Philosophy of Language and Legal Interpretation

Author : Brian Bix

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Brian G. Slocum, *Pragmatics and Legal Texts: How Best to Account for the Gaps between Literal Meaning and Communicative Meaning, in* The Pragmatic Turn in Law: Inference and Interpretation in Legal Discourse (**Mouton Series of Pragmatics**, forthcoming 2017), available at SSRN.

Law is pervasively interested in the proper understanding and application of texts: contracts, wills, trusts, agency regulations, statutes, constitutional provisions, etc. Legal interpretation is obviously central to legal practice, and it is not surprising that legal scholars would come to look to literary interpretation and philosophy of language for insight. The discussion of literary interpretation, and what lawyers, legal scholars, and judges might learn from it, has been one of the themes of the Law and Literature movement. The recourse to philosophy of language has been slower and less well publicized; however, there is now a growing literature applying philosophy of language to problems in law (*e.g.*, Alessandro Capone & Francesca Poggi (eds.), *Pragmatics and Law* (Springer, 2016); Andrei Marmor & Scott Soames (eds.), *Philosophical Foundations of Language in the Law* (Oxford, 2011)).

Brian Slocum is one of the most important scholars working at the intersection of legal interpretation and philosophy of language, as exemplified by his recent book, *Ordinary Meaning* (University of Chicago, 2015). In that book, Slocum contrasted one of judges' favorite touchstones when interpreting documents, "ordinary meaning," with the idea of "communicative meaning." In the present article, *Pragmatics and Legal Texts*, Slocum offers a parallel contrast: between "literal meaning" and "communicative meaning." To understand the "literal meaning" of a text or statute, one need only understand the meanings of each constituent term and how they fit together grammatically and logically to express a proposition. This process is meant to be independent of any considerations of the context of utterance. The article defines "communicative meaning" differently, as "what an appropriate hearer would most reasonably take a speaker to be trying to convey in employing a given verbal vehicle in the given communicative-context." (P. 2, footnote omitted.) This meaning can differ from the literal meaning because communication is a cooperative activity, which presupposes several further norms that can affect the communicative meaning of a statute or text in the context of utterance.

These matters touch on ongoing debates in legal interpretation. There are formalists in contractual interpretation who oppose interpretation in light of customs or context or on the basis of party understandings that vary from the apparent meaning of the text. There are "textualists" who argue that statutes should be interpreted according to the "plain meaning" of the words enacted, without any reference to the statute's purpose. There are originalist theorists who argue that the meaning of provision of the United States Constitution is "fixed," or at least significantly constrained, by the original understanding of the terms used ("original" here meaning at the time of ratification). What is sometimes missed is that when judges and legal scholars argue for and against such "literalism" in legal interpretation, they are not really advocating for literalism in its most narrow and precise meaning. As Slocum points out, a certain amount of reference to assumed communicative intent is accepted even in the most "literalist," "textualist," "formalist," or "originalist" approaches. The article illustrates this using a commonly referenced canon of interpretation, "*ejusdem generis*," under which a general term at the end of a list is assumed to be constrained by the category in which the other items in the list fall. Slocum gives the example of a statute that regulated "gin, bourbon, vodka, rum and other beverages"; in that statute, "other beverages" would be understood as not covering (non-alcoholic) sodas, even

though sodas clearly fall within the literal meaning of “beverages.” (P. 13.) It is the immediate context of the term “beverage” in the text—the other beverages listed—that alters what the term is held to mean. Also, a sign on a building stating that “no dogs, cats, or other animals allowed” would not be read as applying to human beings, even though human beings are animals. (Pp. 19-20.) The way that context can make perceived meaning of a word or sentence vary from literal meaning (narrowly understood) often goes under the labels “pragmatics” or “implicature”—both discussed at length in Slocum’s article and in his other works.

A basic question for those working in—or just reading about—the intersection of philosophy of language and philosophy of law relates to the ultimate objective of the exercise. Is it description or prescription? Are we just getting a clearer understanding of what we (judges, lawyers, law professors) are already doing when we interpret and apply legal texts, with some of the benefit being a more sophisticated terminology for our descriptions; or are we learning the proper way to interpret, lessons that will lead us to change our current interpretive practices? For some academics, no research project is valuable unless it is prescriptive: that it leads to some “bottom line” argument for reform (or defense of current practices against other scholars’ arguments for reform). I think that this attitude is too narrow, and that good descriptive projects are also worthy of our time and attention. In Slocum’s work, the project appears to be primarily about clear explanation (and, secondarily, contesting the explanations by some other commentators), rather than any argument about changing legal practices. For those who want a clear overview about interpretive issues in law, and how these can be understood in terms of philosophy of language, Slocum’s works are an excellent place to start.

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