* at 540 (definition of “frame” involves definition of “formulation”).

348. See *Plane Meaning And Thought*, *supra* note 31, at 669-70.

349. *Id.* at 664-65.

350. *Id.* at 680-81.

Third, background frames often float unconsciously and unchallenged in the background. In the ring example above, the parties were likely framing the band and jewel as a ring without any thought that a better framing might capture the real nature of their dispute. Rather than fighting over a "ring," they might have earlier framed their matter as a question of who should "have" a "band" and who should "have" a "stone." Good lawyers recognize both the flexibility, and often unconscious, background nature of frames.

Finally, good lawyers carefully think through framing possibilities and try to use (and persuade others to accept) frames that best suit the purposes at hand. In the ring example again, a good lawyer would have probed to find the real interests in the parties and would have then chosen a frame of who gets the band and who gets the stone (rather than who gets the "ring").

## 2. *Applicable Concepts and Metaphors*

The concepts and metaphors that we use raise issues similar to those addressed in framing. As I have also written about these issues in detail elsewhere,<sup>351</sup> I will only briefly address them here. Concepts ("ring" vs. "separable-stone-and-band") and metaphors are also man-made and not given, can also float around unnoticed in the background, and should be constructed in ways that best fit the given situation.<sup>352</sup> Additionally, concepts and metaphors highlight and conceal: they highlight common traits and conceal uncommon traits.<sup>353</sup> The latter function of concepts and metaphors can be particularly tricky if one is not aware of (or forgets) what is concealed and how that might differ from reality. For example, the old metaphor "time flies" focuses on how time often moves rapidly like a bird. One might think of that old metaphor and, in a weak moment, go to a party hosted by a bore knowing that "time flies." However, time can also creep, especially when one is bored. Even the oldest, time-tested metaphor can thus lead one astray.

## F. DEIXIS

Referring expressions which require reference to a particular context in order to make sense are generally called "indexical expressions."<sup>354</sup> For example, "The President of the United States is

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351. See *id.* at 686-91, 698-702, 711-24.

352. See *id.*

353. See *id.* at 688-89.

354. See PRAGMATICS, *supra* note 286, at 54. C.S. Peirce examined indexicality in detail and one can debate how this notion of an "index" squares with his thought (if his thought fully squares at all). See, e.g., BOUISSAC, *supra* note 40, at 306-11. For my un-

speaking over there” cannot be understood apart from the physical context to which “over there” refers. Another sort of indexical expression would be where we attempt to point out something with our index finger.<sup>355</sup>

These sorts of indexical expressions are often “designated by the generic term *deixis* (a transliteration of the Greek . . . verb *deiknumai*, “to show,” “to point”).<sup>356</sup> Since the meaning of deictic expressions is tied to the circumstances in which they are utilized, they have “no referential autonomy” and are emptied<sup>357</sup> of meaning apart from those circumstances.<sup>358</sup> A few of the many other words commonly indicating such lack of “referential autonomy” are “I, you, here, and now.”<sup>359</sup> As I would use the term, Deixis can therefore involve anaphora (which refers back in the ways discussed above) and cataphora (which refers forward as noted above).<sup>360</sup> Deixis comes in multiple forms including those addressed below.

### 1. Personal Deixis

Deixis can be personal.<sup>361</sup> For example, if I say, “He is seven feet tall,” the personal reference has no meaning apart from the context.<sup>362</sup> If this person is already the subject of our discourse, we might have anaphora by referring back to him. However, if this is not the case, we must look for other contextual clarification. For example, I might point to him as I am making the statement.<sup>363</sup> In such a case, given the need for personal deixis to assign the reference of “he,” the text “He is seven feet tall” can have no “plain” meaning on its face.

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understanding of “index,” see *Crushing Animals, Crashing Funerals*, *supra* note 20, at 253-56.

355. See Mey, *supra* note 17, at 790 (“the human forefinger is called ‘index’ because it is our first and foremost natural pointing instrument[.]”). I do not mean to suggest that we can determine reference merely by pointing. See *Plane Meaning and Thought*, *supra* note 31, at 680. For example, merely pointing in the direction of a violet cannot alone fix a reference. Am I pointing to the violet as a whole, to a particular leaf, to the ground in which it grows, to the earth itself, and so on? For those wishing to explore further the means by which we fix reference, see CRUSE, *supra* note 27, at 392-407, which discusses, among other things, the roles of describing, pointing, and naming in fixing reference.

