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# Forensic Linguistics

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## Bringing linguistics into judicial decision-making: semantic analysis submitted to the US Supreme Court

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**ABSTRACT** A substantial research endeavour carried out by a team of three theoretical linguists and a law professor on three cases pending before the US Supreme Court in its 1993–4 term resulted in a major law review article which was sent to the Court while the cases were being considered. Unlike the usual *amicus curiae* brief, this research was not undertaken in support of any party in any of the cases. In one of the cases there is reason to believe that the team's analysis may have contributed to the Court's decision and opinion; in another, the concurring opinion seems to have rested directly on the team's analysis; and in the third, although the opinion showed no evidence of reliance on the team's research, the decision was nonetheless in line with the team's findings. The receptiveness of at least some of the current justices of the US Supreme Court to the applicability and relevance of language analysis as carried out by linguists in cases that depend on the resolution of linguistic issues is a hopeful sign to those interested in seeing growth in the recognition of the relevance of linguistics to the law.

**KEYWORDS** Statutory interpretation; lexical meaning; ambiguity; propositional attitudes.

### INTRODUCTION

In its 1993–4 term, the US Supreme Court had the opportunity to see, during deliberations, the results of linguistic research focused directly on three cases before the Court: *US v. Granderson*,<sup>1</sup> *US v. Staples*,<sup>2</sup> and *NOW v. Scheidler*.<sup>3</sup> The research was conducted by the four authors of the present report. The results of this research reached the Court in the form of a review article in the *Yale Law Journal* entitled 'Plain Meaning and Hard Cases' Cunningham *et al.* 1994, which included a detailed analysis of the

contested language in each of the three cases. In one of the cases, we have reason to believe that the team's analysis contributed to the Court's opinion; in another, the concurring opinion seems to have rested directly on the team's analysis; and in the third case, although the opinion showed no evidence of reliance on the team's research, the decision was nonetheless in line with the general direction of the team's findings.

No party or court involved in any of the three cases had sought help from the linguists, nor was the linguistic research formally submitted to the Supreme Court through the conventional device of an *amicus curiae* ('friend of the court') brief. Instead, the research was conducted as part of a law review article, which was made available to the Court in galley form while the cases were pending. This article began as a review essay that Washington University law professor Clark Cunningham had agreed to write for the *Yale Law Journal* on the use of linguistics to analyse legal texts whose meaning is contested. The focus of the review was the first book length treatment of the subject by an American: *The Language of Judges* (Solan 1993). The author, Lawrence M. Solan, is a practising attorney who also holds a PhD in linguistics.

A recurring argument in Solan's book is that some American courts claim to be basing some of their decisions on interpretation of the ordinary meaning of legal texts, such as statutes, yet their analyses are sometimes so at odds with accepted rules regarding English usage as to suggest that their invocation of 'plain meaning' is a sham to cover other motives for reaching the decision. A particularly powerful form of this argument points to decisions of the US Supreme Court where the Justices all agree that a statutory term is unambiguous, but then split 5-4 over what the (unambiguous) meaning is.<sup>4</sup> Solan's criticism is of particular importance to the interpretation of federal statutes because more recent Supreme Court opinions often claim, with frequent citation of dictionaries, that the decision turns on the ordinary language meaning of contested statutory terms, and appear to reject appeals to non-textual arguments such as those based on the history of Congressional debates in enacting the statute and considerations of public policy.<sup>5</sup>

Throughout his book, Solan used linguistics to critique judicial decision-making after the fact. As Cunningham began work on his review of Solan's book, he decided to explore how linguists might be involved in the judicial process before a judicial decision is handed down, using the article itself as a kind of pilot project. Most research by linguists comes to judicial attention (if at all) through presentation by one of the parties in an adversarial proceeding, typically by putting a linguist on the stand as an expert witness (Levi 1994)). Unfortunately, this procedure taints the potential contribution of linguistics with the suspicion of pre-ordained bias toward a particular outcome. Even if a judge overcomes suspicion of a linguist witness as a 'hired gun', a more subtle bias problem remains. Only linguistic research that produces results supporting the party will ever be presented to the court. If a linguist retained by a party conducts research with total scientific objectivity but produces

results unhelpful to that party, the party simply will not use that linguist as a witness, rather than risk having the adverse information come to the attention of the court and opposing parties.<sup>6</sup> Even the submission of scientific evidence in the form of an *amicus curiae* brief is subject to the same taint because, contrary to the root Latin meaning, such briefs have increasingly become submissions from allies of a party rather than true disinterested friends of the court (Krislov 1963).

