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Linguistics in Law

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I. INTRODUCTION

Many judges react against judicial activism. The politics are notorious. The methodology, though, is not necessarily controversial. Deciding "objectively" by following precedent, tried principles, and—as much as possible—the "plain meaning" of statutory terms are strategies for constraining discretion. Some legal scholars say that such judges aim to decide in a scientific manner. In particular, these scholars see plain-meaning analysis as linguistics, and linguistics as science.

Scholars who submit to the notion that statutory interpretation may often be an exercise in linguistics tout that discipline's commitment to the empirical testing of conclusions. Their view is that judges opposed to activism find an objective anchor in linguistic techniques. Thinkers hostile to that notion say that such judges "pretend[] they mechanically follow linguistic science" and sometimes adopt a sort of linguistic approach to bolster a decision made on other grounds with an aura of scientific credibility. So even those thinkers presuppose that a number of judges

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3 See id. at 1568 & n.26 (explaining that because it is customary in linguistics to empirically test various hypotheses, it is identifiable as a science and thus distinguished from philosophical inquiry).

4 Peter W. Schroth, Language and Law, 46 AM. J. COMP. L. 17, 28 & nn.45–46 (1998) (revealing the judicial practice of purporting to base decisions on linguistics or some other form of scientific analysis when the conclusions reached actually derive from legal reasoning).

5 See id. at 27 (citing SOLAN, supra note 1, at 61). In his analysis of the Supreme Court's use of linguistics, Solan considers the voting patterns of Justices in death penalty cases. In doing so, he concludes that the Court's interpretation of language is generally driven by non-linguistic considerations. Id.
occasionally make use of linguistic analysis.\textsuperscript{6}

Commentators who favor broader judicial reliance on linguistics argue that “the methods of linguistic science can significantly inform...judges' innate 'common sense' about their own language, thus providing some objective and principled ways to deliberate over hard cases of interpretation.”\textsuperscript{7} These scholars see Justice Scalia as the paladin of law’s linguistic turn, which they call “the new textualism.”\textsuperscript{8} Their point of departure is Justice Scalia’s summoning of the “plain meaning” of statutory language, and his concomitant de-emphasis upon legislative histories.\textsuperscript{9}

For Justice Scalia, an objective appraisal of ordinary meaning is more reliable and less prone to subjective judicial discretion than is delving into legislative histories.\textsuperscript{10} His opinions resist the doctrine “that if the legislative history of an enactment reveals a ‘clearly expressed legislative intention contrary to [the enactment’s] language,’ the Court is required to ‘question the strong presumption that Congress expresses its intent through the language it chooses.’”\textsuperscript{11} This doctrine, says Justice Scalia, is “an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.”\textsuperscript{12}

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\textsuperscript{6} Id. at 26–27 (explaining that judges sometimes employ linguistic techniques to cloak the basis of a decision that they fear may be criticized as discretionary—ultimately producing results lacking substantive legal support).

\textsuperscript{7} Cunningham & Levi et al., supra note 2, at 1566. See generally Judith N. Levi, The Study of Language in the Judicial Process, in LANGUAGE IN THE JUDICIAL PROCESS 3 (Judith N. Levi & Anne Graffam Walker eds., 1990) (recognizing the fundamental nature of language as the vehicle by which law is promulgated, and thus, advocating the study of linguistics as a tool for clarifying the judicial process); Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions, 79 JUDICATURE 224 (1996) (discussing the use and importance of linguistic analysis when formulating jury instructions in order to eliminate language problems and to provide more accurate legal standards from which the juries can apply those standards).

\textsuperscript{8} See, e.g., William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621, 623 & n.11 (1990) (outlining what the author has termed the new textualism—discussing Justice Scalia’s rejection of any reliance on legislative history in the Court’s analysis of a statute’s plain meaning—and defining the “new” in new textualism as its “intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism”).

\textsuperscript{9} See id. at 623–25 (recognizing the value of Scalia’s suggestion that the Court “rethink” its use of legislative history but questioning the strength of his argument that it “should almost be relevant”).

\textsuperscript{10} See id. at 625 (proclaiming “the most important contribution of the new textualism” as the reminder that legislative history is non-binding, supportive, and merely a derivative of the statute’s plain language).


\textsuperscript{12} Id. In his opinion, Justice Scalia characterized the majority’s exploration of legislative history as objectionable, “not only because it [was] gratuitous,” but also as suggestive that
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This article questions the link between linguistics and statutory construction, as perceived by legal scholars. Toward its end, the article revisits *Plain Meaning and Hard Cases*, the important paper written by Clark Cunningham and three linguists—most familiarly Judith N. Levi—that appeared in the *Yale Law Journal* in 1994, which also spurred the Spring 1995 Law and Linguistics Conference at Northwestern University. At issue here will be Cunningham/Levi’s recommendation that linguists with expertise in areas of word use, meaning, and reference, be brought into legal cases to “provide focused and informed analyses of the language issues in question.”

This article’s goal is modest—it is to explain that law and linguistics pursue different ends, and that for this reason, linguists construing statutes will miss legally decisive issues. More importantly, courts relying on linguists—in the manner the new textualists advocate—will have to scrutinize linguistic findings closely and rectify them, or risk issuing assessments that fail to cohere with the decision-making guidelines announced in relevant precedents. The article does not object to a cooperative arrangement between law and linguistics, or to any other interdisciplinary approach; indeed, linguistics and the other scientific and social scientific disciplines influence legal work and decision making in a variety of ways that scholars may beneficially explore. There are, however, justifiable grounds for resisting proposals that assign non-legal experts an elevated role in the adjudicatory process.

Specifically addressing the Cunningham/Levi proposal, this article first discusses contemporary linguistics. Part II shows that modern “Chomskyan” linguistics constructs a theory of language competence and of the outputs of that competence. Because linguistic science premises its findings on unconscious cognitive structures and capacities, that discipline defines its activities and research goals in psychological terms. Although linguists routinely such exhaustive inquiries are welcome despite the lucidity of the statutory language. *Id.* at 453.

13 Cunningham & Levi et al., *supra* note 2, at 1561. Because the essay may be the most influential statement in the legal literature of the pro-linguistics view, this article takes it as representative, and refers to it throughout as *Plain Meaning and Hard Cases* or the “Cunningham/Levi” paper. As a proper name, “Cunningham/Levi” will be given a plural sense.


15 See Cunningham & Levi et al., *supra* note 2, at 1616.
analyze the structure of natural language in abstraction from the cognitive mechanisms by which we learn and use language, their underlying premise is that linguistics is a branch of psychology. Part III then explains that, by contrast, law's interpretive task is to construe the linguistic outputs of a finely circumscribed political community, the legislature. This Part examines three illustrative Supreme Court cases that Cunningham/Levi also discuss. As these cases show, not only does the Court (unlike the linguistics researcher) primarily interpret language that is a product of drafting contingencies and political compromise, but it is also geared to constantly ask whether the phrasing at issue may allow for a certain construction that is consistent with a favored policy. Whether plain is defined as "ordinary" or "unambiguous," judicial scrutiny of plain meaning is always embedded in a context of competing policy interests. Accordingly, at times there may be little to distinguish two pieces of statutory language that the court construes quite differently on policy grounds.

Finally, Part IV reviews Cunningham/Levi's approach to the three

\[16 \text{ See Noam Chomsky, Syntactic Structures 13 (tenth reprint 1972) (1957) (characterizing the primary goal of linguistically analyzing language as studying the structure of purely "grammatical sequences," which requires the extraction of "ungrammatical sequences"—cognitive by-products—from language output); Michael Devitt & Kim Sterelny, Linguistics: What's Wrong With "The Right View," in Philosophical Perspectives 3: Philosophy of Mind and Action Theory 497, 512-13 (James E. Tomberlin ed., 1989) [hereinafter Devitt & Sterelny, Linguistics] (explaining that the linguists' stated concern is often with the syntactic and semantic properties and relations of linguistic symbols, but that their favored way of describing their discipline is in terms of the mental states that comprise linguistic competence); Scott Soames, Linguistics and Psychology, 7 Linguistics and Phil. 155, 157 (1984) (distinguishing linguistics from cognitive psychology on the basis of the former's empirically supported abstraction of natural language structure from that which is at the heart of cognitive psychology—the study of those who use natural language).}

\[17 \text{ See Devitt & Sterelny, Linguistics, supra note 16, at 514 (illustrating further that the theory of linguistic competence—which concerns the speaker's psychology and mental state—is distinguishable from a theory of objects—or linguistic symbols—produced by the behavioral output of that competence); see also Soames, supra note 16, at 155 (arguing that linguistic theories conceptually and empirically diverge from "psychological theories of language acquisition and linguistic competence").}

\[18 \text{ Cunningham & Levi et al., supra note 2, at 1563-65 (discussing the lack of consensus among Supreme Court Justices concerning what definition of "plain meaning" should be invoked as a method of interpreting statutes—the "ordinary" or "unambiguous" meaning). On one side of the "plain meaning" debate are those assigning priority to a "clear" and "unambiguous" interpretation of the statute as written, whereas some Justices—especially Justice Scalia—have pointed to the rule of "plain meaning" as giving greater weight to the actual text by requiring an initial determination of the ordinary meaning of the language in light of its surrounding text, and then allowing only a "clear indication" of some other acceptable meaning to disturb the application of the ordinary usage. See id. (emphasis added).} \]
cases examined in Part III. Two cases were pending, certiorari having been granted, when Plain Meaning and Hard Cases appeared. In one or two instances, the Supreme Court, or a particular Justice, in fact adopted a point made by Cunningham/Levi. That is not surprising, both because their essay is important, as noted, and because judges rely upon extralegal sources from time to time for various reasons. But the full Cunningham/Levi analyses are not suitable legal reasoning. They flow from the linguist's training and milieu, examined in Part II, and not from a judicial methodology.

II. LINGUISTICS' PSYCHOLOGICAL PROGRAM

A. Chomsky's Enterprise

Noam Chomsky's linguistic theories have transformed his discipline. Chomsky premises his view on the assumption that a person competent in a language knows or "cognizes" that language. With Chomsky, the study of linguistic competence displaced the study of language in the world. As Liliane Haegeman writes, "[t]he shift of focus from language itself to the native speaker's knowledge of language is the major feature of the Chomskyan tradition." Because the prevailing view is that a descriptively adequate grammar must explore the internal processes by which the native speaker produces and interprets sentences, the linguist's epistemological pursuit is an "internalist exploration."

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20 See NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN, AND USE 3 (1986) [hereinafter CHOMSKY, KNOWLEDGE OF LANGUAGE] (illustrating the concept of "universal grammar"—what he terms a genetically determined language faculty—as an inherent element of the human mind that converts the individual's "presented experience" into his or her language system).
21 See LILIANE HAEGEMAN, INTRODUCTION TO GOVERNMENT AND BINDING THEORY 7 (2d ed. 1994). The major departure of this theory from that of traditional linguistics is that while both analyses utilize "grammars"—"general systems that underlie the sentences of a language"—Chomsky's theory characterizes them as manifestations or reflexes of the speaker's innate, unconscious knowledge of the linguistic principles governing their native language. See id. at 6-7.
22 See NOAM CHOMSKY, NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND 164–66.
It is useful to briefly review the roots of Chomsky's program as these may concern the domain of linguistic study. Chomsky's initial sympathies were with traditional grammars and in opposition to a structuralist or "descriptive" linguistics, which was primarily interested in the arrangement of facts. Describing arrangements of linguistic facts based on direct observation is a practice that characterized the positivist taxonomic model. Today, linguists and language philosophers embrace Chomsky's refutation of the positivists' strictly observational methodology, and, in contrast, welcome concern with "high-level' relational properties" and "the underlying generalizations of the language."

Given Chomsky's predisposition, why was he attracted to traditional grammar? As Chomsky explained it, traditional grammar includes a "rich descriptive apparatus . . . [that] far exceeds the limits of the taxonomic model," and has a goal "as far-reaching as that of a generative grammar," namely, "to provide its

(2000) [hereinafter CHOMSKY, NEW HORIZONS] (cautioning that an inquiry into the "science of human nature"—in search of "the secret springs and principles by which the human mind is actuated in its operations")—should remain committed to descriptive adequacy and explanatory force, and thereby avoid explanations that reduce to the entities described by other disciplines, or that generalize on the basis of the insights offered by folk science and common sense).

23 See NOAM CHOMSKY, LANGUAGE AND RESPONSIBILITY (1979), reprinted in ON LANGUAGE 108 (1998) [hereinafter CHOMSKY, LANGUAGE AND RESPONSIBILITY]. Chomsky prefers the treatment of those facts which directly bear on "underlying structure and abstract hidden principles" pertinent to linguistic theory; he attributes the triumphs of physics in part on the discipline's ability to limit the scope of its factual analysis. See id. at 107–108.

24 See W. Freeman Twaddell, On Defining the Phoneme (Language Monograph no. 16) (1935), reprinted in READINGS IN LINGUISTICS 74 (Martin Joos ed., 1963) (advocating reliance on linguistic facts which are observable and able to be simulated; for example, while discussing the interpretation of the words pill and spill, Twaddell warns "[w]e have no right to (and we don't want to) establish any 'phonemic' relations between the stops" of the words); see also Michael Devitt, IGNORANCE OF LANGUAGE 18–19 (Jan. 2, 2001) (draft manuscript, on file with the author) (noting Chomsky's criticism of taxonomic methods as putting "arbitrary and unwarranted" restraints on linguistics).

25 See Devitt, supra note 24, at 19–20. Devitt's philosophical thesis includes the claims that (1) the theory of outputs should be distinguished from and given priority over the theory of competence, since logically the former is a precursor to the latter—"[a] competence is a competence to produce certain outputs," id. at 15; (2) the former theory must not be concerned solely with "actual outputs," but "with any of an indefinitely large number of . . . idealized," "possible" outputs, id. at 16; (3) these outputs will be "produce[d]" by processing rules, but "governed" by structure rules, id. at 16–17; (4) because—as a minimal claim bearing on the "psychological reality of language" beyond which we should remain neutral—the speaker's competence and its processing-rules must respect the governing structure-rules: "a theory of a person's linguistic competence, of her knowledge of her language, must constrain a theory of her linguistic output; and vice versa," id. at 17–18; (6) whether or not the grammar that is our linguistic theory is somehow—going beyond the minimal claim—embodied or represented in the mind, hence psychologically real, id. at 17; and (6) our linguistic output is worthy of theoretical study in its own right, id. at 18.
user with the ability to understand an arbitrary sentence of the language, and to form and employ it properly on the appropriate occasion.”  

