

Philosophical Foundations of Language in the Law

Andrei Marmor & Scott Soames (eds.)

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The interdisciplinary study of law and language does not represent an international discipline in its own right yet, such as the study of law and economics and sociology of law do. On the one hand, law and language does not entail a homogenous method or subject matter. Subfields include forensic linguistics, legal translation studies, law and multilingualism, and legal interpretation, which have sometimes overlapping but otherwise distinct approaches. On the other hand, a more general study of the elementary entanglements of law and language is largely absent. Contrary to what its all-encompassing title suggests, the book *Philosophical Foundations of Language in the Law* does not aim to tackle the rudiments of law and language. Instead, its editors, Andrei Marmor and Scott Soames, describe that the book aims to ‘clarify the roles of linguistic and normative aspects of legal interpretation’ (p. 13). The book centres primarily on legal interpretation in United States law, and analyses the role of language therein by mainly using Anglo-American, analytic philosophy. This focus should come as no surprise, since both editors and the other contributing authors are leading figures in the fields of legal interpretation and analytical

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philosophy. All are professors of law, philosophy, or both, at top American and English institutions such as MIT, Stanford, Princeton, Oxford and the University of Southern California.

The lion's share of the book's chapters dissect two general themes: vagueness of legal texts and the textualist approach to statutory interpretation. For example, with regard to the theme of vagueness in legal texts, Timothy Endicott (Chapter 2) and Jeremy Waldron (Chapter 4) argue on different grounds that vagueness does not necessarily thwart the regulation of conduct, but may actually be of value to it. Endicott makes the case that, where precision is impossible or undesirable, vagueness prevents arbitrariness rather than creating it, because it allows for the purpose-driven application of legal standards. Waldron appreciates vagueness in view of Joseph Raz's thesis, that the rule of law requires a legal system to treat people as rational autonomous creatures. The author explains that vagueness affords the law to be adaptable and thus susceptible to people's autonomy of practical deliberation. Regarding the theme of textualism, Scott Soames (Chapter 3), John Perry (Chapter 6) and Gideon Rosen (Chapter 7) provide various critical analyses. Soames connects textualist statutory interpretation with the issue of vagueness. He points out that when a law is vague due to the context of application rather than its conceptual content, the textualist attempt to ascertain what the lawmaker asserts falls short, because in these cases the courts are summoned to change rather than to ascertain the content of legal texts. Perry takes a favourable stance towards textualism if it involves deriving the content of a statute from its words' meaning at the time of enactment. He rejects, however, a form of textualism in which meaning originates from the legislator's beliefs or understanding of the subject matter in question, since individual actors may diverge in beliefs but together still generate the same words with the same meaning. Rosen shifts the subject of textualism to the interpretation of contracts, and critically assesses the consistency of several versions of 'Originalism' with the US legal system in cases of ambiguity.

The book's overall emphasis on textualism and vagueness in legal interpretation is entirely justified. Yet, because its title promises to tackle the essentials of language in the law, the book inadvertently suggests that the exclusive domain in which language interrelates with law is the pragmatic study of the interpretation of legal texts. Consequently, it risks giving credence to a common assumption amongst lawyers that mulling over the role of language in the law is much ado about nothing. After all, judges do not ascertain the meaning of a legal rule based on its textual verbalisation alone, as they also look to the instrument's purpose or legislative history, or interpret hard cases in the light of legal principles. Moreover, a sceptical

lawyer might even argue that genuinely ascertaining the meaning of legal rules is only a minor factor along other, more important non-legal aspects that inform a court's decision in a particular case. The book thus misses an opportunity to demonstrate that language may very well play a larger part in law. First, language is no less involved in historical and purposivist interpretation than in textual interpretation. The reason is that ascertaining the meaning of a legal text based on, for example, legislative history or its objectives, requires the interpretation of yet other texts, such as committee reports, or transcripts of floor debates. Each of these texts hangs together by the same words and syntax as the legal text whose meaning courts are called upon to clarify. For the same reason, interpreting a statute in view of relevant case law requires the interpretation of the text of judicial decisions. Second, and more significantly, one can make the argument that the role of language in the law transcends mere legal texts. Legal principles, implied exceptions, customary law, or any other form of 'unwritten' law, is no less cloaked in language than texts are. How else is one to bring a principle into play, refer to customs, or communicate a hitherto unarticulated exception? How can we do anything at all with anything legal without language? While perhaps less obvious within the contours of monolingual legal systems, the intrusion of language into the very fabric of law is painstakingly palpable in multilingual legal systems such as the European Union, as well as in comparative legal research involving legal systems that use different languages. That is, one truly experiences the presence of language in law when one is confronted with a statutory text, committee report, judicial decision, legal principle, or even a scholarly review, verbalised in a language that one does not understand.