As an alternative to such adversarial use of scientific research, Cunningham decided to solicit analyses by linguists of pending Supreme Court cases solely for the purpose of the article. Neither he nor the linguists would have any interest in the outcome of the cases, nor even in the substantive law at issue in them. The research question would simply be: what are the possible interpretations of the contested text read as ordinary English? The answer would not necessarily resolve the legal contest, but would be of potential interest to judges who claim to take as their starting point the ordinary language meaning of the text. There are a number of accepted legal principles for declaring that a statute means something other than what ordinary speakers would understand it to mean, but a judicial decision would be justified differently if a judge first accepted evidence of ordinary meaning, and then explicitly invoked one of these principles to interpret the statute contrary to ordinary meaning (Shapiro 1992). The point of Solan's critique is that judges disguise the fact that they are free to choose their judicial result (through, for example, the application of such a principle), by claiming that their decision is governed by the ordinary meaning of the statute.

The primary purpose of the project, as Cunningham envisioned it, would be to present to the article's readers, primarily lawyers and legal scholars unfamiliar with linguistics, what such disinterested research would look like. However, Cunningham also wanted to create the possibility that the outcome of this research might be more than academic. Therefore, he planned a tight writing and publication schedule that would produce the article in time to make it available to the Court, at least in galley form, before the analysed cases were actually argued by the parties.

It is not unusual for law professors to send to the Court a law review article in typescript or galley form before actual publication if the article relates to a case that would be decided before publication. This practice occurs because it is known that Supreme Court Justices frequently do their own research in the legal literature to supplement the evidence, arguments and research presented by the parties and in *amicus* briefs. However, except for the relatively rare instance where an article is subsequently cited in an opinion, its author would have no way of knowing whether the article had been influential, or even read.

A potential problem with sending pre-publication manuscripts to the Justices is that an article might raise an important legal point without the affected parties having the opportunity to address it. In order to avoid this

possible unfairness, we made sure that the attorneys for the parties as well as the Justices received our article before oral argument. In the Granderson case, discussed below, the attorney for the prevailing party, the defendant, was kind enough to call Cunningham after oral argument; in that conversation, the attorney indicated that his strategy for argument was influenced by reading our article.

In July 1993, a few weeks after the Supreme Court adjourned until the new term started in October, Cunningham reviewed all the cases which the Court had already agreed to hear but which were unlikely to be argued until after November. Of these twenty-six cases, he identified the Granderson,<sup>7</sup> Staples,<sup>8</sup> and NOW<sup>9</sup> cases as ones for which the outcome might turn on the ordinary language meaning of a statutory provision. Next he contacted Judith N. Levi, former chair of the linguistics department at Northwestern University, who had done extensive work on language and law, and Levi recommended several other linguists to Cunningham; of those, Georgia M. Green of the University of Illinois and Jeffrey P. Kaplan of San Diego State University agreed to participate in the project along with Cunningham and Levi. Research and analysis on all three cases took place on a very accelerated schedule from August through October 1993.

On 21 November 1993 each of the nine Justices received galley proofs of the article with a brief cover letter stating simply that the authors were sending it 'prior to publication because it discusses three cases pending before the Court this term, one of which is to be argued a week from this Monday'. The referenced case was *US v. Staples*, actually argued before the Court on 30 November 1993. The other two cases were argued on 8 December 1993 (*NOW v. Scheidler*) and 10 January 1994 (*US v. Granderson*). Copies of the galleys were also sent to the attorneys for the parties in each of the three cases. Corrected galleys were sent to the Justices and attorneys on 3 January 1994. (The article appeared in print in April 1994).

In the discussion that follows, we will briefly outline the issues in each case, the nature and results of the linguistic work done by the team, and the Court's holding and reasoning.

## DISCUSSION OF THE CASES

### 1. *US v. Granderson*: a missing referent

#### *Facts and issues in the case*

Granderson had pleaded guilty to a mail destruction charge, for which the maximum sentence was six months' imprisonment. Instead of a prison term, Granderson was fined and placed on five years' probation. He violated the terms of his probation when he tested positive for cocaine. The court

revoked his probation and sentenced him to twenty months in prison, under 18 USC § 3565(a), which provides that if a person on probation possesses illegal drugs 'the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence'. The court interpreted *the original sentence* as referring not to the type of sentence actually imposed, probation, but to its length, five years (i.e., sixty months); one-third of which is twenty months. If *the original sentence* referred to the type of sentence originally imposed – probation – then revoking that sentence and imposing a sentence 'not less than one-third of the original sentence' would reduce the total term of probation from six months to two as a result of the drug violation. To escape that absurd result, the trial court instead read the statute as requiring the court to sentence the defendant to a term of imprisonment not less than one-third of the original term of probation. On appeal, the Eleventh Circuit reversed, holding that *the original sentence* referred to the potential imprisonment range, zero to six months, not the actual sentence of probation. Because Granderson had already served eleven months, more than the six months maximum, he was ordered released. The Eleventh Circuit thus joined three other circuits (the Third,<sup>10</sup> Sixth,<sup>11</sup> and Tenth<sup>12</sup>) in limiting the maximum prison term for a probation violation under §3565(a) to one-third of the maximum potential prison term for the underlying crime. But the Eighth and Ninth Circuits had interpreted *the original sentence* the way the Granderson trial court did: as referring (in regard to length alone) to the term of probation.<sup>13</sup> The Supreme Court accepted the case to resolve disagreement among the appellate courts.