Although Chomsky’s program was “not necessarily incompatible” with that of the structuralists, his “different intellectual enterprise[ ]” was to propose a linguistic undertaking that made explicit what traditional grammar had merely presupposed. More specifically, while the previous grammars had indespensibly relied on the intuition and intellectual capacity of the user, Chomsky’s goal for a generative grammar was to explicitly investigate “the nature of the intuitive, unconscious knowledge, which (in particular) permits the speaker to use his language.” Traditionalists such as Otto Jespersen had recognized speakers’ use of complex structures to generate “creative” and “free expressions,” but had failed to give “explicit principles for determining that these structures . . . belong to the language, while other imaginable structures do not.”  

Focusing on speakers’ everyday creative use of language, Chomsky contrasted two nineteenth-century linguistic views in order to settle upon an initial background paradigm. The general view, taken up by structuralists such as Saussure, saw language “in the concrete sense [as] the sum of words and phrases by which any man expresses his thought.” The Saussurian study of language would be the study of signs and their grammatical properties. In this scheme, however, there is no place for the sort of “rule-governed creativity . . . involved in the ordinary everyday use of language.” Instead, the scope of linguistic study is arbitrarily limited to a study of “mere artifacts.”

26 NOAM CHOMSKY, CURRENT ISSUES IN LINGUISTIC THEORY 16 (1964) [hereinafter CHOMSKY, CURRENT ISSUES].  
27 See CHOMSKY, LANGUAGE AND RESPONSIBILITY, supra note 23, at 108–09 (suggesting the need for the systematic treatment of facts relating to what is “conceived as normal usage of language”).  
28 See CHOMSKY, CURRENT ISSUES, supra note 26, at 16 (noting that only intuition and intellectual capacity allow the user to surmise the meaning of a sentence based on the user’s experience).  
29 CHOMSKY, LANGUAGE AND RESPONSIBILITY, supra note 23, at 109.  
30 Id. (citing OTTO JESPERSEN, A MODERN ENGLISH GRAMMAR ON HISTORICAL PRINCIPLES (1922)).  
31 CHOMSKY, CURRENT ISSUES, supra note 26 at 22 (citing William Dwight Whitney, STEINHALL AND THE PSYCHOLOGICAL THEORY OF LANGUAGE, reprinted in ORIENTAL AND LINGUISTIC STUDIES 372 (1872)).  
32 Id. at 23 (noting that Saussure’s study of modern linguistic elements and the system of those elements lacked the necessary range to embody an entire language system).  
33 See id. at 23–24 (criticizing structural linguists for failing to realize the intricate and interconnected nature of the various components of the language system).
The second, more promising (for Chomsky) nineteenth-century view was that of Humboldt, for whom *die Form* (the form) of language was the underlying factor inhering in each particular linguistic act.\(^{34}\) Language’s underlying form was comprised of “fixed generative rules that determine the manner of its formation.”\(^{35}\) The lexicon is evolving, not static, and our capacity of *Spracherzeugung*—creating or generating our language—is actively extending and recreating our system of concepts. Signs we receive trigger corresponding links in our conceptual system in order to determine how the hearer comprehends the linguistic expression.\(^{36}\)

Having rooted generative grammar in a Humboldtian style of Platonism, Chomsky summons Cartesian rationalism to justify the role that our *inner state* may play in influencing, but not determining, linguistic behavior.\(^{37}\) The Cartesian assumption is that the competent speaker has “privileged access” to—and hence a tacit knowledge of—the rules governing syntax, and that this tacit understanding underlies the speaker’s linguistic intuitions.\(^{38}\) Unacceptable is empiricism’s image of a brain that is “a tabula rasa, empty, unstructured, uniform at least as far as cognitive structure is concerned.”\(^{39}\) We should abandon the use of terms such as “disposition” or “capacity” under circumstances in which the more abstract concept of “cognitive structure” is more appropriate. Thus, Chomsky’s linguistic enterprise is to determine jointly the structure of the mind and its products.\(^{40}\)

**B. Fodor’s Gloss**

The philosopher Jerry Fodor has also influenced language study

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\(^{34}\) See *id.* at 17–21 (praising Humboldt’s traditional linguistic theory on the nature and use of language, providing a comprehensive framework through which language develops).

\(^{35}\) *Id.* at 17.

\(^{36}\) See *id.* at 20–21 (examining the Humboldtian view that words represent a system of concepts that have an individual effect on the hearer based on that hearer’s conceptual system).

\(^{37}\) See *id.* (relying on the Cartesian notion that man creates language to support Humboldt’s belief that the formation of language is influenced by several mental processes).

\(^{38}\) MICHAEL DEVITT & KIM STERELNY, LANGUAGE AND REALITY: AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 167–68 (2d ed. 1999) [hereinafter Devitt & Sterelny, LANGUAGE AND REALITY] (disputing the idea that a grammar—which concerns linguistic symbols and the way these symbols are put together—explains linguistic competence).

\(^{39}\) CHOMSKY, LANGUAGE AND RESPONSIBILITY, *supra* note 23, at 81.

\(^{40}\) NOAM CHOMSKY, REFLECTIONS ON LANGUAGE, reprinted in ON LANGUAGE 23 (1975) (recognizing a modern analytical approach in the study of language and behavior, wherein the use of simplistic terms is improper when referring to the complex nature and abilities of the human mind).
by setting out some of the philosophical implications of Chomsky's work. In a 1981 piece, Jerry Fodor coined the term “the Right View” to describe the general Chomskyan psychological approach to linguistics.41

1. Intuitions as Linguistic Evidence

Two aspects of Fodor's paper are of particular interest here. This subsection concerns Fodor's claim that any science is obliged to explain why the materials it takes to be data are data relevant to the confirmation of its theories.42 In linguistics, a grammar is a theory. Fodor agrees with the prevailing view that the intuitions of speakers43 constitute linguistic data, and asks why this is so. The Right View opines that grammars contribute to our linguistic intuitions because these grammars are embodied and represented in our minds.44 Our intuitions are, therefore, nicely suited for confirming grammars.

To the extent that speakers' intuitions are a focal point of linguistic study, this aspect of the discipline creates pull in the direction of psychological inquiry. Psychological pull is minimal when speakers intuitively tend to label sentences correctly as “acceptable,” “odd,” or “strange.” As Michael Devitt analogously notes, the blacksmith—the one competent at producing horseshoes—is well situated to suggest, from the perspective of his refined intuitions, which horseshoes may be well formed and which are not.45 We may then proceed to study and speak about the horseshoes with little need or inclination (unless we so choose) to examine the Smithy's competence. The analogy to language and its ordinary speakers seems fitting.

But when linguistic intuitions systematically tend to be incorrect in a particular area, there should be a strong impulse to understand why this is so. If everyone agrees, as they seem to, that speakers' intuitions are at least some important evidence useful in constructing linguistic theories, then it is worthwhile to try hard to explain any failure of this evidential source. Accordingly, there will


42 See id. at 200.

43 Fodor usually says “Speaker/Hearer”—for simplicity I halve the formula.

44 See Fodor, Introduction, supra note 41, at 200–01.

45 See Devitt, supra note 24, at 76 (examining the situation in which someone who has considerable knowledge of a particular subject also has a linguistic competence of that subject but not necessarily the ability to communicate such competence).
be a relatively strong pull in the direction of a psychological investigation, and for linguists this endeavor may outweigh other approaches to the data.

As an example, the commonly shared intuition is that the sort of sentence linguists label "multiply self-embedded" is ungrammatical, although often it is not.\(^{46}\) Being multiply self-embedded, however, does not rule grammaticality out. Event-related brain potential (ERP) methodology confirms that some embedded sentences such as, "[t]he student that the committee that the results surprised summoned listened closely," will be harder to understand than others—such as "[t]he painting that the artist that everyone loves painted hung in the living room."\(^{47}\)

This example shows that linguistic structures and meanings have processing consequences, which in turn affect speakers' intuitions. The contents of false intuitions are evidence for a theory of our processing mechanism. Under such circumstances, the nature of our competence would hold a significant explanatory role in linguistic assessments. This means that linguistic research will tend to account for mental factors, and not solely linguistic outputs.\(^{48}\)

2. The Ideal Speaker

Fodor's paper reveals another important source of the psychological program that characterizes contemporary linguistics. This concerns the notion of the Ideal Speaker. The actual speaker's

\(^{46}\) See Fodor, Introduction, supra note 41, at 203.

\(^{47}\) Researchers employing varying methodologies, including connectionist modeling, reading time studies, and ERP studies, theorize why this is so. See Marta Kutas, Current Thinking on Language Structures, reprinted in COGNITIVE NEUROSCIENCE: A READER 431, 441 (Michael S. Gazzaniga, ed., 2000) (suggesting that the difference in understanding the syntactically similar sentences must lie in the mind's ability to process the meaning of the words used in the two sentence structures); Jill Weckerly & Jeffrey L. Elman, A PDP Approach to Processing Center-Embedded Sentences, in PROCEEDINGS OF THE FOURTEENTH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 414 (1992) (comparing two multiply embedded sentences and providing a range of reasons why one sentence would be more difficult for the listener to process).

\(^{48}\) Devitt and Sterelny have suggested that our intuitions may originate in the brain's central processor, which would mean that linguistic intuitions are sensitive to context, learning, and thinking. By contrast, they say, it is likely that a speaker's intuitive competence resides in a sentence-parsing module, in which the central processor plays a small role. Devitt & Sterelny, Linguistics, supra note 16, at 503, 522–23. If they are correct about this, competence is disengaged from intuition, and thus, would not have quite as much epistemic importance as the text may suggest. It would still be the case, however, that there would be a pull within linguistics toward examining mental factors, and not exclusively linguistic outputs.
linguistic behaviors result from interactions between her language mechanism and other aspects of her psychology. For example, the speaker may be unable to produce or understand multiply center-embedded sentences because of limitations resulting from the interactions between her grammar and her short-term memory used in parsing the sentences.49

The concept of the Ideal Speaker abstracts away from the effects of such interactions between a language mechanism and other influences. Psychological or other limitations are discounted. This maneuver allows linguists to exclude hiccoughs, for instance, from the corpus of English utterances; they are produced by the interaction of the language mechanism with the hiccough mechanism, and so attributing them to the former alone would make our linguistic theory go false.50

In other words, linguistic theory is concerned with “idealized outputs.”51 This means, as Fodor explains, that we will have to be concerned with outputs produced by “linguistic mechanisms” in some pure sense of the term, and not with those that result from linguistic-nonlinguistic interactions.52

But only substantial psychological inquiry can inform linguistic researchers about how to draw the line. Conceptualizing the Ideal Speaker requires imagining what a real speaker’s behavior would reveal if his linguistic expression were not influenced by forces external to the language facility.53 Fodor seems right in saying that it would be a mistake to assume “that you can somehow determine a priori which aspects of the behavior/capacities of the speaker/hearer are preserved under idealization.”54

A closely related point is that setting any partition between linguistic and interactive outputs presupposes an awareness of the responsible processor. We will have to already know “which is the correct parsing of the speaker/hearer’s psychology into ‘linguistic mechanisms’ and ‘others.’”55 This, however, entails psychological knowledge, hence a psychological inquiry.

50 See id. at 202–03.
51 Devitt, supra note 24, at 16 (arguing that an analysis of competence must be distinguished from an analysis of the behavior or output resulting from such competence).
52 See Fodor, Introduction, supra note 41, at 203.
53 See id.
54 Id. at 204 (second emphasis added).
55 Id. at 203.
C. Illustrative Linguistic Studies

Before returning to linguistic issues in law, and the linguist's approach to legal issues, it is useful to briefly comment on some recent linguistic work within the discipline itself. The goal, of course, will not be to bore the legal reader with the technical details of an alien discipline, but rather to illustrate, in a simplified way, what tends to go on in linguistic research, and why this research tends towards psychology in many ways. Most significantly, the subsections immediately below should convey, to those familiar with legal problem-solving, a sense of the substantial difference in focus, method, background assumptions, and terminology between law and linguistics. At the same time, however, the disparities should not be seen as signifying an insurmountable barrier between the two disciplines. Linguistics could meaningfully contribute to legal analysis so long as difficulties are anticipated and safeguards are thoughtfully incorporated.

Our backdrop for reviewing linguistic research is the conviction held within the discipline that, in the Chomskyan sense, a language's structure-rules are somehow embodied in the mind and are internally real. Linguistic studies often purport to provide evidence tending to show that the rules of a language are, in this sense, psychologically real. This explains why linguistic

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56 Readers not interested in the anatomy of linguistic studies—or who are already convinced of linguistics' strong psychological program—may skip ahead to Part III without losing the flow of the argument.

57 Devitt would argue that, in each instance, the studies show no such thing but at most reflect the minimal claim that linguistic competence, and the processing-rules that govern its exercise, respect the language's structure-rules. Devitt, supra note 24, at 17. For an opposing view in the debate, see, for example, NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 3–4 (1965) [hereinafter CHOMSKY, ASPECTS OF THE THEORY] (discussing psychology's role in unraveling the speaker's linguistic performance, which concerns the processes of language production and interpretation that engender language acquisition); CHOMSKY, KNOWLEDGE OF LANGUAGE, supra note 20, at 33 (maintaining that an internalized language—or “psychogrammer”—exists and that it is for the natural sciences to discover it); NOAM CHOMSKY, RULES AND REPRESENTATIONS 91 (1980) [hereinafter CHOMSKY, RULES AND REPRESENTATIONS] (explaining that the basic properties of linguistic understanding are “somehow represented in the genotype” of each individual, alongside the genetic instructions that determine the individual's bodily characteristics). It should be emphasized, though, that this debate is philosophical. Within the discipline of “normal” linguistics, the Chomskyan program is the received view. Cf. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (3d ed. 1996) (1962) (explaining that “normal science” rests on the foundation created by past scientific achievements and is guided by the commonly used textbooks and accepted theories of the period).

58 Devitt explains and, to a significant extent, endorses an alternative, non-Chomskyan view of the psychological reality of language that inheres in the “language-of-thought” hypothesis. See Devitt, supra note 24, at 85–89. By this position, language is psychologically
scholarship and experimentation motivate a domain of study that not only encompasses linguistic outputs but that also reaches psychological mechanisms. This article next reviews three illustrative studies or study areas.

1. Study on Russian Unaccusatives

Some linguistic research has suggested that language is biologically rooted in a language faculty or organ that grows as we experience the world.\(^{59}\) An increasing number of studies purport to reveal that young children or infants have early “knowledge” of—or at least some sort of sensitivity to—many linguistic properties.\(^{60}\) This would mean that language is not simply a set of symbols in the world that we learn to manipulate. This sort of evidence, among other factors, has motivated investigators of language to study both the structure of mind and its outputs.

