OBJECTIVE INTERPRETATION AND OBJECTIVE MEANING IN HOLMES AND DICKERSON: INTERPRETIVE PRACTICE AND INTERPRETIVE THEORY

Patrick J. Kelley*

Dedication

It was my good fortune to serve on the same law school faculty with Tom McAffee for 14 years. Tom was the perfect colleague, always eager to talk about his projects and your projects and legal scholarship in general. His keen insight, wealth of knowledge, honesty, and good cheer made him a great foil to bounce ideas off of, as well as a subtle teacher, educating a purported equal by argument and example. His office was just around the corner from mine, and we would talk for hours. I learned so much from Tom that it's still hard for me to tell where his ideas end and mine begin in our shared passions for statutory and constitutional interpretation, legal history, and constitutional law.

After Tom was lured away by the William S. Boyd School of Law in Las Vegas, he continued as my colleague, even though he is now half a continent away and we have to talk by phone. And I have learned even more from him. After a life-threatening accident on his way west, Tom taught me how to deal with adversity: head-on, with a courageous spirit and a cheerful heart.

It is an honor for me to dedicate this article on one of our shared passions to my colleague and friend, Tom McAffee.

*Professor of Law, Southern Illinois University School of Law. An earlier version of this paper was presented at the second annual Law, Culture, and The Humanities Conference in the spring of 1999 at Wake Forest Law School. I am grateful to participants at that conference, particularly George Taylor, for helpful suggestions. Some of the discussion of Dickerson here reformulates the analysis in Patrick J. Kelley, *Advice From the Consummate Draftsman: Reed Dickerson on Statutory Interpretation*, 16 SO. ILL. L.J. 591 (1992).

INTRODUCTION

One ought to begin any intensive exploration of the practices of human communication from the standpoint of a naive realist like Samuel Johnson, who ended a philosophical debate over the possibility of free will by exclaiming, "We *know* our will is free, and *there's* an end on it." Our daily experience with the practices of human communication convinces us that we can and often do communicate successfully with others. We recognize that good communication is a craft that can be taught and we try to teach our children that craft. We see that schools devote time and effort teaching that craft from grade school through college. We all recognize that some speakers and writers are more skillful than others. All of these experiences convince us that successful communication is possible, though not always achieved.

Yet one should not end an intensive exploration of the practices of human communication with just the simple affirmation that we can and do communicate successfully. We want to know more than that. We want to know what and how it is that we communicate with each other; we want to know how it is that we successfully communicate a determinate meaning to others; we want to understand "meaning" itself. We want, in other words, a scientific explanation - a scientific theory - of human communication. As the theory develops, the naive realist serves only as the tether that connects the theory to the human experiences it purports to explain. So we can reject any theory of human communication that denies the possibility of successful communication because it fails to do what we look to theory to do - explain more fully and deeply a set of human experiences. In addition, theories of communication that deny the possibility of successful communication cannot persuasively be argued, for the theorist who makes that position clear must employ the practices of human communication to do so. She is necessarily, then, engaged in a performative inconsistency.

Descriptive linguistic theory has blossomed over the last seventy years, beginning with Gardiner in England and Buhler in Germany, and progressing through the works of Ludwig Wittgenstein, J. L. Austin, Colin Cherry, Hans Hormann, and Paul Grice. These descriptive linguists and philosophers of language have developed more and more accurate explanations of how it is that we communicate successfully with each other using language.

Linguistic theorists might decide to look at judges' opinions in cases that turn on the proper interpretation of authoritative communications in wills, contracts or statutes. They might think "here is a rich lode of explanation of the ordinary practices of successful interpretation by experts in those practices." They would, I believe, be wrong.

Why would they be wrong? Ordinarily, we interpret successfully by unconsciously applying, simultaneously, a whole set of meaning conventions

within a specific perceived context. When judges are called upon to explain why they interpret a particular text one way rather than another, they are unlikely to be conscious enough of the process they went through to explain it accurately. So they are likely to explain their conclusion in one of two other ways. Judges with a taste for theory may explain their conclusion by reference to a currently acceptable theory of legal interpretation. Other judges, schooled in the need to explain their decisions as the result of applying settled legal rules to the facts, may invoke a maxim or rule of construction and show how it applies to compel the interpretation given by the court. Some of these maxims and rules may reflect or embody ordinary interpretative practices; others may not. To use them as explanations of ordinary interpretive practices would, therefore, be dangerous.

In fact, just the opposite seems to be true: descriptive linguistic theorists may not have much to learn from judges' interpretation opinions, but judges may have a lot to learn from accurate descriptive linguistic theory. If drafters of contracts, wills, and statutes employ our ordinary practices of communication to convey determinate meanings, judges faced with questions of interpretation in cases involving these documents could do their job better if they understood more fully the way our ordinary communication practices work. Theories of legal interpretation may therefore improve as prior theories are tested and corrected by reference to ordinary interpretive practices, as explained by accurate descriptive linguistic theory.

If one accepts this thesis, two broad questions arise for the specialized field of statutory interpretation. First, who has tried to apply scientific theories of descriptive linguistics to statutory interpretation problems, and how successful have they been? Second, what is the current state of descriptive linguistics and how is it applicable to statutory interpretation?

This paper is an attempt to answer in part the first question. In it I will examine the theories of Oliver Wendell Holmes, Jr. and Reed Dickerson. Both Holmes and Dickerson were masters of human communication and ordinary interpretive practices. Holmes is probably our leading judicial stylist, and the clarity and grace of his opinions as a judge are unmatched. Dickerson was the dean of professional legislative drafters, with over 20 years experience in drafting and teaching others to draft legislation. They each elaborated a theory of statutory interpretation based on a general scientific linguistic theory. I will argue that each of their theories was an improvement over immediately preceding theories insofar as they modified prior theory to bring theory closer to ordinary practices of interpretation. I will also argue that each theory fell short of a fully adequate theory to the extent that it failed to fully reflect ordinary interpretive practices.

1. Holmes

In *The Common Law,*[1] Oliver Wendell Holmes, Jr. recognized a general tendency in the law to move from liability standards formulated in terms of subjective intent to ever more external and objective standards of liability, formulated solely in terms of observable conduct. This thesis reflects Holmes's acceptance of the reductive positivism of Mill and Comte, as well as Comte's theory of the ineluctable progression of human thought from theological to metaphysical to positivist modes of thought.[2] In the theological mode of thought, events are attributed to the wills of living creatures - animate, inanimate or supernatural. In the metaphysical mode of thought, events are attributed to realized abstractions. For example, it is the nature of a weight to fall. In the positivist stage, events are explained by reference to prior phenomena and scientific laws of antecedence and consequence.

Holmes argued that liability standards begin with the notion of wrongful intent to cause harm, and the accompanying notion of personal moral blameworthiness. This can be seen as a theological stage in legal thought, for it focuses on the subjective intent of the actor. In the second stage, liability is imposed if an ordinary reasonable person in the actor's position would have been morally blameworthy for acting as the actor did. This can be seen as a metaphysical stage in legal thought, for it employs a realized abstraction - "the ordinary reasonable man" - to determine liability. In the third stage, liability rules will be formulated in purely factual terms - if an actor does x, y, and z, he will be ordered by the court to pay damages, where "x, y, and z" are simple factual descriptions. This can be seen as the final, positivist stage, in which liability rules themselves are formulated as scientific laws of antecedence and consequence.

