“When Is Using a Firearm Not Really?” -- An Eminent Philosopher of Language Helps Us Decide

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- Scott Soames**,** Philosophical Essays, Volume 1: Natural Language: What It Means and How We Use It (Princeton University Press, 2009).
- **Scott Soames,** Interpreting Legal Texts: What is, and What is Not Special About the Law (2007).

Philosophers of law and philosophers of language used to hang out together more. H.L.A. Hart spent Saturday mornings over at J.L. Austin’s in the 1950s and 60s, hashing out questions of meaning and usage with Paul Grice. Hans Kelsen did not think much of Wittgenstein, but in the 1920s he chummed around with Moritz Schlick, Otto Neurath, and other members of the celebrated *Wiener Kreis*, the Vienna Circle of philosophers who were making the analysis of language a foreground concern. But, as the twentieth century wore on, practitioners of the two specialties wandered apart. For thirty years on, legal philosophers have tended to dwell on somewhat inward debates over legal positivisms and postscripts thereto, while philosophers of language have been on a great hunt for a semantics of natural languages generally, which has led them to investigate things like naming, reference, and the truth conditions of modal and counterfactual statements. True, the philosophers of law have tried to keep up with the philosophers of language; but, the philosophers of language with the philosophers of law? Not so much. There’s no shortage of legal philosophy that purports to say what philosophers of language would say about law, but next to nothing directly from philosophers of language about law. Are we legal philosophers getting it right?

The silence from the other side of the table made me uneasy. So I was excited to run across this essay by Scott Soames. Soames is Director of the School of Philosophy at USC, where he can lunch with Andrei Marmor, the distinguished philosopher of law. The essay is the concluding chapter of the first volume of Soames’s collected essays, most of which have to do with technical topics in philosophy of language. The Introduction to the volume is a useful preliminary survey of his views of such things as why linguistic structures aren’t likely to map onto the psychological substructures of linguistic competence, and the respective roles of semantics and pragmatics, as reflected in his “least common denominator” view of semantic content. At the end of the Introduction, Soames pauses to reminisce:

> There was a time, just a few decades ago, when philosophy and the philosophical study of language were thought to be one and the same. Then, every significant philosophical question was thought to be a linguistic question. Thankfully, that is no longer so.

This might mean, “Thankfully, we can go back to doing philosophy,” but in fact what Soames means is that:

> today, linguistic semantics and pragmatics, cognitive science, and the general study of language and information are struggling to emerge as productive and interconnected areas of scientific inquiry. (17)

Philosophy of law is struggling, too, but not, evidently, to do that; and it should not expect an invitation to that party. Of course, "philosophy of language still has much to contribute to every area of philosophy." The concluding essay, "Interpreting Legal Texts," is meant to serve as our portion.

Soames critiques a number of cases that turned on a word. *PGA v. Martin* (is it "golf" if the player rides in a cart?); *Nix v. Hedden* (is a tomato a fruit, or a "vegetable"?); *Smith v. US* (does one who barters a firearm "use" it?); and a pair of Boy Scout cases from California (are the Scouts a "business establishment"? a "religious organization"?). He also takes up Lon Fuller's "No sleeping in any railway station," and — though only in footnote — Hart's "No vehicles in the park." The discussions, insightful in their own right, are an effective medium for Soame's lessons.

One lesson we are to take is that what we say is often more than what the words we use say. As a consequence, what statutes mean is often more than their semantic content, which is anyway less than we tend to suppose. Another lesson is that the text's semantic content, even when it is plain, is not what the interpreter wants anyway. What the interpreter wants is the wider "enriched" content consisting of what the text was used to say. What the doctor treating a gunshot victim says by saying "You aren't going to die," is "You aren't going to die from this wound," and not "You are not going to die, period." One further lesson, for judges, is that although "the meanings of legal texts, plus the facts of the case, often fail to determine its outcome … this *shouldn't* be taken to show that *the content of the law* embodied in those texts doesn't determine the outcome, and *mustn't* be used to invite judicial legislation" (404, italics in original). Finally, even where a case is "genuinely hard" — because even the text's pragmatically "enriched" content fails to determine an outcome — the court has only a narrow residual discretion, which is constrained by "further principles" that "routinely guide the interpretation of incomplete, inconsistent, or otherwise defective linguistic materials" (404). Soames does not say what these further principles are, but presumably they include the traditional canons of construction and perhaps doctrines of institutional deference such as the *Chevron* doctrine. They most certainly do not include the judge's "moral and political views," or "Fullerian or Dworkinian views of … broad social, political, and moral matters," for which there "may" be residual room within what Soames is convinced are very narrow limits (423).

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," as Holmes wrote in *Towne v. Eisner*. Much of what Soames has to say may not startle those who have had a legal education. We have been taught to attend to context, and are in possession of aperçus such as Holmes's. It is illuminating, though, to have it explained by someone who makes no pretense of having equivalent training, but who has thought long and hard about how language works and sometimes fails to work. Soames emphasizes a distinction (already noted) between semantically hard and genuinely hard case, and he divides the latter category into three subcategories. It would be interesting to try to map his distinctions onto those that have emerged by the toil of those lawyers, judges, and academics who have long worked the jurisprudential fields. It would also be interesting to figure out how Soames would handle "due process" and "equal protection," those twin wooly bears of constitutional adjudication. None of the cases he discusses involve them; but they are sources of much of the clamor against judicial legislation.

A philosopher of language, wanting to make use of the tools he best knows, may miss the (to lawyers, obvious) point that legal and (especially) constitutional interpretation is inescapably, to some degree, a political and moral exercise through and through. Consider this:

> Just as you [viz., whoever you are] have no standing to reinterpret my remark [viz. any remark] to conform to your moral and political views, *simply because the meaning of my sentence doesn't fully determine the content of my remark*, so judges applying the law have no standing

> to reinterpret it, *simply because the linguistic meanings of the relevant legal texts don't fully determine the content of the law*. (404, italics in original)

Now, read in a friendly way, this is indisputable; and Soames immediately adds that "other principles" (apparently not meaning anything specifically Dworkinian by this) constrain the judge in carrying through with the interpretative task. In conversation, the hearer has the option of asking for clarification, lacking which she may choose not to decide what was meant. Not so with judging. Soames knows all this, but note the too-easy analogy between the "standing" interpreters generally lack, to use moral/political stuff to fill gaps in remarks generally, with the "standing" *judges* have with respect to gaps in *the law*. The pragmatics of a legislative enactment or a judicial decree is a very different sort of animal compared to a comment or suggestion or even order made by one person to another in conversation (see, e.g, Brian Bix, "Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?" *Ratio Juris* 16:281-95 (2003)). A sentence like "Don't sleep in the subway, Darling," normally occurs in a context dramatically unlike that in which "It shall be a misdemeanor to sleep in any railway station," is normally found. Soames is aware of this of course, but he seems to want to confine this complication to a place at the tail-end, and to one that "isn't very large" (423) anyway. But it may be that the semantics and pragmatics that work adequately in normal discourse may need adjustments for legislation, precedent, etc. right from the start, and all the way through. And, in the process of making that adjustment, Soames, like any philosopher of language fully domesticated in the peculiar domains of the law, will have to plow again many of the same, familiar furrows. But I think what he has had to say already merits careful study, for it throws light from a fresh angle on the nature of law and legal discourse.

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