In their investigation, Maria Babynschev\(^{61}\) and her team seek to support the theory of an innate language faculty and acknowledge that the common approach is to show children’s knowledge in the absence of the intensity of environmental stimuli that would have engendered language learning.\(^{62}\) Babynschev et al., however, look at the opposite situation—gaps in children’s linguistic abilities, generally young children’s inability to use passive constructions and unaccusative case verbs the way adults use them.\(^{63}\) For these

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\(^{60}\) See id. at 114–18 (discussing the theory of “Universal Grammar,” claiming that children are equipped with a biological capacity for basic language structure and that the structure is made more complex as experience fills in the gaps or “parameters”); see also Stephen Crain & Rosalind Thornton, *Investigations in Universal Grammar* 319–20 (1998) (suggesting that results of experimental studies that seem to contradict the Universal Grammar hypothesis suffer from poor research design).

\(^{61}\) Dr. Babynschev is a member of the linguistics faculty at Yale University. She specializes in syntactic theory, first language acquisition, sentence processing, and Slavic and East Asian languages. See Yale University Linguistics Department Faculty, available at http://www.yale.edu/linguist/faculty/masha.htm (last visited Sept. 26, 2002).

\(^{62}\) See Maria Babynschev et al., *The Maturation of Grammatical Principles: Evidence from Russian Unaccusatives*, in *32 Linguistic Inquiry* 1, 1–2 (2001) (contrasting the traditional “poverty of stimulus” argument with the inverse “abundance of stimulus” theory, asserting that a child’s lack of linguistic knowledge in the presence of stimulus supports a biological theory of language development).

\(^{63}\) See id. at 7–11 (describing a hypothesis explaining how children—despite their inability to truly understand unaccusative verbs—were able to use such verbs).
researchers, cases of late knowledge bolster the hypothesis "that the biology that supports the relevant knowledge is not available until a comparatively late stage in child development."64

Using linguistics' technical methods and terminologies, Babynyshev et al. note that clauses produced by adults containing unaccusative verbs, like passives, "require an A-chain with a tail in direct object position and a head in subject position."65 Thus:
(a) The door; opened ti.
(b) The mail; arrived ti.

The authors explain that it might be expected that children lacking A-chains would not use unaccusative verbs at all, but inform us that this prediction is clearly incorrect.66 In fact, as the authors conversely note, children successfully use unaccusative verbs.67

There are ways that children lacking A-chains may be able to use unaccusatives. One, say Babynyshev et al., is by assigning "an analysis that produces representations homophous with the unaccusative analysis."68 Thus:
(c) The door opened. [no object trace]
(d) The mail arrived. [no object trace]

Another may be to use a "get-passive analysis." Thus:
(e) The door got opened.69

In all events, the authors' findings appear to show that even the child's deficient language processing apparatus may find a compensatory way to respect the language's structure-rules. This would suggest that either the structure-rules exert some relatively powerful psychological influence, or—which may amount to the same thing—that humans from an early age are psychologically drawn toward verbal behavior in conformity to those structure-

64 Id. at 2.
65 Id. at 7–8. To better understand this passage, consider the sentence, Ralph hit the wall. The noun phrases Ralph and the wall are considered to be "arguments" of hit. The argument Ralph is the agent of the predicate hit the wall, and the argument the wall is the theme of the predicate hit. "A-positions" are argument positions to which subject and object roles can be assigned. For Chomsky, arguments are construed as "chains," and a "chain" is a set of syntactic elements subject to certain conditions. See CHOMSKY, KNOWLEDGE OF LANGUAGE, supra note 20, at 95–96. A "chain" is an "A-chain" if the semantic "head" of the chain is in an argument position—a position to which subject and object roles can be assigned. See id. at 95–98. A "trace" is an empty, or unstated, category encoding the original position of a constituent that has moved to another position in a sentence, and is represented by the symbol t. See HAEgeman, supra note 21, at 285; see also infra note 96 and accompanying text (supplying an example of a trace).
66 See Babynyshev et al., supra note 62, at 8.
67 Id. at 8–9.
68 Id. at 8.
69 Id. at 9 n.9.
rules. From either perspective, the researchers’ leap—whether warranted or not—to a representational (or embodiment) thesis is at least understandable. But if the formulation of a representational hypothesis for the structure-rules of language is understandable, then there will be a pull within the discipline either to accede to such a thesis (which has widely occurred) or to explain it away. Either route must inject psychology into the linguistic domain of study.

Moreover, the pull toward psychological study will be strongest if the evidence suggests that the delayed language learning stems from the way in which some discrete language faculty matures. If linguistic outputs and the speaker’s relation to structure-rules are linked to a faculty within the mind that is both linguistic and capable of growth, then it should seem artificial, or perhaps arbitrary, to sequester the study of the outputs from the study of cognitive mental structures.

Some studies have suggested that children’s relevant linguistic behavior may be environmentally related, and hence, not rooted in an innate faculty. These studies have been able to attribute age-dependent vocabulary differences to the frequency with which various utterances may be accessible to the child. Babayonshev et al. say, however, that studies have not, in fact, found that syntactic development has varied for children as a function of variability of actual input. For the sort of late knowledge Babayonshev et al. discuss in their article, “input frequency is almost certainly not at stake.”

Alternatively, the combination of deficient processing abilities and respect for the relevant structure-rules could be explained based on nonlinguistic maturational factors; namely, the late maturation of mental capacities other than the human language faculty. These include memory capacity, overall processing speed, communicative

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70 See, e.g., Betty Hart & Todd R. Risley, Meaningful Differences in the Everyday Experience of Young American Children 101–02 (1995) (describing the various sources of influence impacting a child’s retention, comprehension, and word usage—specifically mentioning television and parental interaction).
71 Id. at 95–101.
72 See Babayonshev et al., supra note 62, at 4 (reporting a study of children’s use of tense marking that confirms the maturational theory of linguistic development) (citing Mabel Rice et al., Tense Over Time: The Longitudinal Course of Tense Acquisition in Children With Specific Language Impairment, in 41 J. Speech, Language & Hearing Res. 1412, 1412–31 (1998)).
73 See id. (conceding the reasonableness of an input frequency explanation for late knowledge, but stating its limitations as a comprehensive justification).
abilities, and so forth.\textsuperscript{74} What rules this explanation out, however tentatively, is the fact that the child's immature capacity does not seem to manifest in areas of nonlinguistic cognition, as would be expected. Thus, discounting both input-frequency factors and a nonlinguistic function for the immature competence, Babaynyshhev et al. conclude that shifts in grammatical "knowledge" at particular ages are best explained by a theory that assumes a maturing innate linguistic organ.\textsuperscript{75}

2. Study of the Missing Copula in AAVE

It seems almost a truism that the sort of properties a thing possesses will not be a function of the way those properties are explained. One set of linguistic properties is semantic: the meanings of sentences. Seemingly contrary to the truism, some studies suggest that an explanatory choice may affect the nature of the meanings assigned.\textsuperscript{76} When this is so, there will be a pull toward expanding the domain of study beyond the linguistic expressions themselves. William Labov's paper on the missing copula in African-American Vernacular English (AAVE) may translate into this sort of case.\textsuperscript{77}

At issue for Labov is the absence of the verb to be in AAVE and "the search for the underlying grammar that produces this result."\textsuperscript{78} The missing copula constitutes a zero: the complete absence of linguistic material in a place where we normally expect to hear something. The data Labov considers is comprised of sentence tokens recorded during spontaneous speech in various African-American communities throughout the United States.

Labov's sample expressions with zero where we would normally expect the finite form of to be (is, am, are, was, or were) included:

(i) He fast in everything he do.
(ii) Michael Washington out here sellin' his rocks.
(iii) Boot always comin' over my house to eat, to ax for food.
(iv) He just feel like he gettin' cripple up from arthritis.\textsuperscript{79}

At the same time, however, many expressions did contain the

\textsuperscript{74} Id. at 4–5.
\textsuperscript{75} Id. at 37.
\textsuperscript{77} Id. at 25.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 31.
copula, in both full and contracted form:

(v) We send Kenneth, 'cause Kenneth is tough.
(vi) Your mama's a weight-lifter.
(vii) Your mother IS a lizard.
(viii) Because he old, he's old, that's why!  

Such interweaving variations of the full, contracted, and zero forms of to be show that the missing copula "cannot be explained as the result of dialect mixture."  

Labov considers three other possible explanations:

(1) the grammatical category of the copula to be may be optional in AAVE;

(2) the copula may have three alternate forms: is, 's and zero; and

(3) the copula is may be present regularly in the grammar, just as in other dialects, but be reduced by the contraction rules of casual speech to 's and then to zero.

The semantic implications stemming from which explanation is chosen are, according to Labov, quite serious. Let us say we accept (1). This would mean that the speaker could use a linguistic zero instead of the copula in any context and for no semantically informative reason. In English, the finite form of the verb to be, however, is more than a connecting link; it also carries information—notably about the intended tense of the statement. Consider, for instance:

Professor D teaching a course about the psychological reality of language.

In fact, "the finite verb is the main way of signaling tense."  

So choosing an explanation for language processing when a phenomenon such as the missing copula is at issue may well have semantic implications. Labov instructs that while adopting explanation (1), in which the entire grammatical category is optional, may indicate that tense information is missing, explanations (2) and (3) do implicitly account for the information carried by the copula. The latter two explanations assume that the semantic information is present in the speaker's mind, though not
expressed, and could be determined by further investigation.\textsuperscript{85}

If the choice of processing explanation is semantically significant, then in certain instances the study of the meaning properties of sentence tokens will have to account for available explanations of language processing mechanisms.\textsuperscript{86} This reaps the study of linguistic outputs in toward the area of the mind. At the least, the pull would exist within linguistics, once again, to address psychological factors sooner (in an epistemic sense) rather than later.

Labov’s ultimate findings are significant, too. It turns out, he concludes, that zero cannot be freely used whenever we would expect the copula.\textsuperscript{87} The data reveals a number of circumstances within AAVE in which some form of the copula appears regularly. These include: reference to the past (“I was small . . .”); the negative (“I ain’t no cat can’t get in no coop”); the first person (“I’m not no strong drinker”); pronouns ending in /t/, namely, it or that (“I[’]s a real light yellow color”); the nonfinite be (“You got to be good, Rednail!”); the imperative (“Be cool, brothers!”); emphasis (“Allah is god”); and yes-no questions (“Is he dead? is [sic] he dead? Count the bullet holds [sic] in his motherfucking head”).\textsuperscript{88}

Contrary to initial impressions, there are commonalities among the undeletable environments of the copula.\textsuperscript{89} Labov develops explanation (3), and asks whether the omission of the copula in AAVE may track the regular rule for the contraction of the auxiliary in standard English. The finding is this: “Where other English dialects do not permit contraction of the auxiliary, AAVE does not permit deletion. Where other English dialects do permit contraction of the copula, AAVE permits deletion.”\textsuperscript{90} A comparative sampling of sentences intuitively deemed \textit{unacceptable} includes:

<table>
<thead>
<tr>
<th>Other English dialects</th>
<th>AAVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>How beautiful you’re!</td>
<td>How beautiful you!</td>
</tr>
<tr>
<td>Are you going? I’m</td>
<td>Are you going? I.</td>
</tr>
<tr>
<td>Who’s it?</td>
<td>Who it?</td>
</tr>
</tbody>
</table>

\textsuperscript{85} See \textit{id.} (describing the inherent difficulties of interpreting sentences using solution (1), which are not as pervasive in solutions (2) and (3)).
\textsuperscript{86} See \textit{id.} at 26–29 (detailing the ways in which word order implies relationships and therefore offers meaning to sentences containing zeroes).
\textsuperscript{87} See \textit{id.} at 34–37.
\textsuperscript{88} See Labov, \textit{supra} note 76, at 34–36.
\textsuperscript{89} See \textit{id.} at 37.
\textsuperscript{90} Id. at 39 (indicating that this parallel may explain the missing copula in some, but not all, environments).
He's now. He now.\textsuperscript{91}

Labov's conclusions demonstrate his impetus toward cognitive analysis:

Given these parallels between contraction and deletion, we are led to the conclusion that the absence of the copula in AAVE is due to a rule that is parallel and similar to the general auxiliary contraction rule of other dialects of English. This means that the speakers of AAVE have an unconscious knowledge that an underlying copula is present in sentences... where it is frequently absent, as well as where it is consistently present... \textsuperscript{92}

3. Empty Categories

In the case of the missing copula in AAVE, we saw that the linguistic zero is defined in terms of the absence of structural material in a place where we—the speakers, presumably, of standard English—ordinarily expect there to be something. The frustrated expectation signals a violation of structure-rules or a clash of competing ones.

The empty category (EC) is somewhat similar, but without any intimation of the violation of structure-rules. Here, syntactic categories (noun phrases, verb phrases, relative pronouns, etc.) are deemed to be present yet lacking any phonological or orthographic realization.\textsuperscript{93} Consider the phonologically missing verb and verb phrase, respectively, in the following sentences:

(1) John fried the eggplant and Bill ___ the tofu.

(2) Sam won't eat the eggplant but Susan will ___.\textsuperscript{94}

An EC that is "left behind" in a sentence when an element is moved is called a trace.\textsuperscript{95} Janet Fodor suggests the exemplary sentence:

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\textsuperscript{91} Id. at 39–40.

\textsuperscript{92} Id. at 41. Arguably, however, Labov's inference to "unconscious knowledge" is not supported by the evidence presented.

\textsuperscript{93} See Janet Dean Fodor, Comprehending Sentence Structure, in 1 LANGUAGE: AN INVITATION TO COGNITIVE SCIENCE 209, 213 (Lila R. Gleitman & Mark Liberman, eds., 2d ed. 1995) [hereinafter Fodor, Comprehending Sentence Structure].

\textsuperscript{94} Janet Dean Fodor, Empty Categories in Sentence Processing, 4 LANGUAGE AND COGNITIVE PROCESSES: PARSING AND INTERPRETATION 155, 156 (Gerry T.M. Altmann, ed., 1989) [hereinafter Fodor, Empty Categories in Sentence Processing].

\textsuperscript{95} See Fodor, Comprehending Sentence Structure, supra note 93, at 215.
The rat_______Socks chased____ate the malt.96
Rel. Pro.
ECi

The EC after chased is the trace—here a “wh-trace”—of the relative pronoun that moved leftward; in other words, the EC is the trace of a wh-expression, such as which, who, or what, that is a “moved constituent” of the sentence.97

But the linguist’s question is whether theories positing ECs are true. Fodor, for instance, asks whether ECs are real.98 We may take this to mean linguistically real. The assumption (which Fodor at least tentatively accepts) that the human processing mechanism has a “transparent” relationship with the grammar’s structure-rules seems to result in a conflation, though. Explicitly, she wonders whether wh-trace—hence some subset of empty categories—is “psychologically real.” But her question leading to the formulation of this issue is whether experiments such as the ones cited above “may provide an indisputable demonstration of the existence of wh-trace in syntactic structures.”99 The ECs are syntactic categories, ordinary linguistic units that, lacking phonological form,100 may or may not exist.101 But how do we tell?