Notwithstanding, in addition to the legal analyses provided by the previously mentioned chapters, the book succeeds marvellously in making use of analytic philosophy for understanding the complexities that legal interpretation involves. The book primarily uses ordinary language philosophy and pragmatics. It centres on 'linguistic features of legal communication' (p. 3), that is, on the expression of legal rules in natural language, where the linguistic meaning emanates from both semantic content and the context in which it is communicated. For example, Adrei Marmor (Chapter 5) addresses Pragmatics and the 'Communication Theory of Law'. Based on Paul Grice's famous 'Maxims of Conversation', he disentangles pragmatic features of legal speech from a text's mere semantic content, focusing particularly on the implied content of speech. He offers an account of statutory interpretation as legal discourse between lawmakers and courts, revealing the varying degrees of diverging interests and consequent pragmatic commitments. Furthermore, Gideon Yaffe (Chapter 9) uses a well-known notion in analytic philosophy, in

particular the pragmatics of reference, namely the distinction between *de dicto* and *de re* descriptions. He exploits this notion in references to the content of thoughts or mental states, specifically in the case of ascertaining one's intent to commit a crime. He so illuminates which facts must contribute to the content of one's intent in order to establish criminal attempt.

There is in itself nothing at fault with the fact that the book involves analytic philosophy, with an emphasis on ordinary language philosophy and pragmatics. Yet, 'philosophical foundations' of language in the law surely extend beyond ordinary language philosophy and pragmatics alone. True, Richard Holton (Chapter 8) and Mark Greenberg (Chapter 10) take a different approach. Holton uses logical analyses and moves from the interpretation of legal texts entirely. He employs John Horty's work on nonmonotonic logic for explaining how courts in common law admit hitherto unstated exceptions to the application of legal rules without contradicting and thus throwing out that rule altogether. The author proposes to understand legal rules as universals with implicit unless-clauses. Furthermore, Greenberg expressly rejects a pragmatic analysis of statutory interpretation, which he subsumes under so-called 'Communicative-Content' or 'Communication' theory of law. He acknowledges that such a pragmatic approach may bring clarity and help distinguish various aspects of the communicative content of a statute, but he denies that it demonstrates which of these aspects – if any – explain a statute's contribution to the law. The editors are to be commended for welcoming Greenberg's sceptical view in their book (pp. 11–12). However, Greenberg does not look to any other school of philosophical thought. In fact, as if a pragmatic or communicative approach to legal interpretation were the only available flavour, he questions whether language philosophy in general has much value for legal studies. This misses the point that other schools of thought, such as phenomenology, linguistic pragmatism, hermeneutics and deconstruction – to name a few – reflect very differently on the role of language in the law. Some of these are actually at odds, at least partially, with pragmatics' basic tenets. That is, rather than conceiving language as a mere communication tool with which one interlocutor transmits information to another, these traditions credit language with a much larger importance in epistemological or ontological questions. Applied to legal studies, language may be attributed a more constitutive rather than a mere instrumental or communicative role, not only in relation to ascertaining the meaning of legal rules, but in understanding the very notion and workings of law itself.

Clearly, the ways and degrees in which language infiltrates law are up for debate. Indeed, a book on the philosophical foundations of language in the law would have been the ideal platform for such debate, by drawing insights from a

wider range of philosophical schools of thought and expanding the scope beyond the mere interpretation of authoritative texts. That said, due to the authors' commanding expertise, *Philosophical Foundations of Language in the Law* succeeds brilliantly in benefiting from analytical philosophy and pragmatics and getting a firm grip on various difficulties pertaining to the interpretation of legal texts in the US. In that respect, the book makes great strides in advancing a particular subfield of a still indistinct field of law and language. Moreover, notwithstanding the sometimes complex and conceptual subject matter, all chapters are remarkably clear in style and content. For this reason, the book will excite and enlighten scholars, practitioners, as well as advanced students, from various disciplinary and geographical backgrounds.