Consistent with this positivist program, Holmes redescribed the common law of tort and crime without using the theological term "intent" at all. Wherever 'intent' appeared in tort or criminal liability standards, he reduced it to an objective description of an actor's conduct: *either* an act done with knowledge of circumstances from which a reasonable man, based on the experience of mankind, would predict certain harmful consequences (the intermediate metaphysical formulation); *or* an act done with knowledge of circumstances when the experience of mankind shows that such acts under those circumstances are likely to be followed by harm (the final positivist formulation).[3]

When Holmes turned to the law of contract, he took dead aim at the prevailing theory of contract. Under that theory, the validity of a contract depends

---

[1] O.W. HOLMES, JR., THE COMMON LAW, (Little, Brown & Co. 1923) (1891).

[2] I have presented the full argument for this position in Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681 (1983) and Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. L.J. 427 (1990).

[3] HOLMES, *supra* note 1 at 52-58, 133-34, 146-49.

on the mutual common intentions of the contracting parties. This was the mid-nineteenth century form of the will theory of contract. Under the will theory of contract, the critically important elements in the formation of a valid contract were offer and acceptance, for the offer and its acceptance establish the contracting parties' mutual common intentions.

Holmes would have none of that. He argued that the only two elements of a contract are purely external acts by the contracting parties: a promise made by the promisor and consideration given by the promisee. And he gave purely reductive descriptions of both promise and consideration. A promise was simply an accepted assurance that a future event will happen. Acceptance here didn't refer to any mental state, however, as it was conclusively presumed when the promisee gave consideration. Holmes reductively described consideration as any detriment to the promisee that is, *"by the terms of the agreement,* given and accepted as the motive or inducement of the promise."[4] This is purely reductive, as the consideration doesn't have to be the actual, subjective motive or inducement of the promise. It is enough that the terms of the agreement identify the consideration as what is given and accepted as the motive or inducement of the promise.

The subjective motives and the subjective intentions of the parties are thus banished from Holmes's theory. As Holmes said at the end of his elements lecture: "[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."[5] But the "overt acts" that are the observable phenomena are communicative acts–written or oral statements by the contracting parties. And the relevant content of the communication, on Holmes's own theory, is what it says about the party's subjective intentions or subjective motives. The promisor intends, by his conduct, to "assure" another that a future event will occur; the parties, by the terms of the agreement, identify something as the thing that has "induced" the promisor to make his promise. So Holmes may not have formulated a theory based solely on observable phenomena, divorced from the subjective states of the parties. He may have just distanced his theory by one step from those subjective states. Those states may ultimately still be controlling, as the overt acts will be effective to form a contract, under Holmes's own theory, only insofar as they adequately establish a particular intention on the part of each of the parties to the alleged contract. So Holmes's purportedly purely objective theory seems to be just a confused form of the "objective evidence of internal states" will theory of contract formation. In our day, Patrick Atiyah, the leading English contract theorist, has attacked Holmes's theory on precisely this ground.[6]

This apparent problem with Holmes's theory is not an internal inconsistency in the theory. It is clear that Holmes set out to reduce the elements of

---

[4] *Id.* at 293.

[5] *Id.* at 307.

[6] Patrick Atiyah, *Holmes and the Theory of Contract, in* ESSAYS ON CONTRACT 57, 66-67 (1986).

contract to observable phenomena and that he believed he had reduced promise and consideration to purely phenomenal elements. The question is whether the reduction works when the phenomena are human communication and human discourse. Holmes does not seem to have answered that question adequately in *The Common Law*. What was needed was an objective, positivist theory of human communication, or at least an objective, positivist theory of interpretation.

The closest Holmes came to presenting such a theory in *The Common Law* was his analysis of the process of reading conditions into a contract by construction and his critique of Langdell's theory of dependent and independent promises.[7] By examining those parts of Holmes's thought, we may, perhaps, be able to identify an inchoate positivist theory of interpretation.

In Holmes's explanation, the process of implying a condition into a contract can be seen as purely scientific. Holmes defined "construction" in terms reminiscent of Francis Lieber's influential 1839 work on hermeneutics. "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered."[8]

In focusing on the general problem of constructive conditions in order to determine whether a contractual promise in a bilateral contract is "dependent" - i.e. conditioned on the other contracting party first performing her promise, Holmes rejected an approach based on hard-and-fast rules of construction:

> The foundation of the whole matter is, after all, good sense, as the courts have often said. The law means to carry out the intention of the parties, and, so far as they have not provided for the event that has happened, it has to say what they naturally would have intended if their minds had been turned to the point. It will be found that decisions based on the direct implications of the language used, and others based upon a remoter inference of what the parties must have meant, or would have said if they had spoken, shade into each other by imperceptible degrees.[9]

In looking at particular cases, Holmes elaborated on this:

> [T]he most important element of decision is not any technical, or even any general principle of contracts, but a consideration of the nature of the particular transaction as a practical matter. Suppose A promises B to do a day's work for two dollars, and B promises A to pay two dollars for a day's work. There the two promises cannot be performed at the same time. The work will take all day, the payment half a minute. How are you to decide which is to be done first, that is to say, which promise is dependent upon performance on the other side? It is only by reference to the habits of the community and to convenience.[10]

One can thus see in what Holmes did in this area an inchoate objective

---

[7] *See* HOLMES, *supra* note 1 at 316-22, 327-35.

[8] *Id.* at 303.

[9] *Id.* at 334-35.

[10] *Id.* at 337.

process of construction, consistent with Holmes's overall positivist commitments. Although Holmes himself didn't elaborate it in *The Common Law*, this is what the process may have looked like to him. One looks at the words of the contract, which are objective facts, in light of both the surrounding circumstances, which are also objective facts, and the manifest object of the contract, which can be inferred as a fact from the words of the contract and the surrounding circumstances. In light of the words, circumstances, and manifest object of the contract, one can determine scientifically what conditions the parties would have agreed to had their attention been drawn to it at the time of contracting. One can do that by examining the experience of mankind to see what people ordinarily do in such circumstances–that is, by discovering a scientific law of antecedence and consequence.

In the course of his twenty years as a judge on the Massachusetts Supreme Judicial Court, Holmes had the opportunity to develop an explicitly external, objective theory of interpretation to match his inchoate external theory of construction. The case in which he gave fullest expression to this theory was *Nash v. Minnesota Title Insurance & Trust Co.,*[11] decided in 1895. In that case, the defendant title company had written to the prospective mortgagee of real property, assuring him that they had examined the title to the mortgaged real estate, and had found it to be perfect, even though they knew that the property was subject to a prior $30,000 mortgage.[12] The question on appeal was whether the trial court erred in excluding evidence that the officers of the title company had understood their statement to be true in some technical sense (that the title was perfect, even though it was subject to a mortgage).[13] The majority held the trial court had erred, and Holmes dissented.[14] In the course of that dissent, Holmes presented his external, objective meaning theory as follows:

> The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to known [sic] what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of the law to contemplate the natural consequences of his act, as well in the conduct of others as in mechanical results. I can see no difference in principle between an invitation by words and an invitation by other acts, such as opening the gates of a railroad crossing (Brown v. Railroad Co., 157 Mass 399, 32 N.E. 362), or an intentional gesture, having as its manifest consequence, according to common experience, a start and a fall on the part of the

---

[11] Nash v. Minnesota Title Ins. & Trust Co., 40 N.E. 1039 (Mass. 1895).