### *The team's analysis*

This case involved a mistake in interpretation of the phrase *the original sentence*, in that the court interpreted a single occurrence of that phrase one way for one purpose, and another way for another purpose. The decision to sentence Granderson to twenty months imprisonment took the expression *the original sentence* to refer to the sentence allowable for the crime (up to six month's *imprisonment*) for the purpose of determining the *type* of sentence (incarceration), but it took the same expression to refer to the initial imposition of punishment (*five years' probation*) for the purpose of computing the *length* of the sentence. This was a mistake because it incorrectly supposed that utterances allow this kind of flexibility. Natural languages are marvellously flexible instruments, but they do not have this kind of flexibility, as Cruse (1986) and Nunberg (in press) observe in other contexts.

After the team's work was submitted to the Court, Georgia Green came up with two hypothetical examples which illustrate this limitation on the interpretation of ambiguous expressions.

(1)

Suppose Smith has \$6000 in an account at the First National Bank, and \$300 in a metal box buried in the north bank of the Boneyard Creek. If he receives an instruction saying 'GO TO THE BANK AND REMOVE ONE-THIRD OF THE MONEY,' should he get (a) \$2000 from the First National, (b) \$100 from the Boneyard Creek, or (c) \$100 from the First National? The first two are real possibilities, but the third is not, as it would require Smith to compute one-third of the amount buried in the metal box and withdraw that amount from the First National Bank.

(2)

The French word *avocat* is homonymous; one meaning is 'avocado' and the other meaning 'lawyer.' The French sentence *Pierre a fait tomber l'avocat* cannot be interpreted to mean that Pierre did something to a lawyer and an avocado fell.

Wechsler (in press) observes similarly that 'when a single phrase is used simultaneously as a complement of two verbs, it cannot be interpreted in two different senses, one for each verb,' citing the fact that the noun *CD* can refer to either compact discs or certificates of deposit, but not to both at once. We cannot interpret *John can't decide whether to listen to or liquidate his CDs* as meaning that the fellow can't decide whether to listen to his compact discs or liquidate his certificates of deposit.

How could the statute have been so poorly drafted? Clark Cunningham's review of the legislative history of the sentencing statute yielded evidence that prior to 1984, *sentence* in the context of criminal conviction meant imprisonment, fine, or both, but not probation; in 1984 probation was made a type of sentence rather than an alternative to a sentence.<sup>14</sup> This review revealed that the provision at issue, added in 1988<sup>15</sup>, was a last-minute amendment that did not go through the normal committee process; its drafter(s) may not have been aware of the 1984 change in the sense of *sentence* to include probation. Consequently, on its face the statute has an application which is legally implausible ('sentence the defendant to a term of probation not less than one-third of the original term of probation') and a legally plausible application, inferrable from use of *sentence* in its pre-1984 sense ('sentence the defendant to a term of imprisonment not less than one-third of the original term of imprisonment that could have been imposed (6 months)'). A review of the entire section of the federal law on sentencing showed that the provision at issue in Granderson is the only place in the entire section where *sentence* appears as the verb in a clause without additional wording to indicate which of the three possible meanings – sentence of *probation*, sentence of *imprisonment*, or sentence of a *fine* – is intended. Everywhere else *sentence* is used with an explicit complement; the usual wording is *sentence to a term of (probation/imprisonment)* or *impose a sentence of (probation/imprisonment)* rather than simply *sentence*. This



provision is also the only place in the entire section where the phrase *original sentence* appears.

Thus, the team's review revealed co-occurrence differences between *sentence* in the provision at issue and *sentence* everywhere else in the federal law on sentencing as if a speaker of one dialect had interrupted a speaker of another. The provision makes sense under the pre-1984 meanings of *probation* and *sentence*, in which an original sentence would always be a sentence of imprisonment that was suspended if the defendant were placed on probation. However, since the provision was a last-minute amendment, it may have been drafted without an awareness that a new meaning of *sentence*, which included probation, had entered the federal sentencing scheme. As the team wrote in the *Yale Law Journal* article:

It is striking that neither the briefs of the parties . . . nor any of the five circuit court opinions . . . reflect awareness of this particular aspect of the provision's legislative history. The fact that [linguistic analysis], limited as it is to the four corners of the text, generates a useful clue for searching legislative history is a reminder that close attention to text is not necessarily at odds with the use of legislative history in statutory interpretation.<sup>16</sup>

