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STATUTORY INTERPRETATION: CORE MEANING AND MARGINAL UNCERTAINTY

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Somewhat like physicians, lawyers concerned with litigation or the literature of litigation are generally preoccupied, so far as statutes are concerned, with the pathology of the legislative process. Although this preoccupation with sick¹ or intentionally uncertain statutes reflects for the most part sound pedagogy and normal practice, it tends to warp the lawyer's and the scholar's view of language in general and of legal language in particular.

That the warping has been only partial is witnessed by the presence in almost every discussion of statutory interpretation of an express or implied, though sometimes grudging, admission that, despite the vicissitudes of ambiguity, over-vagueness, and over-generality, most language is clear in at least some of its applications.² Beyond this generally perfunctory recognition, however, little direct attention has been given to the areas of clear meaning, mainly because it is the legislative squeak that gets the judicial oil.

On the other hand, a full-blown theory of the interpretation of statutes, even though preoccupied with resolving significant uncertainties of meaning, cannot deal adequately with uncertainty without taking account of the basis for certainty in meaning and the bearing that the certain has on the uncertain. Except for an utterance composed wholly of gibberish (which would not be language), the character of a specific uncertainty of meaning is shaped, at least in part, by the relevant certainties. Thus, an ambiguity³ presupposes at least two particular alternatives each of

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1. I.e., ambiguous, over-vague, or over-general. See Dickerson, *The Diseases of Legislative Language*, 1 *HARV. J. ON LEG.* 5 (1964).

2. "Inside, well on the inside, of the area of their meaning there will be little or no doubt or obscurity or even disagreement." CURTIS, *IT'S YOUR LAW* 62 (1954). "Words . . . are after all not portmanteaus. We cannot quite put anything we like into them. And we may not disregard them in statutes." Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 866 (1930).

3. In the traditional, limited sense of equivocation.

which, taken alone, is free of ambiguity and not so vague as to be meaningless. Similarly, a margin of vagueness presupposes a non-marginal area that, if free of ambiguity, is clear because it is, by hypothesis, non-vague. In each case, the uncertainty thus relates to the presence or absence of factors having a close affinity with those operating in the area of certainty.

Because little attention has been paid to the elements that make clear language clear or how the elements of a particular uncertainty draw their character from what in the relevant context is clear, a recent exchange of views between Professor H. L. A. Hart⁴ and Professor Lon Fuller⁵ carries special significance.

Hart's thesis is that communication is possible only because the general words through which it is conducted have a core meaning or "standard instance in which no doubts are felt about its application."⁶ Around each vague word there is a margin of uncertainty called the "penumbra." The distinction between core and penumbra is important to Hart's larger thesis that the core is the stronghold of the "isness" of the law, whereas the penumbra is the arena to which issues of the nature and role of "oughtness" in resolving uncertainties resulting from imprecision of legislative meaning are confined. Hart's and Fuller's central dispute concerns the respective roles of "isness" and "oughtness" in the law.

Although the larger issue is not the immediate concern of this discussion, it provides the setting in which the issues respecting the concept of "standard instance" or "core meaning" must be seen. Most important is the question: Does "oughtness" affect meaning in the core area? Fuller's deepest concern about Hart's theory of standard instance or core meaning lies in the assumption that it precludes recourse to the purpose of the statute in cases falling within the core,⁷ thus sealing off the value-systems with which the law should be in constant and intimate touch.

On core meaning, Hart supposes this situation:

A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? . . . If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain

4. *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

5. *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

6. Hart, *op. cit. supra* note 4, at 607.

7. Fuller, *op. cit. supra* note 5, at 662-66.

type of behavior be regulated by rules, then the general words we use—like “vehicle” in the case I consider—must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.⁸

Fuller finds several bases for repudiating such a concept. His first objection is that meaning is not conveyed by a mere sequence of single words individually received and separately appraised. Because meaning attaches, rather, to sentences, paragraphs, or whole pages of text (which are likely to be unique), he argues:

Surely a paragraph does not have a “standard instance” that remains constant whatever the context in which it appears. If a statute seems to have a kind of “core meaning” that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, *this* case would still come within it.⁹

His second objection is that, even if we accept a word-by-word approach to meaning, Hart fails to give a “real account of what does or should happen” with respect to core meaning.¹⁰ Fuller also says that even within the alleged core meaning of the word “vehicle” Hart’s insistence that it obviously includes automobiles would produce a dubious result in a case in which some citizens wanted “to mount on a pedestal in the park a truck used in World War II,” if the court paid no attention to what the statute was intended to accomplish.¹¹ Thus, he objects to Hart’s assumption that it is possible to interpret a word in a statute without knowing the aim of the statute.