[12] *See id.*

[13] *See id.* at 1040.

[14] *See id.* at 1042-43.

person toward whom it was directed, in either of which cases I suppose no one would say that a defendant could get off by proving that he did not anticipate the natural interpretation of the sign. Of course, if the words used are technical, or have a peculiar meaning in the place where they were used, this can be shown; if by the context or the subject-matter or the circumstances the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the contract; but, when none of these things appears, a defendant cannot be heard to say that for some reason he had in his mind and intended to express by the words something different from what the words appear to mean and were understood by the plaintiff to mean and are interpreted by the court to mean, whether the action be in tort or conract.[15]

Four years after his dissent in *Nash*, Holmes published in the *Harvard Law Review* an article entitled *The Theory of Legal Interpretation*, in which he further elaborated his theory. Holmes was responding to an 1860 paper by F. Vaughn Hawkins that had been reprinted in 1898 as an appendix to James Bradley Thayer's *A Preliminary Treatise on Evidence at the Common Law.* Hawkins had argued that the general object of all interpretation was "to ascertain the meaning or intention of the writer - to discover what were the ideas existing in his mind, which he desired and endeavored to convey to us."[16] This stirred Holmes to a vigorous response:

It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing. How is it when you admit evidence of circumstances and read the document in light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a

---

[15] *Id.* at 1042-43 (Holmes, J., dissenting).

[16] F. Vaughan Hawkins, *On The Principles of Legal Interpretation With Reference Especially to the Interpretation of Wills in* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, app. C at 580 (1898).

normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.[17]

Holmes then went on to show why this practice of objective interpretation is the appropriate way to interpret contracts, statutes and wills, even though an argument could be made in each case that subjective intent of the contracting parties, of the sovereign, or of the testator should be controlling. On contracts, Holmes argued as follows:

> In the case of contracts, to begin with them, it is obvious that they express the wishes not of one person but of two, and those two adversaries. If it turns out that one meant one thing and the other another, speaking generally, the only choice possible for the legislator is either to hold both parties to the judge's interpretation of the words in the sense which I have explained, or to allow the contract to be avoided because there has been no meeting of minds. The latter course not only would greatly enhance the difficulty of enforcing contracts against losing parties, but would run against a plain principle of justice. For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.[18]

On statutes, Holmes argued as follows:

> [W]e do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means. In this country, at least, for constitutional reasons, if for no other, if the same legislature that passed it should declare at a later date a statute to have a meaning which in the opinion of the court the words did not bear, I suppose that the declaratory act would have no effect upon intervening transactions unless in a place and case where retrospective legislation was allowed. As retrospective legislation it would not work by way of construction except in form.[19]

On wills, Holmes argued as follows:

> So in the case of a will. It is true that the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.[20]

Holmes's positivist, objective theory of interpretation was a significant advance beyond prior theories in at least two ways. First, by asking the scientific question of what a normal speaker who said these things in this circumstance would mean, Holmes focused the question of interpretation on the commu-

---

[17] O.W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).
[18] *Id.* at 419.
[19] *Id.* at 419-20.
[20] *Id.* at 420.

nity's language conventions and other conventions made relevant by the context and away from the search for specific subjective intent. That search seems doomed in all these cases Holmes discussed because the ordinary way we try to clarify subjectively intended meaning when it is unclear - to ask the speaker what she meant - is not available: in the case of wills, because the testator is now dead; in the case of statutes, because the legislature is a composite entity that acts authoritatively only in enacting the specific words of a statute, and no person or group has the authority to speak on behalf of the legislature to explain what it meant; in the case of contracts, because the occasion of a dispute over the intended meaning of contractual terms means either that there was no commonly understood meaning at the time of contracting or that the disputing parties' statements about what they actually intended are now tainted by their current interest in promoting their own interpretation of the contractual terms. Moreover, in all three cases, substantive legal rules giving authoritative status exclusively to the words in a particular document (the will, the act, and the written contract), preclude use of other seemingly direct evidence of the relevant intent. In each case, then, courts ought to employ ordinary interpretive practices for determining the meaning of a communication when the meaning is conveyed exclusively by a single document and the author of the document is not available for questioning. That practice looks a lot like the objective interpretation proposed by Holmes: one should look at the document in its full context and ask what would these words in that context ordinarily mean under the relevant conventions related to meaning.

Second, Holmes analysis focuses on the ordinary meaning of these words by this speaker in this context - a necessarily unique question that cannot be resolved adequately by the application of one or more *rules* of interpretation. Instead of consulting rules of interpretation and construction such as those promoted by Francis Lieber, courts should consult conventional meaning patterns and practices to develop hypotheses about the meaning of these words in this context, realizing that no hard-and-fast rule can capture the full richness of ordinary interpretive practices.

Over a broad range of cases he decided as a judge on the Massachusetts Supreme Judicial Court, Holmes's theory of objective, external meaning either pointed him to ordinary interpretive practices or at least did not stand in the way of his applying ordinary interpretive practices. In these cases, Holmes proved himself to be a virtuoso at interpretation. His purely objective approach to interpretation freed him from the hold of the various judicial "rules" of construction; his opinions show a sensitivity to the precise words of the statute or contract in its immediate context and the broader context of the manifest object of the statute or contract. Out of a great number of possible examples,[21] I have

---

[21] *See, e.g.*, Worcester v. County Comm'rs, 46 N.E. 383 (Mass. 1897) (statute); John Hancock Mutual Life Ins. Co. v. Worcester, Nashua & Roch. R.R. Co., 21 N.E. 364 (Mass. 1889) (statute); Boston & Maine R.R. v. Graham, 60 N.E. 405 (Mass. 1901) (statute); Crocker v. Cotting, 53 N.E. 158 (Mass. 1899); Mack v. N.Y., N.H. & Hart R.R. Co., 51 N.E.

picked the following three cases.