Devitt emphasizes that linguistics should rely upon the intuitions of the linguists themselves.102 The general trend in linguistic thinking is to recognize more rather than fewer ECs.103 But the linguists’ intuitions in this case are fueled by their study of perceivers’ “comprehension process[es].”104 Researchers rely on priming and probing paradigms that look for “reactivation of a

96 Id. at 214.
97 See id. at 215.
98 See id. at 230 (admitting that ECs are hard to see, even with a trained linguistic eye, and that their very existence has been challenged).
99 See Fodor, Empty Categories in Sentence Processing, supra note 94, at 183 (emphasis added). Janet Fodor also notes that “linguists still do not all agree about the proper taxonomy of empty categories.” Id. at 186.
100 See Fodor, Comprehending Sentence Structure, supra note 93, at 230.
101 See id. at 234.
102 See Devitt, supra note 24, at 79 (justifying this reliance by noting the superiority of a linguist’s skill in identifying items with and without a syntactic property).
103 See Fodor, Comprehending Sentence Structure, supra note 93, at 241 (noting that every movement within the sentence structure leaves a trace and citing current research that assumes many more movement operations).
104 See id. at 234 (suggesting that linguists must continue to study such processes for the purpose of providing or disproving the existence of ECs before they can move on to more interesting linguistic questions).
potential antecedent at an empty category position." One method of testing, for example, is to reveal an antecedent to the processor, and to check for the processor’s anticipation of a trace or “gap.” If a likely gap position is in fact not empty, and the processor expresses a surprise reaction, this—the “filled gap effect”—indicates that a trace had been expected.

Fodor acknowledges that, while current experiments show that perceivers correctly understand the relationships between verbs and their noncanonically-placed arguments as if the relevant ECs existed, this work falls short of proving they do. If the best evidence may come, however, from the continued study of processing and its competence, then for this further reason the study of linguistic outputs will tend to include—on the ground floor of the explanatory project—an important psychological dimension. Moreover, the ways in which processors respond to different (putative) empty categories can be highly indicative of how they are treated by the grammar. In such cases, to know the syntax is to have considered its processor, and there will be a strong pull within linguistics to incorporate study of processing.

III. **The Judiciary’s Interpretive Task**

Part II explained that the Chomskyan linguistic enterprise premises its findings on unconscious cognitive structures and capacities. Accordingly, that discipline ordinarily defines its activities and research goals in psychological terms. Even apart from the Chomskyan perspective, however, it is inevitable that psychological factors will significantly color linguistic projects, and that explanations of linguistic phenomena will be psychological in important respects.

This Part shows that, by contrast, the judiciary’s interpretive task is to construe the linguistic outputs of a finely circumscribed political community—the Legislature. Law’s interpretive inquiry will hardly concern itself with psychological factors, and it appears unimaginable that the court would ever approach this task at the

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106 Id. at 161.
107 See Fodor, *Comprehending Sentence Structure*, supra note 93, at 234. For an explanation of “argument,” see Steven Pinker, *Why the Child Hailed the Baby Rabbits: A Case Study in Language Acquisition*, in 1 LANGUAGE: AN INVITATION TO COGNITIVE SCIENCE 107, 170–71 (Lila R. Gleitman & Mark Liberman eds., 2d ed. 1995); see also supra note 65 and accompanying text.
level of legislators' cognitive structures. Instead, the court's concern is with drafting contingencies, political and policy compromise, and settled principles of statutory construction.

The scenario changes when it comes to the scholar's interpretation of statutes. Steven Winter, for instance, has written regarding the statutory term "under color of law" that "the historical and cognitive material... does afford a meaningful framework for analysis and interpretation of the statute. Certain choices make little sense within the frame of the legislative history, the historical usage, and the range of meanings expressed by the phrase under color of law."\(^{109}\)

As another example, in their article William Eskridge, Jr. and John Ferejohn attempt to explain legislative activity as, inter alia, an "ongoing process of error and amelioration", whereby a considerable amount of lawmaking is delegated to agencies because legislators face difficulties when they confront the shortcomings of their own work, including "cognitive dissonance as well as the excessive costs of monitoring and re-legislating."\(^{110}\) Eskridge and Ferejohn cite the rule of continuity—requiring clear evidence that the legislature intended to abandon a longstanding policy before unsettling relied-upon laws—as supportive of their cognitive claim.\(^{111}\)

Scholars are, of course, free to interpret statutes in all sorts of innovative ways, and are increasingly motivated by an interdisciplinary approach to legal analysis. It is also reasonable to suppose that judges are often interested in what legal scholars have to say, and are sometimes influenced by their approaches. Judges cite legal scholarship from time to time.\(^{112}\) They also sometimes rely on other disciplines.\(^{113}\) Decisional law may construct authority that

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\(^{111}\) See id. at 643 (taking the position that psychological theory may provide useful insight into the function of many of the substantive canons of statutory construction) (emphasis in original).

\(^{112}\) See generally Judge Alex Kozinski, Who Gives a Hoot About Legal Scholarship?, Address at the Fourth Annual Frankel Lecture, in 37 Houston L. Rev. 295, 296 (2000) (emphasizing academia's critical role in statutory interpretation, especially in unchartered areas of law).

is derived from these extrajudicial and extralegal sources. Courts are most likely to turn to extrajudicial sources when precedents do not seem to lead to any determinate solution because the issues involve "gray areas" of the law.\textsuperscript{114} Courts may tend to turn to extralegal sources when cases of strong first impression arise,\textsuperscript{115} especially when there have been disorienting shifts in the societal or cultural milieu.\textsuperscript{116}

This suggests that if legal scholars, or scholars in other disciplines, have occasion to consider what role cognitive structures may have played in the drafting or enactment of a statute, judges may do likewise. If so, it seems to follow that courts, in construing statutory language, should have little objection to drawing upon linguistic expertise to help engage in a psychological analysis.

Yet judges stay away from psychological analysis when it comes to statutory construction.\textsuperscript{117} It is possible that a judge would rely upon linguistic work—or fragments of linguistic work—were these

\textsuperscript{114} See Kozinski, supra note 112, at 296 (suggesting that when judges are confronted with legal issues to which there appears to be no definite answer, academic literature often supplies guidance).

\textsuperscript{115} The distinction between first impression in the \textit{strong} sense and in the \textit{weak} sense should be briefly explained. A case of first impression arises in the \textit{weak} sense when no prior decision in the controlling jurisdiction is quite on point, but "persuasive analogies and principles applied in cases not readily distinguishable from this are . . . considered." United States v. Glidden, 78 F.2d 639, 641 (6th Cir. 1935) (enunciating further that a question categorized as such is "not precisely one of first impression"). On the other hand, Judge Learned Hand probably referred to strong first impression in \textit{National Casket Co. v. United States}, 263 F. 246, 247 (S.D.N.Y. 1920), when he authored the opinion that addressed the service of a summons upon the local district attorney, as this particular action had no support in prior sanctioned congressional procedure. He described the case as "wholly of first impression," but provided instruction that it had to be decided in a way that "leaves the fewest anomalies, exceptions, or diversities between cases in substance the same." 263 F. at 247. The implications of this distinction may warrant further examination at a future time.

\textsuperscript{116} See, e.g., Atkins v. Virginia, 122 S. Ct. 2242, 2249–50 (2002) (citing the American Psychological Association as well as other medical organizations to support a holding that reversed the imposition of the death penalty on a mentally retarded defendant, acknowledging that these organizations reflect a societal change in perspective on capitol punishment); \textit{Brown}, 347 U.S. at 489–90, 492–93 (1954) (recognizing that questions dealing with the Fourteenth Amendment's effects on public education should be answered not by considering the status of public schools at the time the Amendment was adopted, but rather, by assessing the most current opinions and research regarding education).

\textsuperscript{117} See, e.g., United States v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1034 (N.D. Ohio 1981) (stating that "the plain meaning rule is suited better than any other cannon of statutory construction to explain [language] in a cognitive sense"); Youngbear v. Brewer, 415 F. Supp. 807, 811 (N.D. Iowa 1976), aff'd, 549 F.2d 74 (8th Cir. 1977) (asserting that a court's main function is to determine the intended meaning of the statute and to apply it to the specific facts of the case before the court).
to examine legislative language, but the judge would not delve into the realm of legislators' language-processing mechanisms. As shown in Part II, however, even when linguistic studies do not explicitly address cognitive phenomena, their orientation is psychological. Given the linguists' discrete focus, their analyses and conclusions will ultimately be disconnected from legal reasoning. Linguists' intuitions will tend to obscure law's interpretive task, which privileges legal meaning over everyday usage.

Subsections (A) and (B) next explain why judges would not adopt linguistic analyses in a substantial or wholesale way. The principal reason is that methods and structures are already in place for interpreting statutes. Accordingly, subsection (A) briefly reviews some of the established statutory or axiomatic guidelines that constrain courts. Then subsection (B) examines three Supreme Court cases that are discussed by Cunningham/Levi. These opinions show more specifically how the court construes statutory language from the perspective of drafting logic in the realm of political and policy compromise.

A. Principles of Statutory Interpretation

Courts often explicitly acknowledge that their interpretive task is to examine drafting strategies in the context of legislative compromise. As the dissenting opinion in a United States Supreme Court case put forth, "[o]ften we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities." As this suggests, certain members of the judiciary tend to blame interpretive problems on the murky drafting that often results when legislation must work a compromise between several competing interests. In another example, a California appellate panel said of that state's "obligations" provision carving out exceptions to products liability that "[t]he statute has presented interpretive

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118 See, e.g., Staples v. United States, 511 U.S. 600, 623 (1994) (Ginsburg, J., concurring) (noting the claim in Plain Meaning and Hard Cases that a word's meaning within a statute should be construed the same way each time it appears).

119 See supra notes 16–17, 41–55 and accompanying text.

120 See infra Parts III.A–B (describing why judges should not uncritically adopt or substantially incorporate linguistic analyses into their decisions).

121 See United Steelworkers v. Weber, 443 U.S. 193, 217 (1979) (Burger, J., dissenting) (condemning the majority for ignoring the statute's explicit language to achieve a desired result separate from its intended legislative purpose).
problems since its original enactment in 1987. It has been described as 'poorly drafted’ and internally inconsistent and the product of a hasty compromise between competing interests known as the “napkin deal.”

Other opinions demonstrate that, when it comes to statutory interpretation, even issues that might ordinarily be deemed to involve internal, cognitive factors are resolved solely on the basis of the linguistic outputs appearing on the page, as informed by settled principles of statutory interpretation. Settling on human intentions, for instance, seems ideally to invite psychological analysis. While legal conclusions about intentions have a psychological basis, the psychological aspect is not vibrant or empirically fresh, but submerged in the form of folk intuitions that are hidden from view within an axiomatic shrouding.

A closer examination of one set of principles of statutory

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122 See McKinney v. California Portland Cement Co., 117 Cal. Rptr. 2d 849, 863 (Cal. App. 1 Dist. 2002) (citing American Tobacco Co. v. Super. Ct., 255 Cal. Rptr. 280, 282, 283–84 (1989) for its analogous discussion of Cal. Civ. Code § 1714.45 (Obligations)); see also Rodney R. Moy, Tobacco Companies, Immune No More—California’s Removal of the Legal Barriers Preventing Plaintiffs from Recovering for Tobacco-Related Illness, 29 MCGREGOR L. REV. 761, 770 (1998) (explaining that the statute earned the title “napkin deal” because the political adversaries responsible for its creation worked out the deal on a white cloth napkin while dining at a Capitol city restaurant). For other examples dealing with statutory interpretation, see Rabouin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952) (cautioning against an expansion of a statute’s interpretation, especially for carefully drafted controversial statutes resulting from legislative compromise); Wing v. Morse, 300 A.2d 491, 500–501 (Me. 1973). In this case, the Supreme Judicial Court of Maine held that:

“[t]he Maine comparative negligence statute differs from its English and Australian counterpart only because of the insertion of the last paragraph found in the Act. This paragraph was not found in the original draft of the Bill considered by the Legislature and is quite obviously the result of a political compromise.”

Id.

123 See Raymond W. Gibbs, Jr., Intentions as Emergent Products of Social Interactions, in INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION 105, 106 (Bertram F. Malle et al. eds., 2001) (describing intentions—at least in the traditional sense—as a mental or psychological state, and as such, possessing content that must be mentally represented); Bertram F. Malle & Joshua Knobe, The Distinction Between Desire and Intention: A Folk-Conceptual Analysis, in INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION 45 (Bertram F. Malle et al. eds., 2001) (elaborating a psychological theory distinguishing intentions from desires and explaining the intricacies involved in classifying a person’s mental state into either category); Richard L. Marsh et al., The Activation of Unrelated and Cancelled Intentions, 27 MEMORY & COGNITION 320, 320–21 (1999) (hypothesizing that evidence of the intention-superiority effect can be present in individual clusters of unrelated activities building upon research that had only tested related activities).

124 See, e.g., Goncalves v. Reno, 144 F.3d 110, 132–33 (1st Cir. 1998) (postulating that “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language”) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987) (emphasis added)).
interpretation—or at least of a telltale subset of those principles—should demonstrate the focus on statutory words, sentence structures, relationships between comparable provisions, and institutional roles, each admittedly informed where appropriate by weathered folk psychological truisms. The New York scheme is probably exemplary, albeit far more extensive than most.