[W]e do not proceed simply by placing the word in some general context . . . Rather, we ask ourselves, What can this rule be for? What evil does it seek to avert?¹²

. . . Surely the judicial process is something more than a cataloguing procedure.¹³

It is thus through the mediation of purpose that core meaning is affected by considerations of “oughtness.”

8. Hart, *op. cit. supra* note 4, at 607.

9. Fuller, *op. cit. supra* note 5, at 663.

10. *Ibid.*

11. *Ibid.*

12. *Id.* at 665.

13. *Id.* at 666.

Fuller's third objection is that Hart's theory fails "to recognize that a rule or statute has a structural or systematic quality that reflects itself in some measure into the meaning of every principal term in it."¹⁴

Finally, he says that the theory of meaning implied in Hart's article appears to have been rejected by three of the principal authorities on modern logic: Wittgenstein, Russell, and Whitehead.¹⁵

If Hart is propounding a word-by-word approach as a full-blown theory of meaning, Fuller's criticism is largely justified. Certainly, a communication is more than the sum of its verbal and syntactical parts and, in the integration of total meaning, the legislative purpose manifest in the context of particular use is the only intelligible unifying force. This is well illustrated by *Roschen v. Ward*.¹⁶ Although in that case the express words of the relevant statute required no more than the presence of a physician or an optometrist at each place where eye glasses were sold, its clear purpose showed that it obligated him in each case either to examine the customer's eyes or to determine that an examination was unnecessary.

The question nevertheless remains whether Fuller's view of the role of purpose rules out all notions of "standard instance" or "core meaning." Although he denies core meaning to the word "vehicle," he can see "without thinking" what the statute "is aiming at in general," with the result that he has no difficulty in concluding that in every case "a noisy automobile must be excluded."¹⁷

Such an assurance invites these questions: By what means is the legislative purpose so obviously manifested? Is Fuller's own certainty as to purpose unrelated to any element of certainty in the individual words of the statute? Are the words of a statute devoid of content when uttered out of context?¹⁸

To this last question Whorf's belief that dictionary meanings derive from the patterned "potentials of linkage" seems pertinent.¹⁹ Even in the lonely isolation of their dictionary cells, words reflect the patterns of their

14. *Id.* at 669, note 40.

15. *Id.* at 669.

16. 279 U.S. 337 (1929).

17. Fuller, *op. cit. supra* note 5, at 663.

18. "Words are meaningless in isolation. . . ." ALLEN, LAW IN THE MAKING 474 (1958).

19. WHORF, LANGUAGE, THOUGHT, AND REALITY 67 note 4 (1956).

many appearances in specific contexts.²⁰ Dewey, although conceding that “no term has logical force save in distinction from and relation to other terms,” adds:

This statement is not contradicted by the fact that all familiar words carry some meaning even when uttered in isolation. . . . Their meaning is potential rather than actual until they are linked to other words. If the words sun, parabola, Julius Caesar, etc., are uttered, a line of direction is given to observation or discourse. But the objective of the direction is indeterminate until it is distinguished from alternative possible terminations, and is thus *identified* by means of relation to another term.²¹

Thus, although “terms as such are logically conditioned by propositions,”²² they have content even apart from their specific contexts. This is true even of syntactical links such as the word “unless,” which Flesch has characterized as the most difficult word in the English language.²³ That this content-out-of-context is likely to be very general, rather than specific, is well illustrated by Fuller’s word “improvement,” which presumes that a standard of value must be supplied by context before the word can take on specific concretion.²⁴ Clarity of meaning is thus a function of the regularity and consistency of particular patterns that, although they arise out of particular uses, persist even beyond them.

Moreover, single words are not the only linguistic elements to which ascertainable and measurable usages attach. For example, the term “parol evidence rule” has a generally understood range of meaning even though it is not a rule of evidence and even though it does not apply solely to oral utterances.²⁵

Usage also shapes the ways in which words can be related to one another. The conventions of word arrangement make it possible, for example, to distinguish the meaning of “man bites dog” from the meaning

20. “. . . even when read out of specific context particular words and phrases retain much of the flavor of their usual associations.” Dickerson, *The Difficult Choice Between “And” and “Or,”* 46 A.B.A.J. 310, 311 (1960).