American courts in the late nineteenth century were extraordinarily receptive to arguments based on the literal meaning of the statutory language. A "plain meaning rule" was often invoked: if the meaning of the statutory language is clear on the face of the statute, there is no need for construction, and the courts will not look to any aids to construction external to the statute itself.[22]

In both *Quincy v. Boston*[23] and *Attorney General v. Walworth Light & Power Co.*,[24] Holmes rejected literal meaning arguments. In *Quincy*, an 1846 statute entitled "An Act for supplying the city of Boston with pure water" had authorized the city of Boston "to take, hold, and convey to, into, and through the said city the water of Long pond [and water from other reservoirs]."[25] The Act further authorized the city to "distribute the water throughout the city, and for this purpose may lay down pipes to any house or building in said city."[26]

In 1888, Boston planned to lay water pipes from its Chestnut Hill Reservoir, through the city of Quincy, to Long Island in Boston Harbor, by way of Moon Island.[27] The city of Quincy sought an injunction to restrain this project and Boston defended its right to proceed by reference to the literal meaning of the Act.[28] Both at the time the Act was passed and in 1888, Long Island was a part of the city of Boston.[29]

Holmes rejected the alleged literal meaning argument. Holmes conceded that the literal meaning of the Act's authority "to lay down pipes to any house or building in said city" would support Boston's position here, but he pointed out that it is improbable that any member of Legislature that enacted the Act in 1846 "ever thought of a little island in Boston Harbor, nearly three miles in a straight line from the nearest part of the city, as it then was, on the mainland."[30] This, he said, would not be enough to defeat the city's claim if the language of

---

1076 (Mass. 1898) (statute); Rockport Water Co. v. Rockport, 37 N.E. 168 (Mass. 1894) (statute); Ryalls v. Mechanic's Mills, 22 N.E. 766 (Mass. 1889) (statute); Hooper v. Bradford, 59 N.E. 678 (Mass. 1901) (statute); Sawyer v. Metropolitan Water Board, 59 N.E. 658 (Mass. 1901) (statute); Morgan v. Wordell, 59 N.E. 1037 (Mass. 1901) (statute); Rotch v. Baylies, 56 N.E. 893 (Mass. 1900) (contract); Hawkins v. Graham, 21 N.E. 312 (Mass. 1889) (contract); Drummond v. Crane, 35 N.E. 90 (Mass. 1893) (contract); Lawrence v. Hull, 47 N.E. 1001 (Mass. 1897) (contract).

[22] *See, e.g.,* Johnson v. Southern Pacific Co., 117 F. 462, 465 (8th Cir. 1902) (citing extensive nineteenth century authority for the "plain meaning rule"), *rev'd*, 196 U.S. 1 (1904).

[23] Quincy v. Boston, 19 N.E. 519 (Mass. 1889).

[24] Attorney General v. Walworth Light & Power Co., 31 N.E. 482 (Mass. 1892).

[25] Quincy v. Boston, 19 N.E. at 520.

[26] *Id.*

[27] *See id.*

[28] *See id.* at 520-22.

[29] *See id.* at 520.

[30] *Id.*

the Act were clear.[31]

Holmes went on to show that the language of the Act was subject to a different interpretation. "When Boston is spoken of in common speech," Holmes noted, "that continuous portion of the main land" within the city alone is meant.[32] Other sections of the Act suggest that this common-speech meaning was the meaning attached to "the city of Boston" in the Act.[33] First, the power to lay down pipes to any home in the city is given for the purpose of distributing the water "throughout the city."[34] Holmes argued that "the word 'throughout' carries with it a suggestion of continuity in the distribution."[35] Second, the authority to build aqueducts from the water sources "to, into, and through" the city, seems to "contemplate those aqueducts reaching the city on its land side, and then running continuously within, but not beyond, the city limits."[36] Third, the Act authorizes the city to construct its aqueducts "over or under any water course, or any street, turnpike road, railroad, highway, or other way."[37] Holmes reasoned that "[i]t is inconceivable that the legislature should have specified with such minuteness water-courses, and the various kinds of ways which might be entered upon and dug up, and then should have made no mention of Boston harbor."[38] Holmes pointed out that "[i]t has not been the practice of the Legislature to allow interferences with the harbor except under supervision or rules."[39]

Holmes then applied a practical interpretive technique ordinarily confined to the interpretation of contracts. He pointed out that subsequent actions by the Legislature at the request of the city of Boston evidence "a practical construction of the statute by the parties interested."[40] In 1849, the city asked for and received special legislative authority to extend its water lines to East Boston (also a non-contiguous part of Boston in 1846), by laying pipes through Charleston and Chelsea, and over and under the tide waters of the Commonwealth.[41] Other subsequent statutes that specifically authorized the laying of pipes over or under the tide waters also provided conditions and precautions.[42]

Holmes's conclusion, based on a "common-speech" interpretation of the literal "city of Boston," thus was consistent with other sections of the Act, subsequent practical construction by the interested parties, and the improbability that the legislature would without specific language authorize an invasion of

[31] *See id.*
[32] *Id.* at 521.
[33] *See id.* at 520-22.
[34] *Id.* at 520.
[35] *Id.*
[36] *Id.* at 521.
[37] *Id.* at 520.
[38] *Id.* at 521.
[39] *Id.*
[40] *Id.*
[41] *See id.*
[42] *See id.*

the harbor when it customarily restricted carefully any incursion into the harbor.

While the literal meaning in the *Quincy* case seemed too expansive, the literal meaning in *Attorney General v. Walwork Light & Power Co.* seemed too narrow. In that case an 1887 statute protected the exclusive city franchises of electrical companies as follows:

> In any city or town in which a company is engaged in . . . the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes, and highways of such city or town, for the purpose of carrying on its business, without the consent of the mayor and alderman.[43]

Among other alleged violations of this Act, the defendant used two wires in a tunnel under Hawley Street that had been laid without a license by its predecessor.[44]

Holmes interpreted the statute consistent with the manifest purpose of the act:

> The reason why the statute forbids laying or erecting wires is to prevent wires being maintained in the streets. If they vanished as soon as erected, the legislature never would have prohibited the mere act of putting them there. But when the legislature forbids erecting wires for the express purpose of preventing their being maintained, it impliedly forbids their being maintained.[45]

Here again, Holmes gives a sensible interpretation of the language, giving the words "lay or erect" a meaning that, in context, it obviously can bear, and arguing brilliantly for that interpretation ("If they vanished as soon as erected . . .").[46]

In *Mulhall v. Fallon,*[47] Holmes refused to follow another general rule of thumb in construing statutes. The plaintiff, a resident of Ireland, relied on the Employer's Liability Act to bring a wrongful death action for the death of her son, who was an alien residing in Massachusetts at the time of his death.[48] The defendant argued that Massachusetts statutes should not be read so as to affect non-resident aliens like the plaintiff.[49] Holmes carefully distinguished between the lack of legislative power to impose duties on non-resident aliens, and the question here, which was whether the legislature had exercised its acknowledged power to give rights to non-resident aliens. This question was a question of construction, which Holmes answered thoughtfully by exploring other provisions of the Employer's Liability Act, the language and the purposes of the act:

> Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if

[43] Attorney General v. Walworth Light & Power Co., 31 N.E. at 482.

[44] *See id.*

[45] *Id.* at 483.

[46] *See id.*

[47] Mulhall v. Fallon, 57 N.E. 386 (Mass. 1900).

[48] *See id.* at 386.

[49] *See id.* at 386-87.

> the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. St. 1887, c. 270, § 1, cl. 3. In the latter case, there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in.[50]

Holmes's performance in statutory construction cases was flawed, however, by a persistent belief that the meaning of general language in a statute was limited to those particular applications of that language that ordinary usage would suggest. This problem most likely stems from Holmes's acceptance of John Stuart Mill's theory of universals, in which a general term refers just to the collection of particulars that it summarizes. Throughout his adult life, Holmes indicated his adherence to this view by repeating his catchy summaries: "we must always translate words into things," and "we must think things, not words."[51] The effects of this notion in Holmes's judging can be seen in the three following cases.