New York has codified its general principles of statutory construction and interpretation in Book One of its Consolidated Laws, simply called Statutes.\textsuperscript{125} Section 71 begins by defining construction as “the drawing of conclusions with respect to subjects which lie beyond the direct expression of the text.”\textsuperscript{126} The commentary distinguishes interpretation, which “strictly speaking, is limited to an exploration of the written text.”\textsuperscript{127}

The interpretive principles in Statutes are meant to formulate folk, or common sense, reactions to ordinary language expressions. The provisions therefore ask what it is “reasonable to suppose” about drafting decisions. Section 74 prescribes, for instance, that courts cannot supply a statutory clause “which it is reasonable to suppose the Legislature intended intentionally to omit.”\textsuperscript{128} When the courts apply section 74’s “reasonable to suppose” requirement, they do not explicitly engage in a psychological assessment. Indeed, the courts nearly always assume without argument that they know what it is reasonable to suppose about the legislative intent.\textsuperscript{129}

Moreover, section 74 dovetails into section 76, which codifies Justice Scalia’s clear language principle.\textsuperscript{130} Section 76 prescribes

\textsuperscript{126} Id. § 71.
\textsuperscript{127} Id. (practice commentary). Although noting the distinction incorporated into New York’s Statutes may shed some light on the practice of statutory interpretation and construction as the legal system understands it, this article will tend to interchangeably use “construction” and “interpretation” throughout.
\textsuperscript{128} Id. § 74. Cf. Id. § 240 (codifying the maxim expressio unius est exclusio alterius, or the supposition that an enumeration of specific items implies the exclusion of items not listed).
\textsuperscript{129} See, e.g., Hays v. Ward, 578 N.Y.S.2d 168, 170 (N.Y. App. Div. 1992) (rejecting an interpretation of a statute addressing criminal accusations lodged against public officials by saying that the trial court had “essentially engaged in such prescribed judicial legislation, since ‘a court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit’”); In re Heysman, 502 N.Y.S.2d 636, 638 (N.Y. Fam. Ct. 1986) (concluding that since legislative history shows that the drafters contemplated the issue at bar and chose to omit it, the court must not interpret the omission as a legislative error or oversight, but rather a clear indication that the omission was intended); In re Virginia E. E., 438 N.Y.S.2d 68, 70 (N.Y. Fam. Ct. 1981) (reiterating that it is a well established doctrine of statutory construction for the courts to conclude that matters excluded from a statute were done so purposefully and deliberately by the legislature).
\textsuperscript{130} Justice Scalia’s clear language principle can be found in his concurring opinion in INS v. Cardoza-Fonseca, 480 U.S. at 452 (exclaiming that “if the language of a statute is clear, that
that, "[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation."\textsuperscript{131}

Interestingly, there is an irony in the new textualist position. As shown, modern linguistics pursues an \textit{internalist exploration},\textsuperscript{132} and linguists view their discipline as a branch of psychology.\textsuperscript{133} Scientific inquiry into cognitive structures must naturally lead to interpretations of language that plumb beneath the surface of common sense meanings. So, by one view, proponents of linguistics in law should encourage the very transcendence of the facial properties of language that the new textualists oppose. Yet law's linguistic turn simultaneously favors linguistic analysis and plain meaning interpretation.\textsuperscript{134}

The New York scheme also sets forth "rules of construction" that seek to resolve the absence of clarity in statutory provisions. Section 91 prescribes generally (and, presumably, clearly) that "[i]f the intent of the lawmaking body is not clear, the court in construing a statute will apply established rules or canons of construction, the purpose of such rules being to discover the true intention of the law."\textsuperscript{135} This provision presupposes that psychologically trained specialists need not be enlisted when courts try to discover "the true intention of the law."\textsuperscript{136}

Section 92(b) elaborates on the methodology a bit more specifically, stating that "[t]he intention of the Legislature is first to be sought from a literal reading of the act itself, but if the meaning is still not clear the intent may be ascertained from such facts and through such rules as may, in connection with the language, legitimately reveal it."\textsuperscript{137} Ferreting out the legislative intent "from such facts" as may "legitimately reveal it," the court will examine the context of the enactment, "focus[ing] in upon the object, spirit and purpose of the Code section."\textsuperscript{138}
Addressing a statute's object, spirit, and purpose is a different exercise than probing the intentions of legislators. Looked at psychologically, intentions will not only be implicit to some extent in behaviors, but will also manifest in the mental realm accompanied by thoughts, desires, and doubts. As shown in the analogous context of linguistics' psychological program, the focal point has changed from behavior or its outcomes to the mental states that produce behavior.

The mental states that have to be considered when intentions are at issue are beliefs and desires. For the philosopher David Hume, intentions were reducible to some combination of desires and beliefs. The Humean view remains influential, and philosophers of psychology continue to press it. Moreover, even a simple inference from behavior to intention will be mediated by reference to the psychological phenomena of desire and belief. From Oscar's reaching for the glass of water, we infer his intention to drink the water, supplying his desire to quench his thirst and belief that drinking water would accomplish this. Courts, on the other hand, have not deemed the range of their legitimate inquiry to include either empirical investigation into legislators' desires and beliefs, or the application of any psychoanalytic principles to the legislators' linguistic outputs.

The other New York interpretive provisions are generally along

N.Y. County 1982 (interpreting a statute's ambiguous use of the word "weekdays" by focusing on the purpose and intention of its drafters); see also Thomas v. Bethlehem Steel Corp., 466 N.Y.S.2d 808, 810 (N.Y. App. Div. 1983), aff'd, 470 N.E.2d 831 (1984) (holding that any amendment to a statute, which does not modify or repeal the original, demonstrates a legislative intent for the amendment to stand with and uphold the original statute).


See supra notes 19–23 and accompanying text (recognizing that Chomsky's linguistic theories—which focus centrally on the psychological reality of the native speaker's grammar—have transformed and dominated the discipline).

See CHOMSKY, KNOWLEDGE OF LANGUAGE, supra note 20, at 3 (elaborating on a particular interest in the study of grammar, specifically, the psychological impact of behavior on the use and development of language).

See DAVID HUME, A TREATISE OF HUMAN NATURE 413 (L. A. Selby-Bigge & P. H. Nidditch eds., 2d ed. 1978) (1740) (attempting to demonstrate that action is motivated by passion and reason, but never by reason alone, and never in opposition of passion).

See David Hilbert, Content, Explanation, and Intention 17, at http://www.uic.edu/~hilbert/papers/intandcont.pdf (last visited Oct. 17, 2002) (stating that "[e]ither intentions always work through their effects through the structure of beliefs and desires possessed by the agent, or intentions are reducible to some special combination of beliefs and desires"); Michael Ridge, Humean Intentions, 35 AM. PHIL. Q. 157, 157–58 (1998) (arguing for the Humean view that intentions are in fact reducible to a cluster of beliefs and/or desires).
the same lines as those already discussed. Law's institutional role frames the interpretive project, not psychological mechanisms. Thus, for example, section 95 of the New York Statutes Law prescribes that "[t]he courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy." Nor should the court's interpretation generate its own mischief. Section 147, for example, requires the court to "adopt a statutory construction which will produce equal results and avoid unjust discrimination."

B. The Application of Interpretive Principles in Three Cases

This subsection reviews the Supreme Court's actual interpretation of statutes in three cases that Cunningham/Levi discuss. The discussion will not only highlight portions of the three cases illustrating the practical application of interpretive principles, but will also comment on aspects of the opinions that will be relevant to the later critique, in Part IV, of the analyses set forth by Cunningham/Levi. In other words, the present subsection both demonstrates particularized applications of subsection (A)'s interpretive conception, and sets the stage for Part IV's comparative evaluation of the linguistic approaches taken by Cunningham/Levi.

1. Staples v. United States

Harold Staples had an unregistered semiautomatic AR-15 rifle that had been modified to fire automatically. This appeared to violate section 5861(d) of the National Firearms Act (the Act), which makes it a felony for any person to possess a firearm not properly registered. The Act includes a machinegun in its classification of a "firearm," and defines machinegun as "any weapon which shoots...or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the

144 N.Y. STAT. LAW § 95 (McKinney 1971). See generally 1 WILLIAM BLACKSTONE *87 (1765) (asserting three elements to be considered in the interpretation of remedial statutes—"the old law, the mischief, and the remedy"—and explaining that judges should construe the statute to stifle the mischief and further the remedy).
145 N.Y. STAT. LAW § 147 (McKinney 1971).
146 511 U.S. 600 (1994).
147 Id. at 603.
148 Id. at 602–603 (citing National Firearms Act, 26 U.S.C. §§ 5801–5872 (1994)).
trigger.\textsuperscript{150}

The Act itself is silent concerning a \textit{mens rea} requirement. Anglo-American jurisprudence, however, dictates that absent an express \textit{mens rea} element in a criminal statute, one should nonetheless be implied.\textsuperscript{151} So the indictment in \textit{Staples v. United States} charged that Staples had "knowingly received and possessed firearms."\textsuperscript{152} And the district court instructed the jury:

The purpose of adding the word 'knowingly' is to insure that no one can be convicted of possession of a firearm he did not intend to possess. The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation. If he has such knowledge and if the particular item is, in fact, regulated, then that person acts at his peril.\textsuperscript{153}

The issue of statutory construction before the Supreme Court was whether the presumption in favor of a \textit{mens rea} requirement should entail proof of a more exacting level of knowledge than the district court had supposed.\textsuperscript{154} This, for the Court, was a policy question. The specific issue was whether the government had the burden of proving that Staples knew that his rifle had those characteristics that made it a "firearm" within the meaning of the Act.\textsuperscript{155}

The parameters for deciding the policy issue had been set in the court's prior rulings. The Court had relaxed the prosecutorial burden of establishing a mental element in so-called "public welfare" or "regulatory" cases, which involved statutes regulating potentially dangerous or injurious items.\textsuperscript{156} In \textit{United States v.}

\textsuperscript{150} Id. § 5845(b).
\textsuperscript{151} \textit{Staples}, 511 U.S. at 605 (remarking that the statute must be construed in accordance with its common law foundation mandating the presence of a \textit{mens rea} in order to constitute a crime) (citing United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978)).
\textsuperscript{152} \textit{Id. at 622} (Ginsburg, J., concurring).
\textsuperscript{153} See id. at 623 n.5 (Ginsburg, J., concurring) (referencing the trial court's instruction to the jury).
\textsuperscript{154} See id. at 604–07 (noting the Court's inclination to require a defendant to be cognizant of his wrongdoing in most criminal matters).
\textsuperscript{155} See id. at 604 (granting certiorari to determine the proper \textit{mens rea} required under the statute).
\textsuperscript{156} See id. at 606–07 (reasoning that a defendant in possession of a dangerous item should be aware that such an item is strictly regulated, and therefore assumes the burden of knowing whether his conduct falls within the meaning of the statute).
Balint, for example, the Court concluded that conviction under the Harrison Anti-Narcotic Drug Act of 1914 merely required proof that the defendant knew that he was selling drugs and not that he knew his inventory included “narcotics” within the meaning of the statute.

Another such case was United States v. Freed, in which the Court had previously addressed a mens rea issue in the context of the National Firearms Act. Freed involved the defendant’s possession of unregistered grenades. The Court held that the government did not need to prove the defendant’s awareness that the grenades were unregistered because the Act’s purpose was to regulate and promote public safety. The Court explained that grenades—as highly perilous and offensive weapons—certainly rose to the level of danger attributed to narcotics in Balint, thus justifying the omission of a mens rea requirement.

Justice Thomas wrote the opinion in Staples. He acknowledged the import of Balint and Freed, but cautioned that Mr. Balint knew, at the least, that he was dealing with hand grenades. Moreover, said Thomas, in Liparota v. United States, the Court had determined that a statute criminalizing the “unauthorized” possession of food stamps required proof that the defendant knew his possession was unauthorized.

The battle in Staples was now joined. The policy question was whether AR-15 rifles fell on the grenades/narcotics side of the divide, or on the food stamps side. Relying on “common experience,” Justice Thomas concluded that “[g]uns in general are not ‘deleterious devices or products’ . . . that put their owners on notice that they stand ‘in responsible relation to a public danger.’ “

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157 258 U.S. 250 (1922).
159 See Balint, 258 U.S. at 254. The opinion in Balint referred to the seller's opportunity to discover that his drug sale was illegal, as well as the difficulty of proving the seller's actionable mental state. Id.
161 See id. at 607.
162 See id. at 609.
163 See id. (finding the weapons so dangerous that the defendant's claim that he was unaware they were covered under the Act was insufficient to persuade the Court).
164 See Staples v. United States, 511 U.S. 600, 609 (1994) (clarifying that the possession of a dangerous weapon is not an innocent act in and of itself).
166 See Staples, 511 U.S. at 610 (holding that not requiring a mens rea would “criminalize a broad range of apparently innocent conduct”) (citing Liparota v. United States, 471 U.S. 419, 426 (1985)).
Accordingly, the *Staples* majority decided that the statue at issue should be interpreted using the common law rule favoring a congressionally intended *mens rea*.  

2. United States *v.* Granderson

Ralph Stuart Granderson was a letter carrier who pled guilty to a charge of destroying mail.  

Under the Sentencing Guidelines, Granderson’s potential prison term was zero to six months.  

The district court did not send Granderson to prison, but sentenced him to five years’ probation and a $2,000 fine.

Granderson’s probation conditions included mandatory drug testing. Weeks into the term, his urine contained cocaine. On its own, the crime of illegal cocaine possession is punishable by up to one year imprisonment.  

The statute at issue in *Granderson* purports to tell courts what they must do if a defendant violates his probation, and one particular provision addresses a violation resulting from illegal drug possession. That provision says, in relevant part, that “if a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.”

The district court construed the statute to require that Granderson be sentenced to a prison term of not less than one-third of the original probationary period. Therefore, the court sentenced Granderson to twenty months’ imprisonment—which was more than the maximum allowable terms for destruction of mail (six months) and cocaine possession (one year) combined.

The Court of Appeals for the Eleventh Circuit upheld the revocation of Granderson’s sentence of probation, but vacated his

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166 See *id.* at 618–19 (postulating that where a statute only calls for a defendant to be aware of “traditionally lawful conduct,” a *mens rea* requirement is appropriate).
168 See *id.* at 43 (identifying the statute under which Granderson entered a guilty plea as 18 U.S.C. § 1703(a) (1988)).
169 *Id.*
170 *Id.*
171 See *id.* at 44, 48.
173 See *Granderson*, 511 U.S. at 43.
174 *Id.* at 43–44.
new twenty-month prison sentence.\textsuperscript{177} The Eleventh Circuit construed the statute to require a minimum prison term of one-third of the original prison sentence the defendant \textit{could have} received, and determined that to mean two months in this case.\textsuperscript{178}

As seen, the statutory provision at issue in \textit{Granderson} mandates that "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."\textsuperscript{179} Writing for the Supreme Court, Justice Ginsburg set forth three possible interpretations of this provision:

(1) The verb phrase \textit{sentence the defendant} and the noun phrase \textit{the original sentence} could refer to the same sort of sentence—probation in each instance. Under this construction, Granderson's sentence would actually be reduced to twenty months of probation;

(2) The verb phrase \textit{sentence the defendant} could refer to imprisonment, and the noun phrase \textit{the original sentence} could refer to the original probationary period, in which case the district court's twenty-month incarceration sentence would be reinstated; or

(3) The verb phrase \textit{sentence the defendant} and the noun phrase \textit{the original sentence} could again refer to the same sort of sentence, but this time in each instance imprisonment. In this case \textit{the original sentence} would refer to the six-month term the district court could have imposed. Under this construction adopted by the Eleventh Circuit, the defendant would be resentenced to a period of at least two months in prison.\textsuperscript{180}

The majority opinion in \textit{Granderson} adopted interpretation (3), and thus, affirmed the Eleventh Circuit's conclusion.\textsuperscript{181} Justice Ginsburg's reasoning can be distilled down to two primary interpretive principles and two supporting principles. The first primary principle may be framed as follows:

The \textit{Plausibility Principle}: Statutes should not be construed to reward defendants for their misconduct (probation violations) because it is not plausible that Congress would have intended such an outcome.