21. DEWEY, *LOGIC: THE THEORY OF INQUIRY* 349 (1938).

22. *Ibid.* Is it not also true that propositions as such are conditioned by terms?

23. FLESCH, *THE ART OF PLAIN TALK* 167 (1946).

24. Cf. Fuller, *op. cit. supra* note 5, at 664-65.

25. “It is often fallacious in considering the meaning of a phrase consisting of two words to find a meaning which each has separately and then infer that the two together cover the combination so arrived at. The two together may, as here, have acquired a special meaning of their own.” *Lee v. Showmen’s Guild of Great Britain* [1952], 2 Q.B. 329, 338 (“unfair competition”).

of "dog bites man." A combination of words and phrases can thus produce a meaning that, while unique in the aggregate, is at least partly a function not only of their established meanings but of the established meanings of particular syntactical relationships. Fuller himself recognizes that "implicit systematic or structural elements in language often enable us to understand at once the meaning of a word used in a wholly novel sense, as in the statement, 'Experts regard the English Channel as the most difficult swim in the world.'"²⁶

Some syntactical usages are well recognized and expressly recorded. Others are latent and subtle. The latter were apparently what Whorf had in mind when he said:

A covert linguistic class may not deal with any grand dichotomy of objects, it may have a very subtle meaning, and it may have no overt mark other than certain distinctive "reactances" with certain overtly marked forms. It is then what I call a CRYPTO-TYPE. It is a submerged, subtle, and elusive meaning, corresponding to no actual word, yet shown by linguistic analysis to be functionally important in the grammar.²⁷

A third kind of specific usage that colors or supplements meaning includes the relevant assumptions that are left tacit because by usage they are not only agreed on but may be taken for granted.²⁸ Perhaps the simplest example is the one suggested by Scriven.²⁹ When the writer of a document dates it "1/4/64," intending to refer to January 4, 1964 (rather than to April 1, 1964), he is tacitly assuming that his addressee, like himself, is operating under the usual American, rather than British or military, system of indicating dates. In general, tacit legislative assumptions are established usages, common to the legislators and the legislative audience to which the particular statute is addressed, that are both relevant to the legislative message and taken account of by it. As integral parts of the shared environment, they are matters of which a court is likely to take judicial notice.

Although, as Hart suggests, a word, phrase, or syntactical relationship may have a single, relatively standardized and therefore determinable usage, it is much more likely to have a cluster of such usages. So far as

26. Fuller, *op. cit. supra* note 5, at 668 note 40.

27. WHORF, *op. cit. supra* note 19, at 70 (see also 92).

28. FULLER, *BASIC CONTRACT LAW* 666-70 (1947).

29. In *Definitions, Explanations and Theories*, in *MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE* (Herbert Feigl and others, ed.) Vol. II. 99, at 133 (1958).

these usages are interrelated, they comprise a family of usages and, if they relate to different aspects of the same general referent, they may be treated, not as separate words, but as inflections or other use-variants of the same word.³⁰ On the other hand, so far as the usages are unrelated, they constitute a bundle of homonyms, each of which, when identified, carries a standard instance or core meaning and may be treated for most purposes as a separate word.³¹

Such an identifiable use-pattern, consisting of specific language and the particular pattern of "actions into which it is woven," constitutes, in Wittgenstein's terminology, a "language-game" that is played according to the rules that custom has established for it.³² These rules, in turn, comprise the core meaning of the particular use-pattern.

Moreover, even when the cluster of usages is taken as a whole (i.e., when the word is read apart from any particular use-pattern), it carries a core meaning. For a family of related usages, a single, broader core meaning attaches so far as they relate to the same general referent. For a family of unrelated usages or a bundle of homonyms, the "core meaning" consists simply of the aggregate of the core meanings of the separate use-patterns. Accordingly, the core meaning of a word taken out of context is in most cases like a quiver of individually unique arrows each of which shares, in addition to the same quiver, one or more aspects, such as the same size, weight, color, or shape, with some, all, or none of the others. As an alternative, Fuller has likened such a word to a number of keys on the same ring.