In *Beard v. City of Boston*, the state transferred a woman prisoner from the state's reformatory prison for women to the state lunatic hospital.[52] Ordinarily, the costs of care for an indigent in the state lunatic hospital would be borne by the city from which the patient came.[53] A special statute, however, provided that "when a state prison convict is committed to a state lunatic hospital, the charges for his support shall be paid by the Commonwealth until the expiration of his term of sentence to the state prison."[54] Holmes, for the court, held that "state prison" in this Act refers only to the state prison for men.[55] Holmes argued that that prison was habitually referred to by the legislature in other statutes simply as "state prison," where the reformatory prison for women was never referred to as "state prison" in other statutes.[56] The defendant city had

[50] *Id.* at 387-88.

[51] *See, e.g.*, O.W. Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899), *reprinted in* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 210, 238 (1920).

[52] *See* Beard v. City of Boston, 23 N.E. 826, 827 (Mass. 1890).

[53] *See id.* at 827.

[54] *Id.*

[55] *Id.*

[56] *Id.*

argued that "the general object of the statute plainly is that those who are a charge upon the Commonwealth by reason of their sentence shall not be put back upon the city or town of their settlement because of their insanity."[57] This seems like a good argument, and the words "state prison" seem to bear a general meaning, applicable both to the state prison for men and the [state's] reformatory prison for women. Holmes's based his primary argument, however, on the ordinary application of the term "state prison," both in statutes and in common usage. His other two arguments were that legislation may start off dealing with only part of the same problem, and that women can be sent to the reformatory prison for felonies or misdemeanors while men can be sent to state prison only for felonies. These arguments are unpersuasive standing alone. Altogether, *Beard* is an uncharacteristically bad performance by Holmes.

In *Larabee v. New York, New Haven, and Hartford R.R. Co.*, the Supreme Judicial Court was faced with a Massachusetts statute that applied the same requirement to intrastate railroad traffic as that imposed by federal statute on interstate railroad traffic: "No railroad corporation shall haul or permit to be hauled or used on its lines . . . any car which is not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."[58]

Before it was reversed, the United States Court of Appeals for the Eighth Circuit held that "car" in the federal version of the statute did not include locomotives, applying a literalist "plain meaning rule."[59] Holmes got to that conclusion before the Court of Appeals. He held that "car" within the meaning of the state statute didn't include locomotive tenders, "even though the rear end of the tender is within the policy and object of the act."[60] Holmes relied on "the ordinary use and acceptance" of the word "car," which "excludes the tender as obviously as it does the engine.[61] It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what the writer had in mind."[62]

The last example is the famous case of *McBoyle v. United States*, in which Holmes for the United States Supreme Court held that the National Motor Vehicle Theft Act, which prohibited the transportation across state lines of a stolen "motor vehicle," did not apply to the transportation of a stolen airplane.[63] The statute specifically defined "motor vehicle" to include "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled

---

[57] *Id.*

[58] Larabee v. New York, New Haven & Hartford R.R. Co., 66 N.E. 1032 (Mass. 1902).

[59] *See* Johnson v. Southern Pacific Co., 117 F. 462 (8th Cir. 1902), *rev'd,* 196 U.S. 1 (1904). Hart and Sacks commented extensively and critically on the United States Supreme Court Opinion. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at 1144 *et seq.* (tent. ed. 1958).

[60] *Larabee*, 66 N.E. at 1033.

[61] *See id.*

[62] *Id.*

[63] *See* McBoyle v. United States, 283 U.S. 25, 26-27 (1931).

vehicle not designed for running on rails."[64] Holmes relied on everyday speech:

> The question is the meaning of the word 'vehicle' in the phrase "any other self-propelled vehicle not designed for running on rails." No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e.g., land and air, water being separately provided for, in the Tariff Act, September 22, 1922, c. 356, § 401 (b), 42 Stat. 858, 948. But in everyday speech 'vehicle' calls up the picture of a thing moving on land. Thus in Rev. Stats. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used "as a means of transportation on land." And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 997, § 401 (b); 46 Stat. 590, 708. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words "any other self-propelled vehicle not designed for running on rails" still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies.[65]

Holmes's reasoning is not persuasive. Ordinary speech is flexible enough to include an airplane within the broad definition of "motor vehicle" as "any other self-propelled vehicle not designed for running on rails." An airplane is "self-propelled," it is self-propelled by a "motor" and it does not "run on rails." This broad meaning is also consistent with the apparent reason for making it a federal crime to transport a stolen vehicle across state lines: local law enforcement of anti-theft statutes may be stymied if a stolen vehicle is propelled quickly into another state's jurisdiction. The question of whether the narrower or broader meaning was intended cannot reasonably be resolved by simply choosing the one meaning, of the two possible, that the words call up as a picture by their ordinary usage, regardless of context.

It seems then, that Holmes's purely external, objective theory of interpretation was primarily theory-driven. His starting points, it seems, were his positivist commitment to a limited epistemology [all we can know are phenomena and the laws of antecedence and consequences or coincidence] and his positivist rejection of subjective intent as an empty theological notion. That led him to an approach to interpreting legal documents that focused exclusively on the objective indications of meaning. So Holmes looked at the facts — these words in this context — and invoked scientific laws of antecedence and consequence - here roughly equivalent to language and meaning - assigning conventions - to decipher the meaning. Holmes's positivism thus led him to a theory of interpretation that coincided almost exactly with our ordinary practices of interpretation in special cases where we have an exclusive vehicle of communication and the only available means for determining the intended meaning are

---

[64] *Id.* at 26.

[65] *Id.*

wholly objective.

Since Holmes was an outstanding writer and conversationalist his unconscious practical skills of interpretation were well developed. Insofar as Holmes's theory coincided with ordinary interpretive practices, then, his theory didn't get in his way as a judge in reaching sensible interpretations of statutes. Further, his theory inoculated Holmes against the pernicious spread of rule-based interpretation in the law, championed by contemporaneous writers like Sutherland and embedded in scores of late-nineteenth century opinions.

Holmes's Achilles heel as an interpreter was his acceptance of a theory at odds with ordinary interpretive practice - John Stuart Mill's theory of universals, which identified the meaning of general terms with the collection of particular specific facts that the general term pointed to. In practice, this limited the meaning of any general terms to the set of specific facts referred to by the speaker in using the term. Thus, *McBoyle*, *Larabee*, and *Beard*. Holmes's explanations in these cases didn't fall into the obvious error of some of his contemporaries, who argued that a general term could mean only those specific instances of the general term the speaker consciously had in mind. Holmes's positivism kept him from that. Instead, he explained these cases in terms of the ordinary or conventional meaning of the words used. But those meanings, for Holmes, seem to be viewed through the lens of Mill's theory of universals, and hence to be limited to the set of specific applications ordinarily referred to by speakers using that term. This builds in the same resistance to new, otherwise appropriate applications of the general term based on its understood general meaning or connotation, just like the more obviously-flawed "specific applications consciously intended by the speaker" theory.