By virtue of the Plausibility Principle, Justice Ginsburg eliminated interpretation (1) above as a possible interpretation of the revocation provision.\textsuperscript{182}

\textsuperscript{177} \textit{United States v. Granderson}, 969 F.2d 980, 985 (11th Cir. 1992).

\textsuperscript{178} \textit{Id.} at 983–85.


\textsuperscript{180} \textit{See Granderson}, 511 U.S. at 41–42.

\textsuperscript{181} \textit{Id.} at 43, 56–57.

\textsuperscript{182} \textit{See id.} at 41 (pronouncing that such construction is obviously not what Congress
Because the Plausibility Principle eliminated (1), and because both (2) and (3) entailed that a drug-possessing probationer be resentenced to a prison term, the issue of the type of punishment meted out by section 3565(a)'s drug-possession provision was resolved. The remaining issue concerned the duration of that punishment.  

Justice Ginsburg was able to decide this final issue on the basis of a second primary interpretive principle, as follows:

The Nonspeculation Principle: “[T]he Court will not interpret a federal criminal statute so as to increase the penalty... when such an interpretation can be based on no more than a guess as to what Congress intended.”  

Because it would be merely guesswork to suppose that Congress had intended the combination of a mail destruction penalty (up to six months imprisonment) and a cocaine possession penalty (up to one year imprisonment) to warrant a twenty-month incarceration term, the Court was able to eliminate interpretation (2) above. This left alternative (3), and the case was resolved.

The Court's task is more than logical, however. It has to bring credibility to the mandate, a goal that may sometimes be at odds with stern-seeming concision. The government and the defendant vigorously debated whether interpretation (2) or (3) should apply, and so well behooved the court to summon supporting principles by which to reinforce (3)'s superiority. One such principle may be stated as follows:

The Consistency Principle: When a word is used as both a noun and a verb in a single statutory statement, that word should be construed similarly in each instance.  

Because interpretation (2)—the one favored by the government and adopted by the district court—took the verb phrase sentence the

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intended because it fails to increase a defendant's punishment when he was found in possession of illegal narcotics). Justice Ginsburg went on to add that such a "novel interpretation would authorize revocation sentences under which drug possessors could profit from their violations." *Id.* at 45 n.4.

183 See *id.* at 42. (observing that although theories (2) and (3) agree on the issue of sentencing, the two disagree on the point at which the sentence's duration should be measured).

184 *Id.* at 42–43 (citing *Bifulco* v. United States, 447 U.S. 381, 387 (1980); *Ladner* v. United States, 358 U.S. 169, 178 (1958)).

185 See *Granderson*, 511 U.S. at 46 (categorizing the government's incompatible interpretation of the word *sentence* as both flawed and contrary to Congressional statutory design); *Reves* v. *Ernst & Young*, 507 U.S. 170, 177 (1993) (reasoning that in instances in which Congress used the same word twice in a statutory provision, the Court should define both words in a similar way).
defendant to refer to a sentence of imprisonment, and the noun phrase the original sentence to refer back to the dissimilar probation sentence, (2) violated the Consistency Principle and could, again, be eliminated. This reinforced the work done by the Nonspeculation Principle.

A second supporting principle—here functioning as a corollary to the Nonspeculation Principle—was the due process precept called "the rule of lenity," which may be paraphrased as follows:

The Rule of Lenity: When traditional interpretive principles are not definitive, ambiguous terms in a criminal statute should be resolved in the defendant's favor.

The guesswork prohibited by the Nonspeculation Principle implicitly stems from ambiguity, while the Rule of Lenity enhances the Nonspeculation Principle by holding that when a criminal statute contains ambiguous terms, these terms should be construed in the defendant's favor.


Sedima, a Belgian corporation, entered into a joint venture with the Imrex Company to supply American electronics components to another Belgian firm. Believing Imrex cheated, Sedima filed a lawsuit seeking, inter alia, private treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO).

Specifically, Sedima brought its RICO claims under section 1964(c), which provides, in relevant part, that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor [sic] in any appropriate United States district court and shall recover threefold the damages he

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186 Granderson, 511 U.S. at 54.
187 See Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (affirming that under the rule of lenity, an ambiguous statute should be interpreted in favor of the defendant); see also United States v. Shabani, 513 U.S. 10, 17 (1994) (noting that the rule of lenity can only be invoked when traditional guides to interpretation fail at clarifying ambiguous statutes).
188 As seen in infra Part IV, Justice Ginsburg cited favorably to the Cunningham/Levi paper both in her majority opinion in Granderson, and in her concurring opinion in Staples. See infra notes 248, 272, 297–300 and accompanying text. In Staples, Justice Ginsburg judiciously borrowed from Plain Meaning and Hard Cases. See 511 U.S. at 623 (Ginsburg, J., concurring). In Granderson, she noted one of Cunningham/Levi's psychological comments, but assigned it little or no weight. See 511 U.S. at 53.
sustains."\textsuperscript{192}

So the initial issue in a private suit for damages under RICO is whether the defendant has violated section 1962 of this chapter.\textsuperscript{193} Roughly, section 1962 makes it illegal to have or to acquire any interest in an enterprise that affects interstate commerce if that interest derives from "a pattern of racketeering activity" or via "collection of [an] unlawful debt."\textsuperscript{194}

Section 1961(1) defines "racketeering activity" as any of a number of generic crimes "chargeable" under state criminal laws, along with any of numerous crimes "indictable" under various federal provisions, including mail and wire fraud.\textsuperscript{195} Sedima's RICO claims alleged violations of section 1962 based on Imrex's predicate acts of mail and wire fraud.\textsuperscript{196}

The tricky issue in Sedima was whether a civil RICO plaintiff could recover under the statute merely by showing a business or property injury that resulted from at least two predicate acts—being a "pattern"\textsuperscript{197}—of racketeering (the liberal or broad interpretation), or whether, as the district court held, "something more or different than injury that would result from the predicate acts must be shown by the plaintiff"\textsuperscript{198} (the restrictive or narrow interpretation). The Second Circuit affirmed the district court's holding, concluding that a RICO plaintiff must allege a "racketeering injury," or an injury different in kind from the harm caused by predicate illegal acts.\textsuperscript{199}

The Supreme Court split on which interpretation to afford section 1964(c).\textsuperscript{200} The competing sides engaged in the sort of debate envisioned, for instance, by section 95 of New York's Statutes—namely, how to construe the RICO scheme so as to suppress the mischief and advance the remedy.\textsuperscript{201}

It should be explained why both the broad interpretation advanced in the majority opinion, and the narrow interpretation

\begin{footnotes}
\textsuperscript{192} 18 U.S.C. § 1964(c) (1988).
\textsuperscript{196} See Sedima, S.P.R.L., 473 U.S. at 484.
\textsuperscript{197} 18 U.S.C. § 1961(5) (1988). The Court noted the congressional view that a pattern should involve the threat of a continuing activity—at the very least, something more than one racketeering activity. 473 U.S. at 496 n.14 (citing S. Rep. No. 91–617, at 158 (1969)).
\textsuperscript{199} See Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984).
\textsuperscript{200} See Sedima, S.P.R.L., 473 U.S. at 480 (5–4 decision).
\textsuperscript{201} See supra note 144 and accompanying text.
\end{footnotes}
argued by the dissenters, would have seemed compelling to their respective proponents. The underlying concern in each instance was whether the statutory language would allow for an interpretation cohering with the Justices' beliefs about the policy driving RICO's civil liability provisions. These policy perspectives were rooted in the Justices' excavations of the object, spirit, and purpose of the statutory scheme.202

Writing for the majority, Justice White explained that, under the statute, a defendant engages in "racketeering activity" when he commits a predicate act, such as mail or wire fraud.203 If a defendant engages in two or more such predicate acts that are sufficiently related, his misconduct has formed a pattern and he is liable for the resulting business or property damage.204 Justice White further stated that the statute did not require any more than this, however, as the spirit of the violation resides in committing acts connected "with the conduct of an enterprise."205

Justice White's reading of RICO's civil scheme appears to be a straightforward paraphrase of the statutory language.206 Yet, further portions of the opinion reveal the policy considerations that sustained this reading. First, the majority reviewed the legislative history of the private treble damages provision.207 One representative on the House Judiciary Committee explained that the provision was modeled after a similar private damages remedy afforded by the antitrust laws, and that the RICO action aimed at giving victims of organized crime access to a legal remedy.208 The Committee rejected the opponents' view that the treble-damages provision would be expansively used to harm business competitors.209

The majority later paid special attention to the congressional

203 Id. at 481-82.
204 Id. at 482-83.
205 Id. at 497.
206 See id. at 497-98. Justice White declared that RICO must be broadly read and liberally construed to give effect to the remedial purposes Congress intended with the use of such expansive language. Id.
207 See id. at 486-88.
admonition that RICO must be liberally construed to facilitate its remedial purpose of providing a means for individuals to bring a private action to recover for injuries caused by racketeering activities.\textsuperscript{210} The opinion also emphasized that “RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime,” and that “it is in this spirit that all of the Act’s provisions should be read.”\textsuperscript{211}

Someone seeking to downplay the policy dimension might respond that the later policy language in White’s analysis was fairly boilerplate, and thus hardly a driving force. It is reasonable to suppose that his linguistic exercise was primary, and that he secondarily summoned policy factors to shore up his conclusions about Congressional intent. Indeed, Justice White said that the “less restrictive reading is amply supported by . . . the general principles surrounding this statute,”\textsuperscript{212} thereby indicating the primacy of the exercise in plain meaning.

But even assuming that policy considerations played a minor role in \textit{Sedima}'s outcome—and this is unlikely—it is clear that the Court believed, at the least, that its linguistic findings had to cohere with the probable object, spirit and purpose of the RICO provisions at issue. One set of propositions $p$ coheres with another $q$ if either $p$ supports $q$ or $q$ supports $p$. If a minimal coherence relation has to obtain between $p$ and $q$, then an analysis that emphasizes one to the exclusion of the other risks going awry. Judicial reasoning consistently aims at locating the policy context of statutory phrasing.\textsuperscript{213}

The importance of resting the statutory paraphrase on a policy cushion is heightened when courts divide over which interpretation to endorse. Justice White’s majority opinion in \textit{Sedima} acknowledged the pervasive split in the decisions of esteemed jurists nationwide who had addressed the civil RICO provisions. Not only did the Supreme Court itself divide on this issue, but White noted at length that the courts of appeal sharply disagreed.\textsuperscript{214}

\textsuperscript{210} See \textit{id.} at 498 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)).
\textsuperscript{211} \textit{id.}
\textsuperscript{212} \textit{id.} at 497 (emphasis added).
\textsuperscript{213} See, e.g., \textit{James Willard Hurst, Dealing With Statutes} 32 (1982) (classifying legislative intent as indispensable for proper interpretation); \textit{William D. Popkin, Statutes in Court: The History and Theory of Statutory Interpretation} 11 (1999) (referring to the theory of “equitable interpretation” and holding a statute’s “spirit” to be its equity, which in turn requires an investigation into that statute’s objective and substantive background considerations).
The day after issuing Sedima, the Second Circuit—housing another panel of divided judges—reached a similar conclusion.\textsuperscript{215} A month later, the Eighth Circuit issued a ruling that it deemed inconsistent with Sedima.\textsuperscript{216} And two months later still, a Seventh Circuit decision rejected the Second Circuit view in both Sedima and Bankers Trust by dismissing the racketeering injury requirement.\textsuperscript{217} Indeed, the conflict in appellate and district court outcomes formed the predicate for the Court’s grant of certiorari in Sedima.\textsuperscript{218}

In the light of the schisms between and within the circuits, it seems that the Justices hearing Sedima must have assumed that reasonable minds could differ about how to construe RICO’s sections 1964(c) and 1962. It is unlikely that any Justice, whether broadly or narrowly interpreting RICO, believed that the minds of the jurists on the opposing side of the issue were unreasonable. If Justice White did assume that reasonable minds could differ about how to construe section 1962’s phrase a pattern of racketeering activity, then he could not have consistently held this phrase to be unambiguous. Certainly, “[a] statute is ambiguous when reasonable minds differ or are uncertain as to its meaning.”\textsuperscript{219} As Saul Kripke states, to recognize that a sentence “has two distinct analyses is to attribute a syntactic or semantic ambiguity to it.”\textsuperscript{220}

The majority opinion did, however, refer in a footnote to “the plain words of the statute.”\textsuperscript{221} How can this statement be reconciled with the inference, just drawn, that the panel probably grasped the statute’s ambiguity? It has just been suggested that it would have been bizarre—given the widespread difference in judicial opinion—

\textsuperscript{215} Id. at 485 n.5 (citing Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516–18, 522–24 (2d Cir. 1984), vacated by 473 U.S. 922 (1985)).

\textsuperscript{216} See id. at 486 n.6 (citing Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 413 (8th Cir. 1984), vacated by 473 U.S. 922 (1985)).

\textsuperscript{217} See Haroco, Inc. v. Am. Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985) (asserting that a civil RICO plaintiff need not show injury beyond harm to business or property as a result of the motivating racketeering acts).

\textsuperscript{218} See Sedima, S.P.R.L., 473 U.S. at 486. In granting certiorari, the majority noted the importance of the issues involved and the varied approaches taken by the lower courts in dealing with those issues. Id.


\textsuperscript{220} Saul Kripke, Speaker’s Reference and Semantic Reference, in CONTEMPORARY PERSPECTIVES IN THE PHILOSOPHY OF LANGUAGE 6, 13 (Peter A. French et al. eds., 1979).

\textsuperscript{221} See Sedima, S.P.R.L., 473 U.S. at 495 n.13. Justice White also rhetorically asserted that the application of RICO’s civil provisions “in situations not expressly anticipated by Congress” exhibits breadth but not necessarily ambiguity. Id. at 499 (quoting Haroco, 747 F.2d at 398).
had the Sedima court not understood, at the least, that reasonable minds could differ on the interpretation.

First, inferring the Court’s belief in an ambiguity is not automatic. A person may believe a, and a may entail b, yet that person may not believe b.222 So even if the Court recognized that reasonable minds could differ about the statute’s meaning, and even if this factor establishes the statute’s ambiguity, it is not necessarily the case that the Court recognized that the statute was ambiguous.