The distinction between the vague and the certain, even with respect to single words, seems to be taken for granted by most philosophers of language. This is hardly surprising, because the vague implies the non-vague, and if it is proper to characterize some words in isolation as having wide areas of vagueness, it is likewise proper to characterize others as being relatively precise and certain. Although significant vagueness, like significant ambiguity, is realized only in specific use, and although a word or phrase is highly flavored by the particular context in which it appears, it is useful to classify words and phrases according to their potentialities for giving or avoiding trouble. Use in many specific legal contexts makes it possible, for example, to classify the word "reasonable" as potentially

30. E.g., "run," "have run," "ran," "was running," etc.

31. E.g., "Well," the judge asked, "how well did the contractor build the well?"

32. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 5, 20, 27, 80, 109 (1953).

vague, and the word "children" as potentially ambiguous. This makes possible a science of lexicography and the writing of dictionaries.

Here is Black's account of how certainty and uncertainty can be predicated even of words taken in isolation:

The process of logical analysis of a language can be regarded as the exhibition of a set of conventions for the use of symbols, abstracted from the regularity of linguistic habits in some postulated speech community, and proceeding by a series of successive approximations involving the use of "simplified" or "model" entities.

The vagueness of symbols in any such abstract system is a symptom of the degree of deviation of the "model" language from the empirically discoverable linguistic habits in the corresponding speech community.³³

Black's concept of an "empirically discoverable linguistic habit" seems to approximate Hart's concept of "standard instance" or "core meaning." Here, again, the definiteness of the habit, and thus the clarity of the meaning that it generates, depends on who are assumed to be the "users of the language."³⁴ These, in turn, define the relevant speech community. (It may be important to know whether a statute is addressed to the general public or to an elite technical group.) It is not surprising that in concrete situations the line between the certain and the significantly uncertain, between core and penumbra, is usually blurred.

Some notion of standard instance is implicit in the almost universal assumption that there is a practical limit to the meaning that a specific configuration of words is capable of bearing. The factors of usage that set an outer limit to the penumbra are those that determine the existence and extent of the core. The revelation of legislative purpose is similarly circumscribed, because (1) so far as it is revealed by the enacted language itself, it is no more certain than the language by which it is revealed, and (2) so far as a purpose is revealed by elements (verbal or non-verbal) other than the enacted language, constitutional requirements as to how statutes must be enacted intervene to inhibit the wholesale extension of that language. Because total specific context tends to be unique, what do these relatively standardized inhibitions consist of except the established use-patterns of specific words, phrases, syntactical relationships, and tacitly shared assumptions?

33. BLACK, LANGUAGE AND PHILOSOPHY 28 (1949). Vagueness results not only from the cognitive incapacities or variant purposes of particular users but, more important, from minute, objective differences in degree in what is being observed.

34. *Id.* at 29.

On the other hand, Hart's approach, taken alone, reflects the limitation in Professor Charles W. Morris's behavioristic approach to meaning.³⁵ It ignores that the total meaning conveyed by a unique configuration of symbols uttered in a unique context may be more than the sum of a series of separate conditioned responses and that, in many cases, an act of induction or deduction (i.e., of "interpretation") is required of the reader, an act shaped by the necessary presumption that the total communication is intended to express a rational and integrated legislative purpose or congeries of related purposes.

In this process, the concept of standard instance with its penumbra plays two important roles. First, it furnishes the basic data upon which any later act of induction or deduction necessarily depends. Second, it has a composite limiting effect on the ultimate range of meanings possible even in a loose context.

Even if, in the interpretation of statutes, we must agree with Fuller that the "judicial process is something more than a cataloguing procedure," it is partly a cataloguing procedure. Single words carry, even into context, an important one-way significance: Their established ranges of connotations set maximum limits on what the total communication can mean to the audience addressed. That they do not fix minimum limits reflects the normal functioning of context. Here, Fuller is fully justified in criticizing Hart for saying that the word "vehicle" necessarily covers all automobiles regardless of circumstances, including the circumstances of a narrower legislative purpose disclosed by the total context. To say that standard instance is immune to the forces of context is to deny what is perhaps the central and most useful function of context: to limit otherwise over-general language. Context makes it possible, for example, to include in a federal statute a very general word such as "person" without incurring the slightest risk that it will be read as including persons wholly beyond the jurisdiction of the United States.