2. Dickerson

Reed Dickerson originally started out to be a law professor. The Second World War intervened, however, and Dickerson spent the war years in Washington, D.C., where he drafted regulations for the Office of Price Administration. In struggling relentlessly with the difficulties of drafting price-control regulations, Reed made himself into a first-rate draftsman. He stayed on in Washington as a prized draftsman for 13 years after the end of the war. In 1954, he published a book entitled *Legislative Drafting,*[66] which quickly became the bible for other draftsmen. When he returned to law school teaching in 1958, he was widely known as the dean of legislative drafting. Back in academia, Reed devoted himself to teaching students the craft of drafting. He published a handbook on legal drafting, now canonical,[67] and a set of materials on legal drafting,[68] together with a helpful teacher's manual.[69]

---

[66] REED DICKERSON, LEGISLATIVE DRAFTING (1954).

[67] REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING, (2d. ed. 1986).

[68] REED DICKERSON, MATERIALS ON LEGAL DRAFTING (1981) (425 pages).

[69] REED DICKERSON, TEACHER'S MANUAL FOR MATERIALS ON LEGAL DRAFTING (1981) (237

By the time he published his treatise on statutory interpretation in 1975,[70] Reed Dickerson had spent more than 20 years in the demanding practice of legislative drafting and in teaching that practice to others. The art of legislative drafting has a single goal — the clear and complete communication of legislative meaning. In order to do that, the drafter must be able to anticipate how members of the legislative audience would understand a particular bill, and how to draft a bill to avoid misunderstandings of its meaning. A good drafter and a good teacher of legislative drafting, therefore, must not only understand interpretive practices but also be able to consciously articulate and then explain those interpretive practices. When he began to develop a theory of statutory interpretation, Dickerson came as an articulate, self-conscious practitioner. Not surprisingly, his theory reflects the commitments and practical knowledge of a seasoned practitioner of the legislative drafting art. The book has had less influence than it deserves, perhaps because of certain problems related to its organization. The book is a somewhat loose collection of previously published law review articles. This organization leads Dickerson to discuss some topics more than once, with consequent apparent contradictions between the different discussions, as well as apparent breaks in the continuity of the argument. The careful reader can minimize these problems.[71]

To plod on through the arid wasteland at the beginning of any drafting project, a legislative drafter must believe that what he is doing is important and that it can be done successfully. These two essential commitments became the cornerstones of Dickerson's theory of statutory interpretation. The first assumption of Dickerson's theory that lends practical significance to the drafter's task is the constitutional principle of legislative supremacy in the field of lawmaking. When a legislature, acting within its constitutional limits, enacts a statute, the courts are constitutionally required to defer to the legislative judgments embodied in that statute, whether or not the judges agree with those judgments, because courts are subordinate law-making bodies in our constitutional order.

The second cornerstone of Dickerson's theory is a model of human communication that first accepts that we are ordinarily successful in communicating with each other, and then explains how that success is possible. The explanatory model of successful communication that Dickerson adopted comes from the language theorists who stress that human language is a set of conventions used by a particular language community.[72] A speaker and her

---

pages) (more than half the pages in the MATERIALS).

[70] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

[71] Both in this article and in *Advice*, the author attempts a coherent connected interpretation and cautions augmentation of Dickerson's work. *See* Patrick Kelley, *Advice From the Consummate Draftsman: Reed Dickerson on Statutory Interpretation*, 16 SO. ILL. L.J. 591 (1992).

[72] In the body of his work, Dickerson cited and relied on writers we could see as descriptive semantic theorists. *See* JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (1938); CHARLES MORRIS, SIGNS, LANGUAGE, AND BEHAVING (1949); B. WHORF, LANGUAGE, THOUGHT, AND REALITY (1956); COLIN CHERRY, ON HUMAN COMMUNICATION (2nd. ed. 1966); LUDWIG

audience share a common understanding of those conventions which assign certain ranges of meanings to certain words and to the ways words are put together. The context of the communication, as understood by both the speaker and the audience, further limits and clarifies the meaning conveyed by the communication. Communication is ordinarily successful, then, because the speaker and her audience share a set of conventions about the range of meaning of certain words and the ways they are put together; they share a set of conventions about how context limits meaning; and, together, they recognize the relevant facts of this communication: the words spoken and the relevant meaning-conditioning elements of the context.

Dickerson consistently applied this model of ordinarily successful communication to legislation. The speaker is the legislature; the audience is the statute's intended audience; the words are exclusively the words of the statute; and the relevant context includes those elements shared by the legislature and its intended audience that the legislature can rely on to help make its meaning clear.

Dickerson combined the principle of legislative supremacy with this model of ordinarily successful communication to elaborate a powerful theory. Put simply, Dickerson's theory is based on the beliefs that the legislative judgments embodied in statutes are authoritative and that those judgments are ordinarily discoverable.

With these two basic commitments, Dickerson proceeded to develop a practical theory that has much to tell us about the central questions of statutory interpretation. These questions are: (1) Is there such a thing as legislative intent, and, if so, what is it? (2) What is the significance of the words of the statute? (3) What is included in the appropriate context for interpreting statutory language? A brief summary of Dickerson's position on these central issues follows.

A. Legislative Intent

The starting point for Dickerson's analysis of legislative intent is the uncontestable observation that a legislature, following the appropriate statutory and constitutional conventions, can act. It can enact a statute - an authoritative legal directive consisting of a particular set of words in a particular order. This collective action must be understood as purposive or it makes no sense at all. As Dickerson put it: "The postulation of some actual, though not directly knowable, legislative intent underlies the very idea of a legislative process."[73]

WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, (1953); M. BLACK, LANGUAGE AND PHILOSOPHY (1949); C. OGDEN & I. RICHARDS, THE MEANING OF MEANINGS (10th ed. 1956). If he were writing today, he might include GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS (1987); and HANS HORMANN, TO MEAN —TO UNDERSTAND (1981) and MEANING AND CONTEXT (1986).

[73] DICKERSON, *supra* note 70 at 78.

Dickerson's formal argument for legislative intent relies on objective facts at each of three stages in the argument. First, we know that the legislature acts - it enacts a statute. A statute is, at bottom, a communication to a particular audience. Since its purposive behavior is a communication to an identifiable audience, the legislature can plausibly be said to have the intent to enact the words of this statute. Second, we can infer from this, in light of our general understanding of communication, that the legislature has an intent to enact the general meaning of those words, as understood by the typical member of the legislative audience, in light of the appropriate context. Thus, for Dickerson, the search for the actual legislative intent cannot go beyond the manifest intent:

> [W]e must read statutes as if actual intent and manifest intent coincided, because in the long run we can approximate actual intent more reliably under that assumption than under any other .... Although it is necessary to assume a general legislative intent to give direction and significance to statutory interpretation, the courts' bases for inferring what it presumes to be the particular intent respecting the issue before it are necessarily limited to the statute and appropriate extrinsic materials.[74]

Third, statutes are a particular kind of communication - directives to others to be applied in particular circumstances. Given this factual understanding of legislation as a directive, the legislative intent to enact a legal directive with a certain general meaning can be translated into a general intent to bring about the results obtainable by applying that general meaning to particular instances.[75] Dickerson's analytical distinctions between connotation and denotation and his distinction between interpretation and application led him to recognize that the legislative intent ordinarily attaches to a general meaning, not to specific applications of that general meaning. The general meaning can therefore be applied to a specific instance even though the legislature had no specific intent to apply the statute to that specific instance.