### *The Court's decision*

Justice Ginsburg, writing for a 7–2 majority (Chief Justice Rehnquist and Justice Thomas dissented), cited, and, to an extent, tracked, the team's analysis. The opinion rejects the Government's contention that *the original sentence* unambiguously refers to the sentence of probation, noting that the Government's interpretation reads the term *sentence* inconsistently, essentially following the distinctions the team outlined. Justice Ginsburg wrote:

The Government reads the word 'sentence', when used as a verb in the proviso's phrase 'sentence the defendant', to mean 'sentence to imprisonment' rather than 'sentence to probation'. Yet, when the word 'sentence' next appears, this time as a noun ('original sentence'), the Government reads the word to mean 'sentence of probation'. . . . [H]ad Congress designed the language to capture the Government's construction, the proviso might have read: 'the court shall revoke the sentence of probation and sentence the defendant to a term of imprisonment whose length is not less than one-third of the length of the original sentence of probation'.<sup>17</sup>

Ginsburg noted that Granderson's counsel in oral argument had suggested that the drafters

might . . . have had in mind the pre-1984 sentencing regime, in particular, the pre-1984 practice of imposing a sentence of imprisonment, suspending its execution, and placing the defendant on probation. . . .

The proviso would fit the suspension-of-execution scheme precisely. The 'original sentence' would be the sentence imposed but not executed, and one-third of that determinate sentence would be the revocation sentence.<sup>18</sup>

Justice Ginsburg went on:

If Granderson could demonstrate that the proviso's drafters in fact drew the prescription to match the pre-1984 suspension-of-execution scheme, Granderson's argument would be all the more potent. The closest post-1984 analogue to the suspended sentence is the Guidelines sentence of imprisonment that could have been implemented, but was held back in favor of a probation sentence.<sup>19</sup>

At that point in the opinion a footnote appears citing the team's *Yale Law Journal* article. The Court then pointed out that it was not possible to infer with certainty that the drafters used *original sentence* with the pre-1984 sense in mind, but 'where text, structure, and history fail to establish that the Government's position is unambiguously correct . . . we apply the rule of lenity and resolve the ambiguity in Granderson's favor'.<sup>20</sup> Thus the Court affirmed the decision of the appeal's court to release Granderson.

## 2. *US v. Staples*: the scope of *knowingly*

### *Facts and issues in the case*

Staples was convicted of violating the National Firearms Act<sup>21</sup> because he failed to register a rifle he owned, and was sentenced to five years' probation and a \$5000 fine. The rifle in question was an AR-15 assault rifle that had been modified so it could fire multiple shots with a single pull of the trigger. The Act requires registration of such an automatic weapon. The indictment against Staples charged that he 'knowingly . . . possessed [a] firearm . . . [not] registered to him'. In the National Firearms Act, *firearm* is a term of art which is defined to include automatic weapons but not single-shot rifles. Staples admitting possessing the weapon in question but denied knowing that it had been modified so as to be an automatic weapon.

*Knowingly possessed* as a predicate about Staples is ambiguous between: (1) simple knowledge that the object was in his possession, and (2) additional knowledge of those of its properties which made it a 'firearm' as defined under the Act. In order to have that knowledge, Staples would have to know that the object was an automatic weapon (or some other weapon within the ambit of the provision in the act, e.g., shotguns with barrels shorter than eighteen inches, rifles with barrels shorter than sixteen inches, and hand grenades). Staples proposed the second interpretation as

a jury instruction, but the trial judge gave the following instructions to the jury:

The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and the particular item is in fact regulated, he acts at his peril. . . . It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.<sup>22</sup>

Staples was convicted, and on appeal his conviction was upheld.

### *The team's analysis*

This case involved the same kind of mistake in interpretation as in Granderson: interpreting an expression one way for one purpose and interpreting the same occurrence of that expression differently for a different purpose. The disputed jury instruction amounted to instructing the jury to understand *firearms* in the indictment phrase *knowingly possessed firearms* as meaning 'weapon' with respect to what Staples knew, but as meaning 'machinegun' with respect to what he possessed.

It is not surprising that a mistake could be made in interpreting any phrase qualified by a word which, like *knowingly*, describes a person's mental state regarding an event, whether actual or hypothetical. The use of words of this sort (which include *want* and *think* as well as *know*, and the related adverbs *willfully* and *knowingly*) creates a much-studied problem in interpretation (cf Quine 1960), because, in ordinary usage, when we assert that an individual has one of these mental states with respect to some proposition (like *X possessed a machinegun*), we accurately ascribe that attitude to the person only insofar as he himself would recognize that he holds the attitude toward that proposition. This means that the individual whose attitude is described must recognize all the objects referred to in that assertion by the descriptions of them that are used in the assertion. In terms applicable to the Staples case, a person knows that he possesses an object described as a machinegun if he knows both that he possesses some object, and that that object is a machinegun. The Staples case was complicated further by the fact that the word *firearm* was used instead of *machinegun*, but it was defined in the statute to have a meaning much narrower than its usual meaning in ordinary language. Thus, Staples could only 'knowingly possess a firearm' if he knew that the object which he knew he possessed was considered a machinegun (a 'firearm' as defined by the statute) but not if he simply knew that the object he possessed was a rifle (a 'firearm' in ordinary language).