However, the limitations so imposed by context do not affect the general lexical meaning of an otherwise broad word. In the sentence, "A special statute is undesirable in this case," there is no inconsistency in saying that the word "statute" means statute in its usual broad sense, even though the sentence as a whole refers to only one kind of statute. The general meaning of a word is not necessarily the same as the meaning

35. MORRIS, SIGNS, LANGUAGE, AND BEHAVIOR (1949). See the discussion in BLACK, *op. cit. supra* note 33, at 169-77.

of the particular sentence or paragraph in which it appears. No legitimate purpose is served by a contextual theory of meaning that treats the word "statute" as changing its meaning simply because it carries a modifier. The significant question in most cases is not the meaning of any constituent word but the meaning of the entire sentence or provision, as conditioned for that "language-game" by the standard instances and penumbras of the words "special," "statute," "undesirable," and "case," the syntactical usages reflected, and the contextually implied, and therefore tacit, legislative assumptions. For this reason, the concept of the general stability of standard instance or core meaning need not be abandoned merely because of the concomitant limitations of context.

Nor is the concept of standard instance or core meaning necessarily denied by variations in shades of meaning provided by variations in specific context. As with all classifications, lexical samenesses exist only because the existing differences are insignificant in the light of the purpose at hand, and thus may be disregarded.

If the concept of standard instance or core meaning is limited to particular words, phrases, syntactical relationships, and their use-patterns, and if its composite effects are subject to the normal conditioning of context, including the legislative purposes revealed by total context, there is wide scope for the play of the value-systems reflected in expressed legislative purpose, at least so far as context serves to limit the full potentialities of standard instance. On the other hand, they cannot extend lexical meaning beyond the outer reaches of standard instance and its penumbra of uncertainty.

That context not only limits the sweep of otherwise over-general language but also selects among homonyms and other use-patterns and often resolves grammatical ambiguities, both without changing the general potential force of established usage, refutes any notion that the vital effect that context has on total meaning rules out any concept of standard instance or core meaning. On the contrary, it presupposes it. For this reason, the mere recognition of the force of context found in Wittgenstein, Russell, and Whitehead does not repudiate the notion of standard instance or core meaning as such. At most it refutes Hart's apparent assertion that standard instance and core meaning are invulnerable to the limiting force of context.

Russell's strictures on the "cult of common usage"³⁶ seem directed,

36. See the essay, "The Cult of Common Usage," in RUSSELL, *PORTRAITS FROM MEMORY AND OTHER ESSAYS* 154 (1956), reprinted in *THE BASIC WRITINGS OF BERTRAND RUSSELL* 137 (1961).

not at the concept of common usage, but at what blind enthusiasm has claimed for the vaguenesses and over-generalities that comprise much of what passes as "plain English." It seems generally agreed among the philosophers of language not only that common usage in a particular speech community generates the conditioned responses upon which even unique communications are built but also that such linguistic habits are empirically and objectively discoverable. On this assumption are founded all notions of clear meaning. Nor is this assumption undermined by the fact, made so evident by Wittgenstein,³⁷ that even within the same speech community the same word plays as many roles as there are identifiable use-patterns that employ it.

To summarize, a full-bodied theory of interpretation should recognize (1) that the common usage that makes clear language clear is not limited to individual words taken in isolation, (2) that by usage, combinations of words often carry meanings independent of the meanings of their constituent parts, (3) that usage extends also to observed patterns of syntax and to shared tacit legislative assumptions, (4) that the same word, expression, syntactical pattern, or tacit assumption may have multiple common usages, (5) that each such usage relates to a particular speech community, and (6) that patterns of context are to a limited extent reflected in the dictionary meanings of words. Crowning these facts is the integrating force of legislative purpose. Hart's views as expressed on the occasion of this exchange with Fuller may not have been wrong so much as they failed to include other equally important aspects of communication.

These observations, of course, do not detract from the validity of Fuller's main points: (1) that a legislative communication is presumably both an integrated whole and inherently purposive, (2) that knowledge of this fact not only is helpful in resolving many uncertainties of meaning, but conditions the normal play of established usage, and (3) that where the immediate legislative purpose is clearly revealed by the pertinent statutory language read in proper context its meaning is clear.

Although Fuller has effectively punctured any notion that standard instance or core meaning is impervious to context and the value-systems inherent in manifest legislative purpose, a concept of standard instance or core meaning is indispensable to setting outer limits on potential meaning and, indeed, even to the revelation of legislative purpose itself. If so,

37. *Op. cit. supra* note 32.

Hart is right in supposing standard instance or core meaning, but wrong in dissociating it from the limiting implications of legislative purpose. It is unfortunate, too, that he did not delineate more fully its extent and significance, because therein lies the source of legislative clarity.