In rejecting the specific legislative intent approach, Dickerson followed Lon Fuller's brilliant refutation[76] of John Chipman Gray's "pointer theory of meaning."[77] Gray, following a positivist reductive theory of meaning similar to Holmes's, saw a general term as simply a shorthand reference to the particulars the speaker had in mind in using that term. Applied to statutory interpretation, this theory led Gray to conclude that the controlling legislative intent was the intent to reach a particular result in the cases the legislature had in mind in enacting the general language. Dickerson, following Fuller, recognized that this reductive theory of meaning is inadequate.[78] Speakers using general terms focus on the general meaning of that language and not on a set of particulars comprising that generality. Thus, if a legislature in 1890 enacts a statute mak-

---

[74] *Id.* at 80-81.

[75] *See id.* at 87-88.

[76] LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

[77] JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1972).

[78] *See* DICKERSON, *supra* note 70 at 76-77.

ing it a criminal offense to carry a concealed deadly weapon, that statute may appropriately be applied in 1990 to carrying a concealed deadly laser gun even though the 1890 legislature did not have laser guns in mind when it adopted the general language. The general meaning (the connotation) was what was intended to be enacted and that remains the same even though the class of particular applications (denotations) expands over time.

Dickerson went on to distinguish actual legislative intent from longer-range legislative purposes, which may be multifarious.[79] A simple example may make the distinction clear. A legislature enacting a guest statute may be said to have a single intent to preclude recovery in tort by a guest passenger for the ordinary negligence of his host driver. There may be many purposes, however. The purpose behind the guest statute may be to cut down on collusive suits between guests and hosts attempting to defraud the hosts' insurers or to bar the courts from providing a forum for ungrateful guests seeking to recover from their generous hosts. Legislators voting for the guest statute may have either or both of these purposes, or simply the purpose to enhance their political careers. A single legislative purpose, therefore, cannot be derived from the statutory language itself. Those voting for the statute, however, may be presumed to have the intent to bring about what the general statutory language, as applied, will bring about: that is, to preclude recovery in tort by guest passengers for the ordinary negligence of their host drivers. Dickerson likened his distinction between legislative intent and legislative purpose to the familiar legal distinction between intent and motive.

B. The Words of the Statute

Dickerson recognized that the enacted words of the statute are the exclusive vehicle conveying the legislative judgment. Moreover, his model of ordinarily successful communication recognized that, even though context is important in determining meaning, it is the uttered words that carry the meaning to the intended audience in the particular context. These two positions both emphasize the vital importance of the particular words in the statute and their ordinary meaning.

Dickerson supported a sophisticated plain meaning rule: if the statutory language, read in appropriate context, would have a plain or clear meaning to the ordinary member of the intended audience, the court ought to read the language that way, even though a different reading might seem to the court more desirable and even though another interpretation might confer more benefits on persons the legislature obviously intended to benefit.[80]

Dickerson's version of the "plain meaning" rule differs significantly from other, less sophisticated versions. It is not a rule dictating the adoption of the literal, dictionary meaning of statutory language. Dickerson does not assume

---

[79] *See id.* at 86-102.

[80] *See* DICKERSON, *supra* note 70 at 229-33.

words can have plain meanings regardless of context. He insists, however, that the words of the statute are of primary importance, and Dickerson agrees with Hart and Sacks that the courts should not give those words a meaning they cannot reasonably bear. Moreover, Dickerson concludes, if their meaning in their appropriate context would be plain to the ordinary member of the legislative audience, the court must give them that plain meaning.

C. Appropriate Context

For Dickerson, then, the key question becomes, "What is the appropriate context?" In resolving that question, Dickerson returned to his model of ordinarily successful communication. In that model, the context comprises those elements shared by the speaker and her intended audience on which the speaker can rely to help make her meaning clear.

In its broadest sense, then, context includes the cultural assumptions, values, and beliefs shared by speaker and audience.[81] In analyzing the individual elements of legislative context, Dickerson divided context into matters internal to the document as a whole and matters external to the document as a whole. The internal context for interpreting particular words in a statute, he argued, includes the words around those particular words and their relationship to those words, as well as the structure and meaning of the rest of the statute in which those words are embedded. The context external to the statute includes other statutes on the same subject matter and the known basic commitments of the legislature.

Dickerson always kept the relationship between statutory language and its context in perspective. He recognized that context is subordinate to the specific words as a guide to determining intended meaning. He recognized, moreover, that the words themselves define the relevant context. But he also recognized that context is often essential to determine the true meaning of the statutory language. Context may clearly resolve an apparent ambiguity, for instance, or drastically cut down the actual meaning of an over-general word. Dickerson put this clearly:

> The most useful, indeed almost indispensable, function of context is to narrow the range of reference of otherwise over-general words. Without it, all but the simplest communications would be intolerably long. Consider Wittgenstein's famous example: "Some one says to me: 'Shew the children a game.' [sic] I teach them gaming with dice, and the other says 'I didn't mean that sort of game . . ..'" [Wittgenstein's] example well illustrates our point. The shared expectations likely to exist in such a situation strongly imply the qualification "suitable under our common standards of value to children of their ages, abilities, and temperaments."[82]

From this analysis, Dickerson derived four criteria for determining whether

---

[81] *Id.* at 105-08.

[82] *Id.* at 111-12.

something is appropriately part of the context for interpreting legislative language:

> Proper context, which thus completes the communication, consists only of the cultural aspects of the speech community concerned that, when considered in relation to the written vehicle, are (1) relevant to the written vehicle, (2) reliably revealed, (3) shared by the author and the legislative audience, and (4) relied on by both author and audience to complete the communication.[83]

Dickerson insisted that the appropriate context was that of the time the statute was enacted. He recognized that the authority of a statute comes from its enactment by a particular legislature at a particular point in time. To give the statutory language its meaning in today's context when that meaning differs from the meaning it would be given by the typical member of its initial intended audience would be to violate the principle of legislative supremacy. Dickerson said it clearly:

> The principle that the court should focus on the date of enactment is supported also by the general judicial assumption that the orienting force in statutory interpretation is the search for legislative intent, a concept that, despite its limitations, most courts consider basic to the interpretation of statutes. This means the intent, if any, of the enacting legislature, not that of a later or the current one. . . .
>
> To read statutes against current, rather than original, usage and environment would subject statutory meanings to uncontrolled and often capricious circumstance. Where the vagaries of usage and environment happened to produce results that were more congenial to current notions of public policy, a court would be tempted to take the present as a base. But what should it do where the results were less congenial? Or should the courts say that they will reflect current conditions where they like the result and reject them where they do not?[84]

Dickerson thus clearly recognized that the context within which to read a statute is its contemporaneous context. He thus recognized the historicity of a statute's communication and further recognized a principle of original contemporaneous context designed to preserve legislative supremacy of the original legislature. But Dickerson failed to articulate fully all the consequences that flow from the simple fact that any legislative communication is historically embedded, as the command of a particular legislative acting at a specific time. In particular, Dickerson's definition of context, focusing only on "common cultural aspects of the speech community concerned," seems to leave out of account an essential element of context - the specific historical occasion of the communication. To understand what someone means when he says, "stop that", we need to know more than the cultural conventions of the speech community. We need to know what his hearers were doing just before he said it. Most stat-

---

[83] *Id.* at 124.