*The Court's decision*

Writing for the majority,<sup>23</sup> Justice Thomas addressed primarily the common-law rule requiring the defendant to know the facts that make his actions unlawful, and the issue of whether guns fall within the category of potentially harmful or injurious items (like drugs) which burden a possessor with the responsibility of discovering whether they are regulated. According to Thomas, private ownership of guns has been entirely lawful in the US for so long, and the penalty attached to what would otherwise be innocent conduct is so harsh, that Congress would have made it clear if it intended to dispense with the *mens rea* requirement. The statutory silence suggests no such intent. The Court consequently reversed Staples' conviction.

Justice Ginsburg's concurrence addressed the more narrow linguistic issues of the language of the jury instruction, following the team's argument closely, and citing the team's work in saying,

The indictment thus effectively charged that Staples knowingly possessed a machinegun. 'Knowingly possessed' logically means 'possessed and knew that he possessed'. The Government can reconcile the jury instruction with the indictment only on the implausible assumption that the term 'firearm' has two different meanings when used once in the same charge – simply 'gun' when referring to what petitioner knew, and 'machinegun' when referring to what he possessed. See Cunningham, Levi, Green, and Kaplan; 'Plain meaning and hard cases', 103 *Yale L. J.* 1561, 1576–1577 (1994); cf. *Ratzlaf v. United States*, 510 US— (1994) (slip op., at 8) (construing statutory term to bear same meaning 'each time it is called into play').<sup>24</sup>

### 3. *NOW v. Scheidler*: lexical semantics

#### *Facts and issues in the case*

The issue in this case was whether the Pro-Life Action Network (PLAN), a network of anti-abortion activists whose aim was to shut down abortion clinics, was an 'enterprise' as that word was used in the Racketeer Influenced and Corrupt Organizations Act ('RICO'; 18 USC § 1962(c) (1988)). The specific provision of RICO invoked by the plaintiffs provides:

It shall be unlawful for any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such *enterprise's* affairs through a pattern of racketeering activity or through collection of unlawful debt. 18 USC § 1962(c) (1988). (Emphasis added.)

The National Organization of Women (NOW) sought monetary damages and an injunction to prevent PLAN from engaging in criminal acts such

as trespass, vandalism, and extortion. The defendants argued that PLAN was not an enterprise within the meaning of the statute because, according to the defendants, an organization could be an enterprise only if its primary focus was economic. In other words, according to the defendants, *enterprise* was a synonym or near-synonym of *business*. The plaintiffs argued that the word *enterprise* as used in the statute had a wider denotation, containing both economically-focused and non-economically focused entities. The case law in the lower courts conflicted. The court below<sup>25</sup> relied on another court's holding that an enterprise had to 'exist for the purpose of maintaining operations directed toward an economic goal',<sup>26</sup> but other courts used wider meanings (e.g., regarding an enterprise as 'an ongoing organization, either formal or informal in nature in which the various associates functioned as a continuing unit. The enterprise must have an existence separate and apart from the pattern of activity in which it engages',<sup>27</sup> or as 'a group of persons associated together for a common purpose of engaging in a course of conduct'<sup>28</sup>).

### *The team's analysis*

The team first ascertained that neither dictionaries nor the definitions section of the statute sufficed to resolve the dispute. Depending on the dictionary consulted, support could be found for either interpretation of the word. The definitions section of the statute, rather than defining the word *enterprise*, reads "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity<sup>29</sup> (emphasis added), without providing any additional characteristics required for an entity to be considered an enterprise. That an actual definition would require such criteria follows from the observation that if the statutory word *includes* were interpreted as 'means', any individual would be an enterprise – surely an unreasonable result.

The team next designed two projects to explore the ordinary meaning of *enterprise* as it might be relevant to the NOW case. First it collected 192 occurrences of *enterprise* from written and spoken sources<sup>30</sup> from the NEXIS database produced by Mead Data Central. After filtering out the mass noun uses (e.g., uses equivalent to 'initiative, ambitious self-reliance', as in 'Hard work and enterprise are part of the Vietnamese culture') and the count noun uses denoting activities rather than entities (e.g., 'Making and launching that many satellites will be a very expensive enterprise'), the team found that the remaining count noun entity uses included not only many referring to organized profit-seeking entities, but also a significant minority unambiguously referring to non-business entities.<sup>31</sup> The team also found several occurrences of the expressions *business enterprise*, *commercial enterprise*, and *economic enterprise*, which were judged to be non-redundant. The results of this search were thus that in the data the team examined

(1) *enterprise* was most commonly used to refer to businesses but (2) many uses of *enterprise* were found which referred to entities that did not have an economic goal. Consequently, the team concluded that in ordinary use, *enterprise* was not synonymous with *business*, but instead represented a broader category which included but was not limited to businesses. Thus this part of the work supported the plaintiffs' view of the meaning of the word.