An alternative explanation, however, is that the majority’s reference to “the plain words of the statute” signified a minimal assertion that the words were clear enough for Congress to have been able to anticipate the way in which those words might be construed. Indeed, the footnote’s full sentence reads as follows: “[g]iven the plain words of the statute, we cannot agree with the court below that Congress could have had no ‘inkling of [section 1964(c)’s] implications.”223 This statement does not suggest the Court’s view that the statute’s words in isolation from policy considerations reveal a determinate congressional intent; any such reading of the footnote would be unjustifiably strong.

Nor is there anything about a judicial acknowledgment that a provision may reasonably be construed in inconsistent ways that prevent the Court from arguing for a particular construction.224 The court will inevitably back its assertion that its favored interpretation is a good one with policy justifications. When a court’s grasp of an ambiguity is implicit but not explicit, the assertion that its reading derives from the plain language of the statute may best be seen as a rhetorical construct. Judges are typically lawyers, and their polemic habits often originate in litigation.225

222 See infra notes 244–47 and accompanying text (discussing “opaque” linguistic contexts).
224 Sometimes, of course, the finding of ambiguity is in and of itself deemed to entail a particular outcome. This was seen with respect to the Rule of Lenity, as it manifested in Granderson, by which ambiguous terms in criminal statutes are construed in the defendant’s favor when other principles of statutory construction are not definitive. See supra notes 187–88 and accompanying text. As a further example—albeit outside the context of statutory interpretation—ambiguities in insurance contracts are, in principle, construed against the party responsible for drafting the controversial provision, routinely the insurer. See, e.g., Perez v. Aetna Life Ins. Co., 150 F.3d 550, 557 n.7 (6th Cir. 1998) (noting that “[t]he rule of contra proferentum provides that ambiguous contract provisions in ERISA-governed insurance contracts should be construed against the drafting party”).
225 Cf. RICHARD A. FOSNER, CARDozo, A STUDY IN REPUTATION 137 (1990) (criticizing Cardozo’s judicial approach for exhibiting characteristics strongly associated with being a litigator, such as an intermittent drifting into the “adversarial mode”).
In sum, if the majority opinion in *Sedima* did not declare section 1962 ambiguous, it was not necessarily for believing it to be clear. The majority's reference to “the plain words of the statute” does not necessarily signify more than an assertion that these words plainly fit the Justices' preferred policy perspectives. It is noteworthy that the Court did not say that “the plain words” require the broad interpretation, but said instead that those words chosen by Congress warrant a reading far more expansive that that given by the Court of Appeals.\(^{226}\) This is the reading that would align with RICO's broad remedial purposes.

The dissent in *Sedima* argued, of course, for the restrictive view. Justice Marshall said at the outset: “I believe that the statutory language and history disclose a narrower interpretation of the statute that fully effectuates Congress' purposes, and that does not make compensable under civil RICO a host of claims that Congress never intended to bring within RICO's purview.”\(^{227}\) Marshall focused immediately on several policy objections to the majority's liberal reading.\(^{228}\)

While the details of the dissent's long policy analysis\(^{229}\) are not pertinent here, it is significant that, for Marshall, the important point was that the statutory language allowed for the policy commitments he was advancing.\(^{230}\) Moreover, Justice Marshall articulated the interpretive principle upon which he was relying; namely, that where a punitive remedial statute is at issue, the “narrow[est] interpretation that comports both with the statutory language and the legislative history” should be applied as to avoid litigation that Congress may not have intended.\(^{231}\)

Finally, as with the majority opinion, it would not seem responsible to claim that the dissenting opinion provides valuable insight into Justice Marshall's mental state regarding RICO's ambiguity or lack of ambiguity. For Marshall, a RICO or


\(^{227}\) *Id.* at 501 (Marshall, J., dissenting).

\(^{228}\) *See id.* (Marshall, J., dissenting) (arguing that the majority's interpretation of the Civil RICO provision changes the entire sphere of private litigation by federalizing an area of law that is traditionally handled at the state level).

\(^{229}\) *See id.* at 501–507 (Marshall, J., dissenting) (outlining the various policy considerations and implications surrounding the Court's interpretation of the RICO statute).

\(^{230}\) *See id.* at 507 (Marshall, J., dissenting). For example, Marshall believed that when Congress enacted RICO it was cognizant of the restraining influence of prosecutorial discretion; thus, it chose to bestow upon the Executive broad statutory authority anticipating that this power would be utilized solely in cases warranting such use. *Id.* at 503 (Marshall, J., dissenting).

\(^{231}\) *Id.* at 523 (Marshall, J., dissenting).
racketeering injury entailed something more than the injury incidental to the commission of the predicates.\textsuperscript{232} He felt that such an injury had to be linked to the outcome that the racketeer’s acts were designed to achieve.\textsuperscript{233} Importantly, Marshall precedes and limits these contentions with the expression “to my mind,”\textsuperscript{234} which ordinarily implies a belief that reasonable minds could differ on this point.

On the other hand, it is true that Justice Marshall also said that the majority’s construction “distorts the statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any indication of congressional intent that justifies a deviation from what I have shown to be the plain meaning of the statute.”\textsuperscript{235} But the principal basis for Justice Marshall’s interpretation was his policy view. Moreover, in the very next sentence, Marshall remarked that even if he found ambiguity within the statutory language, his original interpretation would have remained unchanged.\textsuperscript{236} While this statement does not expressly acknowledge ambiguity, it does demonstrate that the dissent was not necessarily relying on a finding of a lack of ambiguity.

In any event, the dissent’s bluster about the plain meaning of the statute is best seen as a rhetorical maneuver. The dissent certainly made a more forceful plain-meaning claim than did the majority. Dissents, however, do not represent the court’s authoritative voice, and it is customary that their counterpunching offers a less constrained bravado than does the majority panel’s lawmaking.\textsuperscript{237}


\textsuperscript{233} Id. at 521 (Marshall, J., dissenting). Thus, for example, if a racketeer engages in arson for the purpose of driving a competitor out of business, the victim must, under the narrow construction, recover under state common law for the immediate harm caused by the arson, but the victim may also allege injury under the RICO provisions to recover for lost profits resulting from the racketeer’s attempt to monopolize. See id. (Marshall, J., dissenting).

\textsuperscript{234} See id. at 520–23 (Marshall, J., dissenting) (giving three examples to demonstrate the parameters of the definition of injury under RICO).

\textsuperscript{235} Id. at 509–510 (Marshall, J., dissenting).

\textsuperscript{236} See id. at 510 (Marshall, J., dissenting) (stating that despite RICO’s ambiguity or lack thereof, the statute’s legislative history well defines its scope).

\textsuperscript{237} See Richard A. Primus, Canon, Anti-Canon, and Judicial Dissent, 48 DUKE L.J. 243, 267 (1998) (citing to Judge Cardozo who explains that dissenting judges are able to pen more creative and individualistic opinions without fear of a later court interpreting such language as statements of law); see also Avidan Y. Cover, Note, Is “Adequacy” a More “Political Question” Than “Equality”? The Effect of Standards-based Education on Judicial Standards For Education Finance, 11 CORNELL J.L. & PUB. POL’Y 403, 436 (2002) (commenting that “the rhetoric is often more pitched in dissent than in a majority opinion”).
IV. THE LINGUISTS’ INTERPRETIVE EFFORT

This Part assesses Cunningham/Levi’s analyses of *Staples* and *Granderson*—the cases that were then pending before the Supreme Court when *Plain Meaning and Hard Cases* appeared—as well as their discussion, in hindsight, of *Sedima*. It will be shown that Cunningham/Levi’s linguistic approach ran afoul in certain significant ways of the judicial reasoning the Court would have to employ; it will also be shown that, with respect to *Sedima*, hindsight from a linguist’s perspective is not flawless. In the final analysis, this article concludes that linguistic appraisal is not suitable judicial reasoning, and will have to be retrofitted if adopted at all by jurists.

A. *Staples*

Recall that the issue in *Staples* was whether the government—in a prosecution under the National Firearms Act—had the burden of proving that the defendant knew that his gun possessed the specific characteristics that made it a “firearm” within the meaning of the Act.238 The policy question was whether the controversy qualified as a “public welfare” or “regulatory” case, which typically involves “potentially harmful or injurious items” and hence a relaxed prosecutorial burden.239

Cunningham/Levi ignore the policy context in which *Staples* would be decided.240 This in itself is not necessarily problematic: Cunningham/Levi aim not for a holistic reconstruction of legal decision making, but rather aspire to provide the linguist’s perspective in a way that “contributes” to adjudication.241 What is problematic, however, is that by analyzing the *mens rea* issue in *Staples* based on the indictment’s intentional language as seen in a vacuum—hence to the exclusion of other contextual factors—Cunningham/Levi propose an interpretation meant to apply whenever the court may encounter similar language. Yet such an

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238 See supra notes 154–56 and accompanying text.
239 See *Staples* v. United States, 511 U.S. 600, 606–607 (1994) (stating that a defendant in such cases need not know his conduct is illegal in order to be subjected to criminal liability) (emphasis added).
240 See Cunningham & Levi et al., supra note 2, at 1573–77 (relying primarily upon a linguistic analysis of the statute involved in *Staples* rather than the welfare/regulatory context upon which the Court based its opinion).
241 See id. at 1577 (calling on jury instruction drafters to heed the benefit that linguistics can provide in clearly stating legal requirements).
all-embracing solution is precisely the outcome that policy considerations preclude.

More specifically, Cunningham/Levi examine the indictment's allegation that Staples "knowingly received and possessed firearms." They offer three different ways of interpreting *knowingly possessed*: "(1) simple knowledge that the object was in his possession, (2) additional knowledge that the object was a dangerous weapon, or (3) further knowledge that the object was a specific type of weapon, namely a machinegun."243

The first alternative, requiring only "simple knowledge," would effectively eliminate *mens rea* from the criminal prosecution, and so, even the government did not advance it. The choice, therefore, was between Interpretation (2), as the district court had apparently charged, and Interpretation (3), for which the defendant argued.

Cunningham/Levi begin with a brief explanation of the role of higher order thoughts in addressing opaque linguistic contexts. The insight spurring this approach is primarily psychological, but has also been an important theme in analytic philosophy. As Cunningham/Levi explain, we ordinarily assert that a person holds an attitude toward a proposition only if that person himself recognizes that he possesses the same attitude toward that proposition.244 Thus, even if it is true that Smith knows that her neighbor is Jones, and even if it is also true that Jones is a judge, it is not necessarily true that Smith knows her neighbor is a judge.245 Another way of explaining the point is to say that, "given a true statement of identity, one of its two terms may be substituted for the other in any true statement and the result will be true."246 Concerning the Smith/Jones example, however—in the context of the propositional attitudes—there is a failure of substitutivity of the seemingly coreferential terms *Jones* and a judge.

This analysis may be applied in the *Staples* context because, in a criminal prosecution, *mens rea* requirements rest on the defendant's possession of an attitude, usually knowing or believing. Now we are better poised to appreciate why it might be true both that D *knows*
that D possesses x, and that x is a machinegun, but not necessarily true that D knows x is a machinegun. The indictment charged that Staples "knowingly possessed" a firearm, and the district court instructed the jury that the defendant would be guilty as charged if the proof established that he knew merely that he possessed a dangerous weapon, fulfilling Interpretation (2) above.

So Cunningham/Levi next purport to eliminate Interpretation (2) by explaining that:

The only way to make the indictment consistent with the trial judge's explanation of it to the jury is to make the implausible claim that the indictment used the single word firearm with two different meanings in the same sentence. This would amount to treating firearm as meaning simply gun when speaking of what Staples knew, but as meaning machinegun as to what he possessed.247

Although this is the very portion of the Cunningham/Levi analysis to which Justice Ginsburg would later cite, for the same point, in her concurrence,248 it is the portion that arguably missteps as legal reasoning. The higher order thought analysis summoned by the linguists derives from psychological insight, but Cunningham/Levi's reading of the trial judge's instruction overlooks a substantive legal principle upon which that judge relied.

The district court explained that "[t]he purpose of adding the word 'knowingly' [to the indictment] is to insure that no one can be convicted of possession of a firearm he did not intend to possess . . . . It would be enough to prove [the defendant] knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation."249 The linguists asked what level of knowledge the district court was requiring for a conviction and unquestioningly posited a level corresponding to Interpretation (2), namely, knowledge that the object was a dangerous weapon. This, of course, presents a lesser mens rea requirement than does Interpretation (3), which calls for added knowledge that the object (altered weapon) was indeed a machinegun.250 Accordingly, Cunningham/Levi conclude that "[t]he only way" to make the language of the indictment and the instruction consistent is to construe the indictment as using the single word firearm two

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247 Cunningham & Levi et al., supra note 2, at 1576.
249 Id. at 623 n.5 (Ginsburg, J., concurring).
250 See Cunningham & Levi et al., supra note 2, at 1573.
different ways in the same sentence.\footnote{Id. at 1576 (emphasis added).}

What Cunningham/Levi overlook is that the substantive legal doctrine of \textit{constructive knowledge}—if defined in the strong sense as \textit{deliberate indifference} or \textit{reckless disregard}—achieves this consistency without linguistically mistreating any of the indictment’s language. Proof that a defendant acted with “deliberate indifference” about the consequences of his action suffices to establish “the \textit{mens rea} necessary for criminal liability.”\footnote{Shi v. Cube, No. 7:98–CV–00780, 2000 U.S. Dist. LEXIS 17164, at *14 (W.D. Va. Jan. 7, 2000) (emphasis added) (embracing the subjective \textit{mens rea} standard traditionally associated with criminal liability).} The \textit{deliberate indifference} standard is often taken to be a constructive knowledge doctrine,\footnote{See, e.g., United States v. Cabrera-Diaz, 106 F. Supp.2d 234, 238 (D.P.R. 2000) (characterizing reckless disregard as constructive knowledge satisfying the subjective \textit{mens rea} standard discussed).} although \textit{constructive knowledge} may also imply a lesser level of mental awareness, equivalent to the knowledge that one would acquire in the exercise of reasonable care.\footnote{See Tusa v. Omaha Auto Auction, Inc., 712 F.2d 1248, 1253–54 (8th Cir. 1983) (holding that where one has an affirmative duty and lacks actual knowledge, constructive knowledge will be inferred from reckless disregard).} A showing of reckless disregard, however, “which is the same as ‘deliberate indifference,’ . . . is a proxy for intent.”\footnote{See Hill v. Shobe, 93 F.3d 418, 421 (7th Cir. 1996).}

The notion of constructive knowledge—in any legal sense of the term—is no part of psychology or linguistics. Rather, the principle is embedded in legal doctrines of culpability and responsibility.