[84] *Id.* at 126 (footnote omitted). *See also* Steven D. Smith, *Law Without Mind,* 88 MICH. L. REV. 104 (1989) (a more elaborately argued repetition of Dickerson's second point in quoted material).

utes are, to a degree, similar to this "stop that" command. Their purpose is to change the law to correct some problem the prior law didn't adequately address. It helps immensely, then, in understanding the true meaning of the statutory language, to know what the law on the subject was before enactment of the statute and what the problem was with that law. This is captured in the hoary advice in Coke's report of *Heydon's Case*:

> "[F]or the sure and true interpretation of all statutes in general ... four things are to be discerned and considered: 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy ...."[85]

In other writings, Dickerson accepted the *Heydon's Case* analysis as a helpful tool for interpreting statutes.[86] Moreover, he seemed to accept that the historical occasion for enacting the statute may shed light on the statute's intended meaning. And, as we have seen, he argued forcefully that the controlling legislative intent is the intent of the original enacting legislature.[87] He insisted that the appropriate context was that of the time the statute was enacted. He recognized that the authority of a statute comes from its enactment by a particular legislature at a particular point in time. To give the statutory language its meaning in today's context when that meaning differs from the meaning it would be given by the typical member of its initial intended audience would be to violate the principle of legislative supremacy.

One could add what Dickerson implied. The probable meaning of statutory language to the typical member of its initial intended audience is a question of fact that can be explored and decided based on objective historical evidence. The language of the statute and the state of the law just prior to its enactment are two essential keys for unlocking that meaning.

Putting all this together, we suggest that Dickerson would agree to the following addition to his theory. Since the historical occasion is appropriately part of the context for interpreting statutory language, we cannot use the current legislative audience in applying Dickerson's third criteria for proper context - that the material be "shared by the author and the legislative audience" - or in applying his second criteria - that the material be "reliably revealed." The relevant facts about the historical occasion may be accessible to and reliably revealed to the intended legislative audience at the time the statute was first en-

---

[85] Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584) (footnotes omitted).

[86] In his teaching materials, Dickerson espoused the usefulness of the *Heydon's Case* analysis: "*So* far as there is semantic leeway, knowing the evil at which the statute is directed is the most important key to meaning ...." DICKERSON, *supra* n. 52 at 449 (quoting Heydon's Case, 76 Eng. Rep. at 638); *See also* DICKERSON, *supra* n. 70 at 212-13.

[87] Dickerson himself recognizes that the initial context of the legislation, not the later current context, is controlling. *See* DICKERSON, *supra* n. 70 at 125-26.

acted, but not to the legislative audience many years later. To make the judgments called for by the *Heydon's Case* formula, then, we may need to consult historical records not obviously referenced in the statute itself. Those records could be evidence of the historical context without being themselves part of that context.

The interpreter should consider historical facts relevant to any of the questions highlighted by *Heydon's Case* - the prior law, what was considered to be the defect in the prior law, and how the statute goes about remedying that defect. In resolving the defect and remedy questions, the interpreter will naturally give great weight to the language of the statute juxtaposed against the prior law. In many, perhaps most cases that may be conclusive. But other relevant historical evidence may, in certain cases, modify or qualify the judgments an interpreter might make based on those two facts alone. Included in that other historical evidence may be materials from the internal legislative history of the statute - committee hearings, committee reports, floor debates, and other records of the statute's course through the legislature. Dickerson argued that these materials are not properly part of the context for determining the true meaning of the statutory language, because these materials are neither shared by the typical member of the legislative audience nor relied on by the legislature and its intended audience to complete the communication. But for later interpreters seeking to rediscover the original context, these materials may be helpful evidence of historical context even though they are not themselves part of the context.[88]

CONCLUSION

Over the last 60 years, descriptive linguists and philosophers of language have developed more and more accurate explanations of how it is that we communicate successfully with each other using language. Theory seems at last to be catching up with practice. This provides a unique opportunity for lawyers, judges, and legal scholars to reexamine the theory and practice of statutory interpretation. The basic constitutional principle of legislative supremacy suggests that in interpreting and applying statutes courts should attempt to discover and apply the legislative judgment. A corollary conclusion can be drawn: if ordinary, everyday interpretive practices are ordinarily successful in interpreting the meaning of the speaker or writer, courts ought to use those practices in interpreting statutes, insofar as those practices are applicable.

Both Holmes and Dickerson can be seen as pathbreakers for this reexamination of the theory and practice of statutory interpretation. Holmes wrote

---

[88] *Compare* Hart and Sacks' notion that internal legislative history materials should be consulted only after all other sources for determining legislation meaning have been exhausted, that the internal legislative history materials should be limited to confirming an interpretation reached by other methods, and that the internal legislative history should be consulted only to answer specific questions related to the general purpose of the statute. *See* HART & SACKS, *supra* note 59, at 1243-86.

when the founders of modern descriptive linguistics were but gleams in a parent's or grandparent's eye. Inspired by the scientific spirit of mid-nineteenth century positivism, he elaborated a plausible descriptive linguistic theory that pointed judges toward ordinary interpretive practices and away from the prevailing sterile approach that looked to rules and maxims of construction to resolve interpretation problems. His performance as a judge in statutory interpretation cases was of the highest quality, marred only by his adherence to an unrealistic theory of universals.

Reed Dickerson, building on the prior work of Lon Fuller, Henry Hart, and Albert Sacks, articulated precisely the position urged here. He deliberately used the writing of contemporary descriptive linguists to elaborate a descriptive theory of the ordinary practice of interpretation, as it could be applied by courts in statutory interpretation cases.

The work of Reed Dickerson suggests that the special features of legislation do not preclude the application of most ordinary interpretive practices to legislation. The fact that the author is a composite entity just means we cannot rely on certain evidence of intended meaning accessible to us when the author is a single individual and available for questioning. The historical embeddedness of old legislation as a command from a long-ago legislature simply requires us to recover, in some instances, the context that would have been shared by that legislature and its contemporaneous intended audience.

Dickerson's theory seems flawed around the edges. He accepted the Ogden and Richards analysis of meaning, for instance, and he adopted Gerald MacCallum, Jr.'s[89] suggestion that legislative intent could plausibly refer to the vectored combination of individual legislators' subjective intentions. But neither of these positions played a major role in Dickerson's analysis. The only serious flaw in his formal analysis seems to be the unqualified application of his narrow criteria for relevant context to historically embedded legislative directives. And even there, his practical discussions of related questions seem to qualify the formal overbreadth in his discussion of context.

Holmes and Dickerson point us along the right path, towards the day when courts consciously adopt as their practice in statutory interpretation the ordinary practices of successful interpretation. That may happen when judges, following the lead of Holmes and Dickerson, adopt a normative theory of statutory interpretation based on an accurate descriptive theory of how we ordinarily communicate successfully.

---

[89] *See* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L. J. 754 (1966).