The team next designed questionnaires, based on those described in Coleman and Kay (1981), to ascertain what criteria speakers would use in deciding whether a candidate organization was an enterprise. This step was motivated by the standard assumption in linguistics that identifying the meaning of an expression which is used in a speech community is not a matter of mere intuition, and may require empirical research into how the expression is used and understood by members of the community. Through this demonstration of the complexity of the question of what an expression may 'mean', the team hoped to provide evidence that would help convince the Court – operating under its customary assumptions – that such research could be relevant to cases.

The team did not assert that surveys should determine judicial application of expressions. In the *Yale Law Journal* article, the team wrote:

In using surveys to explore further the meanings of *enterprise*, the authors are not suggesting that judges should delegate to others the task of ascertaining just how statutory terms should be applied to particular cases. Nor do we suggest that legal meaning is something that can be determined by an opinion poll. Rather . . . the surveys are a device for expanding an individual's ability to bring to conscious awareness her intuitive understanding of word meaning, and for informing an individual of perfectly acceptable and normal uses, or subtleties thereof, that a word may have in the speech community – uses of which the individual might not previously have been aware.

(Cunningham *et al.* 1994: 1600–1)

In a footnote, the team said more regarding the relevance of empirical data:

Judges should, however, take survey data very seriously in regard to whether a word or phrase is ambiguous as a matter of ordinary language. It is very hard to maintain that a particular utterance is capable of only one interpretation if large numbers of native speakers can be shown to disagree about its interpretation.

(Cunningham *et al.* 1994: 1600)

In the questionnaire, twelve candidate 'enterprises' were listed, some real, some fictitious. The candidates' properties were designed to test the components of the definition of *enterprise* most widely applied in RICO cases and the one used by the court below, the 'Anderson' definition:<sup>32</sup> (a) structure, (b) economic goal as the focus, (c) existence separate from the predicate

acts. The candidate enterprises included such entities as the IBM Corporation, a children's lemonade stand, a bible discussion group, and a fictitious entity designed to embody the properties of PLAN, the 'Coalition for Fair Adoption Laws (CFAL)', which was described as follows:

A highly organized national network of non-profit organizations representing adoptive parents and persons seeking to adopt. The executive directors of the member organizations comprise the steering committee of CFAL. CFAL's activities include lobbying, rallies, and planning demonstrations at courts and adoption agencies.

Subjects were asked to circle, in answer to the question 'Does it seem right, to you, to call [X entity] an enterprise?' one choice from 'Yes', 'I Can't Tell', and 'No'. Then they were asked to indicate their confidence in their answer by circling the appropriate response in the prompt 'I am VERY SURE . . . FAIRLY SURE . . . NOT TOO SURE . . . that most others would agree with the choice I circled [above]'.

Questionnaires were administered to 116 students from San Diego State University, Northwestern University and Washington University. Questionnaires were also submitted by mail to 127 US District Court judges, 37 of whom responded.

The results were in line with those from the database search, but provided additional information about the use of *enterprise* in the speech community. The questionnaire results supported the notion that businesses are prototypical enterprises, but at the same time they suggested that the three-part Anderson definition of *enterprise* does not correspond well with the way most speakers understand the word. Rather, a significant number of ordinary speakers of American English, probably a majority, use the following broader criterion for deciding whether something is an enterprise: whether it has a goal, regardless of whether the goal is economic or otherwise. On the basis of the numerical scores derived from subjects' choice of 'Yes', 'No', or 'I Can't Tell' and the confidence measure, and written rationales for categorizations (sought from two of the student subject groups), the subjects fell into two distinct groups in regard to the primary criterion for categorizing an entity as an enterprise. One group's primary criterion was whether the entity had a clear goal, while the second group's primary criterion was whether the entity had the specific goal of seeking a profit. The disagreement between the two groups was not due to categorical indeterminacy; rather, many speakers who disagreed about whether an entity was an enterprise agreed that the concept of enterprise was not indeterminate, and felt fairly sure that others would agree with their own conclusion regarding membership in the category. As a result, while businesses are stereotypical enterprises for both groups, it appears that reasonable members of the speech community differ as to whether they consider a goal-oriented but non-profit-seeking entity such as PLAN to be an enterprise. People who identify an enterprise primarily by its clear goals can be predicted to

classify PLAN as an enterprise, because it has a clear and specific goal; in contrast, for people who apply an economic criterion in deciding whether an entity is an enterprise, PLAN will probably not qualify as an enterprise because its economic activities are so incidental that it does not significantly resemble a profit-seeking business.