356. BOUISSAC, *supra* note 40, at 185.

357. I say “emptied” rather than “empty” of meaning since dictionaries will provide general meaning for words like “there.”

358. See *id.* at 183.

359. See *id.* (italics omitted).

360. See MARTIN ET AL., *supra* note 40, at 33.

361. CRUSE, *supra* note 27, at 402.

362. See PRAGMATICS, *supra* note 286, at 54.

363. See *supra* note 355 on the complexity of fixing reference.

## 2. *Spatial Deixis*

Deixis can be spatial.<sup>364</sup> Spatial deixis is found “principally in the form of locative adverbs such as *here* and *there*, and [in such terms] as *this* and *that*.”<sup>365</sup> For example, if we are looking at a single book in a store, the meaning of “Please give me that book” cannot be determined apart from the spatial context. Given the need for spatial deixis to assign the reference of “that book,” the text “Please give me that book” can have no “plain” meaning on its face.

## 3. *Temporal Deixis*

Deixis can be temporal.<sup>366</sup> Temporal deixis locates “points or intervals on the time axis, using (ultimately) the moment of utterance as a reference point.”<sup>367</sup> In English, the “most basic” temporal deictic terms are “now” and “then.”<sup>368</sup> For example, “Emma is singing now” cannot be determined apart from the temporal context. By “now” the speaker could mean the day the speaker spoke, the day before, or some other time. Given the need for temporal deixis to assign the reference of “now,” the text “Emma is singing now” can have no “plain” meaning on its face.

## 4. *Conversational or Discourse Deixis*

Deixis can be conversational.<sup>369</sup> Conversational or “[d]iscourse deixis refers to such matters as the use of *this* to point to . . . things which are about to be said . . . , and *that* to point to past [things said].”<sup>370</sup> Simple examples include “Listen to this” (which points forward) and “That was not a very nice thing to say” (which points backwards).<sup>371</sup> More complex examples are not difficult to provide. For example, imagine that we have a transcript of a discourse on January 2 which says: “A: Thanks for warning me about what you saw yesterday. I saw one this morning, too. B: You’re welcome. What are we going to do? A: Let’s just do what you suggested yesterday. B: Good. Let’s get to it.” In addition to the need to assign the personal references of “me,” “you,” and “I,” to assign any reference whatsoever to, *inter alia*, “one” or “it,” we need to know the prior discourse. Given the need for both personal reference assignment and for discourse deixis

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364. CRUSE, *supra* note 27, at 403.

365. *Id.* (italics in original).

366. *Id.* at 403-05.

367. *Id.* at 403.

368. *Id.* at 404.

369. *See id.* at 406 (discussing “discourse deixis”).

370. *Id.*

371. *Id.*

to assign the references of, *inter alia*, “one” and “it,” this transcript can have no “plain” meaning on its face.

5. *Social Deixis*

Deixis can be social.<sup>372</sup> Social deixis refers to “relative social status.”<sup>373</sup> If we have a note from the 1600s which only says, “Thou art early,” we know from Section VI(C) above that the use of “thou” as opposed to you could be inappropriate and thus insulting in certain social situations. Without knowing the situation in which the writing was made, i.e., without sufficient personal *and* social deixis, we cannot know how to interpret either the personal or social dimension of that meaning. Given the need for personal *and* social deixis to assign the reference and social meaning of “Thou,” the text “Thou art early” can have no “plain” meaning on its face.

6. *Deixis As Incompatible With Inherent Plain Meaning*

To the extent text involves any of these types of deixis, a text can therefore have no “plain” meaning in itself. We cannot materially begin to interpret “He,” “that book,” “now,” “one,” “it,” or “Thou” in the above examples without *first* knowing what these words refer to. In all these examples, nothing in the text gives us the actual reference. We may of course begin our interpretation process by looking at the applicable text in each example. However, the reference of each of these deictic terms does not begin there, and we must promptly look outside the text to determine that reference.

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372. *Id.* at 405.

373. *Id.* at 405-06.