Significantly, the two ways of interpreting *enterprise* correspond to the competing interpretations in the lower courts. Thus the split in authority reflects actual features of ordinary language use, which may do much to explain the origin and persistence of both definitions, including the unreflective way courts use each in the case law.

### *The Court's decision*

On 24 January 1994 the Court issued a terse unanimous opinion in favour of NOW, authored by Chief Justice Rehnquist. The unanimity and swiftness of the decision (it appeared only seven weeks after oral argument), and the brevity and content of the opinion, suggest that the Justices' reliance on their own linguistic intuitions about the 'plain meaning' of *enterprise* may have been a significant factor. Key to the opinion is its *presupposition* that *enterprise* as used in ordinary English is appropriately applied to PLAN. This presupposition is apparent in statements that begin and end the substantive discussion in the opinion: 'We turn to the question of whether *the racketeering enterprise* or the racketeering predicate acts must be accompanied by an underlying motive',<sup>33</sup> (emphasis added), and 'the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either *the enterprise* or racketeering activity has an overriding economic motive'<sup>34</sup> (emphasis added).

Neither the Rehnquist opinion nor the brief concurring opinion by Justice Souter contain a citation to the Yale article, nor do these opinions contain any other evidence that the Justices were influenced in their decision in any way by reading the galleys of the article that had been available to them for the previous two months. No strong inference can be derived from this absence of evidence, however, given that the Justices were under no obligation to acknowledge or respond to the team's analysis because it was not presented to them by one of the parties to the case through the formal adversarial process. Moreover, as several colleagues have suggested to us, there may be purely personal differences among various Supreme Court Justices as to their practices of citing or otherwise acknowledging scholarly articles in their opinion writing.

Furthermore, the team's analysis was not really pertinent to the Court's decision at least if understood in the terms articulated in the Rehnquist opinion. The NOW decision exemplified the principle expressed by Rehnquist in an earlier case: 'When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional



circumstances'.<sup>35</sup> In deciding the NOW case, Rehnquist took as obvious and uncontested that the statutory term, *enterprise*, is unambiguous in not requiring economic motive as part of its meaning, writing: '[A] requirement of economic motive [is] neither expressed or, we think, fairly implied in the operative sections of the act . . . Congress has not . . . in the operative language required that an "enterprise" in 1962(c) have an economic motive',<sup>36</sup> and 'We believe that the statutory language is unambiguous . . .'<sup>37</sup> He thus devoted all his attention to whether any 'rare and exceptional circumstance' justified modifying that unambiguous meaning and easily concluded that no such circumstance existed. For example, the Rehnquist opinion rejected arguments that the preface to the Act or the history of Congressional debates while enacting the law were strong evidence that Congress intended that the law be limited to economically motivated entities.

The NOW opinion does not acknowledge that any argument could be made that *enterprise* is at least ambiguous or vague in the statutory context as to whether economic motive is a necessary condition. Of course the interpretation requiring an economic motive for an entity to be an enterprise was not only pressed by the anti-abortion groups in their arguments to the Court, but was also accepted as law by many federal courts of appeals. A variety of theories could be offered for why Rehnquist wrote the opinion as if the ordinary meaning of *enterprise* was clear beyond dispute in the face of such evidence to the contrary. The team's analysis does suggest one intriguing explanation. Most respondents to the survey were sure or fairly sure that other speakers would agree with their judgment of whether *enterprise* applied to a given example. This certainty applied both to speakers who thought a given example was not an enterprise and to those who thought it was. Thus relatively few subjects struggled over the meaning of *enterprise* even when faced with examples that the case law suggested were 'hard' problems. The team's analysis thus suggests that if the nine justices had themselves completed the survey, it would not have been surprising for all nine to have categorized non-economic entities like PLAN as enterprises and to have been sure that all other speakers would agree. Such a pattern of response represented the majority of both college students and responding district judges.

Of course the Rehnquist opinion does represent exactly such confidence that the author's own intuition about the meaning of *enterprise* is common to all speakers. However, because the evidence uncovered by the team that in fact not all speakers share the same understanding was not presented to the Court in a form that required judicial acknowledgement, there is little that can be concluded about what kind of evidence – and what kind of procedure – would be necessary to convince a judge to reconsider his or her own intuitions about the ordinary meaning of a statutory term.

## CONCLUSION

Some of the current Justices of the US Supreme Court, particularly Justice Ginsburg,<sup>38</sup> appear to be receptive to the applicability of language analysis as performed by linguists in cases that hinge on linguistic issues. To linguists interested in seeing growth in the recognition of the relevance of linguistics to the law, this is a hopeful sign.

## NOTES

- 1 969 F.2d 980 (11th Cir. 1992), cert. granted, 113 S Ct 3033 (1993), aff'd, 114 S Ct 1259.
- 2 971 F.2d 608 (10th Cir. 1992), cert. granted, 113 S Ct 2412 (1993), rev'd, 114 S Ct 1793.
- 3 968 F.2d 612 (7th Cir. 1992), cert. granted, 113 S Ct 2958 (1993), rev'd 114 S Ct 798 (1994).
- 4 See e.g. Solan (1993), p. 70–2 and 99–104; Cunningham, Levi, Green, and Kaplan (1994): 1571, 1582, and 1585.
- 5 See Cunningham *et al.* (1994): 1564–6.
- 6 A particularly troubling example of the failure of pertinent linguistic research to influence judicial decisionmaking is in the area of jury instruction comprehension. Considerable and uncontroverted evidence has been accumulated over the past 15 years that jurors are unlikely to comprehend many standard jury instructions. Yet a study in 1991 indicated that, despite these well-established findings, the appellate courts of every state in the nation had either failed to correct two simple flaws in jury instruction procedure or, where change had taken place, changed procedures for the worse (Tanford 1991). The problem of presenting scientific research in an adversarial context was further highlighted by the recent decision of the federal court of appeals for the Seventh Circuit in the case of *Free v. Peters*, 19 F.3d 389 (7th Cir. 1994) rev'g 818 F. Supp. 1098 (N.D. Ill. 1992), rejecting research that the trial court said produced 'overwhelming empirical evidence' that the Illinois death penalty instructions permitted 'arbitrary and unguided imposition of the death penalty' (Levi 1993).
- 7 *US v. Granderson*, above n.1.
- 8 *US v. Staples*, above n.2.
- 9 *NOW v. Scheidler*, above n.3.
- 10 *US v. Gordon*, 961 F.2d 426 (3d Cir. 1992).
- 11 *US v. Clay*, 982 F.2d 959 (6th Cir. 1993), cert. den'd, 114 S Ct 1388 (1994).
- 12 *US v. Diaz*, 989 F.2d 391 (10th Cir. 1993).
- 13 *US v. Byrketts*, 961 F.2d 1399 (8th Cir. 1992); *US v. Corpuz*, 953 F.2d 526 (9th Cir. 1992).
- 14 Sentencing Reform Act of 1984. See S. Rep No. 98–225, 98th Cong, 2d Sess. 88 (1983): 88, quoted in *US v. Corpuz*, 953 F.2d 526 (9th Cir. 1992).
- 15 Public L. No. I 100–690, 102 Stat. 4181 (The Anti-Drug Abuse Act of 1988).
- 16 Cunningham *et al.* (1994): 1582.
- 17 *US v. Granderson*, above n.1 at 1264 (1994).
- 18 *Id.*, at 1267.
- 19 *Id.*, at 1267.
- 20 *Id.*, at 1267. The rule of lenity directs that ambiguity in criminal statutes should be resolved in favour of defendants.
- 21 26 USC § 5845 (1988).

- 22 971 F.2d 608 (10th Cir. 1992), at 612.
- 23 Justice Thomas, Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Souter; Justice Ginsburg, joined by Justice O'Connor, filed a concurring opinion. Justice Stevens, joined by Justice Blackmun, dissented.
- 24 114 S Ct 1793 at 1806, 128 L Ed 2d 608 at 627 (1994).
- 25 *NOW v. Scheidler*, above, n.3.
- 26 *US v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980, cert. denied, 450 US 912 (1981)).
- 27 *Northeast Women's Center v. McMonagle*, 868 F.2d 1342, 1348 n.5 (3d. Cir.), cert. denied, 493 US 901 (1989).
- 28 *US v. Turkette*, 452 US 576, 583 (1981).
- 29 18 USC § 1961(4) (1988).
- 30 National Public Radio news broadcasts, *The New York Times*, *The Sacramento Bee*, *The St. Petersburg Times*, *Time Magazine*, and *US News and World Report*.
- 31 For example: 'Princeton University acquired 850 acres . . . and transformed them into the Forrestal Campus. What has evolved is a mix of academic, scientific, and business enterprises'; and 'When we live in a society that . . . condemns student enterprises like *Not for Profit* (an underground high school paper)'
- 32 *US v. Anderson*, above n.26.
- 33 114 S Ct at 803.
- 34 114 S Ct at 806 n.6.
- 35 *Demarest v. Manspeaker*, 498 US 184, at 190 (1991).
- 36 *NOW v. Scheidler*, above n.3.
- 37 *Id.*, at 806.
- 38 Also, apparently, Justice O'Connor, who cited the team's analysis in a later case: 'The meaning of words may change over time, and many words have several meanings even at a fixed point in time . . . see generally Cunningham, Levi, Green, and Kaplan, 'Plain meaning and hard cases', 103 *Yale L. J.* 1561 (1994). *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S Ct 2251, at 2255 (1994) (ascertaining the ordinary meaning of 'burden of proof' at the time statute was enacted).

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