We should now see why the district court’s instruction—that “[i]t would be enough to prove [the defendant] knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation”\footnote{Staples v. United States, 511 U.S. 600, 623 n.5 (1994) (Ginsburg, J., concurring) (quoting the trial court’s jury instruction on the issue of the indictment’s inclusion of a mental element).}—may be considered a constructive knowledge charge. The implicit issue for the jury was whether Staples had been deliberately indifferent about whether his rifle had any characteristic, such as the capacity for automatic fire, that would have brought it into the regulatory realm. If so, he could be deemed to have \textit{intended} to possess a firearm within the meaning of the Act.\footnote{See \textit{id.}. Recall that the district court’s instruction indicated that the rationale behind the addition of the word \textit{knowingly} to the indictment was to prevent convictions for the possession of firearms defendants “did not \textit{intend} to possess.” Id. (emphasis added).} But, being constructive, the defendant’s knowledge and
intent would be inferred from his reckless disregard.\textsuperscript{258}

It is therefore reasonable to say that the district court’s jury instruction strove to align with Interpretation (3), in that it called for a finding of criminal knowledge, either actual or constructive (in the strong sense), that the object Staples possessed was a specific type of weapon, namely a machinegun.\textsuperscript{259} If this reading of the court’s instruction is arguable, then in \textit{Plain Meaning and Hard Cases}, Cunningham/Levi are wrong in saying that the only way to reconcile the indictment with the trial court’s jury instruction is by implausibly positing incompatible word usage in the indictment.\textsuperscript{260} The other way to make the indictment consistent with the district court’s instruction is to posit that the latter incorporated the doctrine of constructive knowledge in its strong sense. But, through no fault of their own, linguistics and psychology are blind to this legal doctrine.

Concomitantly, linguistics and psychology are blind to the policy determination that must be made, in deciding the criminal \textit{mens rea} issue, between levels of proof that establish constructive awareness versus actual knowledge. The issue in \textit{Staples} was whether the government had the burden of proving that the defendant actually knew that his rifle was primed to fire automatically.\textsuperscript{261} If the court had determined, as a matter of policy, that rifles were “deleterious devices or products” ... that put their owners on notice that they stand ‘in responsible relation to a public danger,’”\textsuperscript{262} then it would have held that proof of Staples’ actual knowledge that he possessed a gun with automatic fire capabilities was not requisite to conviction under the Act.

Cunningham/Levi purport to eliminate this possible outcome apart from any of the policy considerations and wholly on the basis

\textsuperscript{258} See \textit{id.} at 603–604. Since the district court did not give an explicit constructive knowledge instruction, the inference to the defendant’s intent under the Act would, in effect, be drawn as a matter of law from the jury’s finding that the defendant knew that he had a dangerous device likely to be regulated. By defining which devices fell into this category, the jury was actually left to decide a question of law. See \textit{id.} at 612–13 n.6.

\textsuperscript{259} See Cunningham & Levi et al., \textit{supra} note 2, at 1573.

\textsuperscript{260} See \textit{id.} at 1576 (asserting the implausibility of the word \textit{firearm} having two different meanings in one sentence of the indictment).

\textsuperscript{261} See \textit{Staples}, 511 U.S. at 612. More generally, the issue was whether a criminal statute omitting a \textit{mens rea} requirement should be interpreted to have one. See \textit{id.} at 605–607. This question, while more pressing for the majority and dissenting opinions in \textit{Staples}, is not relevant to the appraisal of \textit{Plain Meaning and Hard Cases}, which focuses on the implications of the use of the phrase \textit{knowingly possessed} in an indictment or jury instruction. \textit{Id.} at 606, 625–26; see also Cunningham & Levi et al., \textit{supra} note 2, at 1577.

\textsuperscript{262} \textit{Staples}, 511 U.S. at 610–11.
of their linguistic appraisal of the phrase *knowingly possessed firearms*. If their assessment is on track, then any similar phrase or element in a prosecution must be construed equivalently, regardless of the policy context. As just stated, however, had the Court viewed the policy factors differently—believing the possession of a semiautomatic AR-15 rifle to create a public welfare circumstance—it would without compunction have construed the indictment's *knowingly possessed* language to allow a conviction with evidence that the defendant had knowledge he possessed a dangerous device and should have been aware of the possibility of regulation.\(^{263}\)

Moreover, jurists recognize that the public welfare doctrine has been used in determining that an individual may "knowingly violate" a criminal statute despite being unaware that he is acting in violation of the law.\(^{264}\) The legal construction of *knowingly* does not mesh with Cunningham/Levi's linguistic exercise because they would say that the statement implausibly uses the single word *statute* with two different meanings in the same sentence. In other words, by Cunningham/Levi's understanding, the statement would treat *statute* as meaning something akin to the defendant's conduct when speaking of what the defendant knew, but as meaning the legislature's proscription when speaking of what he violated.

In this respect, the most significant case that highlights the disconnect between legal reasoning and Cunningham/Levi's linguistics analysis is likely *United States v. International Minerals & Chemical Corp.*\(^{265}\) The defendant in that case shipped "corrosive liquids" interstate and was charged under provisions that regulate such shipments, and that impose criminal penalties upon anyone who "knowingly violates any such regulation."\(^{266}\) The issue before the court was whether knowledge of the regulation was requisite to conviction—a question that Cunningham/Levi would have to answer affirmatively.

The Court, however, resorted to the very sort of interpretation that Cunningham/Levi deemed "implausible"—as a linguistic

\(^{263}\) *Id.* at 634–35 (Stevens, J., dissenting).

\(^{264}\) *Hanousek v. United States*, 528 U.S. 1102, 1104 n.2 (2000) (Thomas, J., dissenting on other grounds) (citing *United States v. Weitzenhoff*, 35 F.3d 1275, 1284–86 (9th Cir. 1993)) (surveying cases in which the public welfare doctrine has been utilized for this purpose and noting that where parties' conduct is closely regulated—such as operating a sewage treatment plant—knowledge of a violation is imputed since a reasonable person should be cognizant of the fact that such conduct is subject to "strict public regulation").

\(^{265}\) 402 U.S. 558 (1971).

\(^{266}\) *Id.* at 559 (quoting 18 U.S.C. § 834 (a), (f) (1960) (repealed 1979)).
matter—in the context of the *Staples* case. More specifically, the Court asserted that it found “no reason why the word ‘regulations’ should not be construed as a shorthand designation for specific acts or omissions which violate the Act.” One of the policy principles guiding the Court’s interpretive exercise was the maxim that ignorance of the law is no defense.

But linguistics and psychology are as blind to this legal principle as to the constructive knowledge doctrine arguably at issue in *Staples*. To be consistent, Cunningham/Levi’s linguistic analysis would have to be uniform as between cases such as *Staples* and *International Minerals*, which present roughly the same issue at the level of linguistic phrasing. Because the legal outcomes in those cases are contrary, owing to the opposing policy considerations, any such linguistic analysis must be problematic. Were Cunningham/Levi to apply their reasoning regarding *Staples* to *International Minerals* in a consistent manner, they would not be able to account for the legal outcome in the latter case. Because the linguistic assessment misses the critical policy dimension of adjudication, even their arriving at a correct outcome in *Staples* must be seen as largely fortuitous.

**B. Granderson**

As shown in Part III, the Court’s task in *Granderson* was to construe the statutory provision prescribing that, if a probationer “possesses illegal drugs, ‘the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.”’ The issue concerned the meaning of the verb phrase *sentence the defendant* and the noun phrase *the original sentence*. Relying on what we have labeled the *Plausibility Principle* (do not construe statutes to reward misconduct), the *Nonspeculation Principle* (do not guess that a statute increases a penalty), the *Consistency Principle* (construe similar words similarly), and the *Rule of Lenity* (resolve statutory ambiguities in the criminal defendant’s favor), the court determined that *the original sentence*

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267 See Cunningham & Levi et al., supra note 2, at 1576 (revealing the inconsistency of an interpretation that assigns one meaning of “firearm” to what the defendant knew and another to what he possessed).


269 *Id.* at 563.

referred to the term of imprisonment the defendant could have received, and sentence the defendant referred to a period of imprisonment at least one-third as long as that original, potential term.\textsuperscript{271}

Because Justice Ginsburg looked favorably on Plain Meaning and Hard Cases,\textsuperscript{272} some of what Cunningham/Levi had to say found expression in the ultimate opinion in Granderson. The Court's dispositive interpretive principles, however, hardly overlapped with the linguists' analysis. One exception is Cunningham/Levi's mention of a linguistic analogue to the Consistency Principle. They say that there was no linguistic justification in the statutory text for the district court's decision that sentenced Granderson to a prison term of one-third of the original probationary period, because "that interpretation selected one interpretation of sentence for the type of punishment (incarceration) and a different interpretation for the term of that punishment (one-third of the probation period)."\textsuperscript{273}

Apart from this overlap, the linguists' analysis does not appreciate the Plausibility or Nonspeculation principles. These concern not simply the text, but have roots in the tradition of public value analysis in statutory interpretation, which seeks to legitimize legal reasoning in the extrajudicial world comprising law's domain. William Eskridge, for instance, identifies the antecedents of public values analysis as (a) Blackstone's Commentaries,\textsuperscript{274} which "presented a multifaceted approach to statutory interpretation that had little to do with legislative intent," (b) the "canons" or "maxims" of statutory interpretation developed by Anglo-American courts as background principles of style and substance, and (c) the civil law tradition, which derives principles and public values from statutes themselves and which seeks interpretive coherence across statutes.\textsuperscript{275}

Eskridge further discusses the "theoretical watershed in statutory interpretation" constituted by Henry Hart and Albert Sacks's Legal Process materials in the 1950s.\textsuperscript{276} These materials revive the three

\textsuperscript{271} See supra notes 169–88 and accompanying text (providing the background of the Granderson case and discussing the Court's utilization of these principles in its analysis and decision).

\textsuperscript{272} See Granderson, 511 U.S. at 53, n.10.

\textsuperscript{273} Cunningham & Levi et al., supra note 2, at 1579.


\textsuperscript{275} See id. (enunciating that despite criticism from legal realists, all three traditions have influenced statutory interpretation in the United States).

\textsuperscript{276} Id. at 1012 (citing Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process:
aforementioned analytical sources and are instructive about public values analysis in general, emphasizing not only statutory text and legislative history, but also “the presumptive ‘reasonableness’ of legislative activity and its statutory products, the importance of legal and societal context in yielding different interpretations over time, and the usefulness of statutory purpose and the canons of construction for interpretation,” along with “the coherence of a present decision with other sources of law (other statutes, common law decisions).”

Even though the Hart/Sacks view of statutory interpretation has been particularly criticized for neglecting the role of competing interest groups, that view indicates the need, for those construing statutes, to appreciate issues of coherence, policy context, and law’s public legitimacy. Such concerns, however, are missing for the most part from Cunningham/Levi’s exercise. The discussion of Jerry Fodor’s work in Part II showed that the linguistic program is concerned with idealized outputs. Linguists bypass law’s synthesis of policy and interpretive factors and aim at directly computing the meaning of the statutory words before them. Cunningham/Levi realize that they are not able to do so, however, with regard to the sentencing statute in Granderson.

For Cunningham/Levi, the linguistic task is to identify the referent for the phrase the original sentence. But upon reflection they conclude that “original sentence has no contextually identifiable referent.” Because there is no discernible prior referent, “the interpretive problem with original sentence is not

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277 Id. at 1012–13.
278 See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 435 (1989) (using Hart and Sacks’ theory to exemplify the problem with an analysis that fails to account for the true nature of legislative processes, particularly objecting to the insufficient attention given to the influence of special interests in determining statutory substance); see also Gary Minda, Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine, 41 Hastings L.J. 905, 941 n.125 (1990) (echoing Sunstein’s objections to the Hart and Sacks theory, attributing its failure to an “overly optimistic conception of the legislative process” and noting the damaging assumption that the influence of special interests could be “mediated by an inherently democratic process”).
279 See supra notes 51–55 and accompanying text (discussing the concept of idealized outputs which are produced solely by the language mechanism and exclude external influences).
280 See Cunningham & Levi et al., supra note 2, at 1578 (debating possible referents for the statutory phrase original sentence).
281 Id. at 1579.
ambiguity as to which prior referent is meant."
Therefore, the interpreter should look at extratextual sources to interpret the provision.

One might suppose at this point that Cunningham/Levi have resolved that linguistics cannot significantly contribute to the construction of the sentencing provision made relevant by Mr. Granderson's mischief. But, as Part II has established, the Chomskyan discipline constructs not only a theory of linguistic outputs, but also of cognitive, hence psychological, mechanisms. Reconstructing legislative history opens a window for psychological commentary.

Delving into the legislative history, Cunningham/Levi suggest that the Sentencing Reform Act of 1984 redefined the traditional meanings of sentence and probation. Prior to the 1984 Act, criminal defendants were "sentenced" to a fine and/or imprisonment, whereas "probation" was deemed to be an alternative to sentencing. The 1984 Act made probation a type of sentence. Perhaps the provision at issue in Granderson, which was added in 1988, has conflated the pre-1984 and post-1984 terminologies. Cunningham/Levi speculate that the provision "might have been drafted with the pre-1984 meanings in mind" and that it "thus might have been framed without an awareness of the new meaning of probation as a type of sentence in the federal scheme."

The italicized phrases in mind and an awareness—emphasized by the author—show that Cunningham/Levi were attempting to draw a psychological inference. This explains their readiness to extend their linguistic analysis beyond the text and into the legislative

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282 Id.
283 See id. (concluding that since there is no contextually identifiable referent, the provision's meaning is not a "matter of ordinary language," and therefore a broader interpretive context comes into play).
286 See United States v. Corpuz, 953 F.2d 526, 528-29 (9th Cir. 1992) (reviewing the historical view of probation in the federal system and comparing it to the contemporary view).
287 See id. at 529.
289 See Cunningham & Levi et al., supra note 2, at 1581.
290 Id. (emphasis added).
history. But they do not acknowledge the psychological pull that is rooted in the study of linguistic reality. Instead, they curiously express that a linguistic interpretation of a statute—though limited to the actual text—may also be well served by a review of the legislative history.291

In any event, we may wonder whether Cunningham/Levi’s legislative historical surmise is supportable on its own terms. As just seen, they explain that the probation revocation provision might have been composed without an awareness of the new federal sentencing framework.292 Yet the provision, once again, prescribes that if a probationer “is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.”293 Clearly, the emphasized segment establishes that the provision’s drafters did consider probation to be “a type of sentence in the federal scheme.”294

Even if Cunningham/Levi have indeed provided a “useful clue for searching legislative history”295 we may wonder whether this is a contribution that linguists are somehow uniquely poised to make. They suggest that it might be when they say that the pre- and post-1984 discourses hint at different “dialect[s]” and that “[i]t is striking that neither the briefs of the parties before the Supreme Court nor any of the five circuit court opinions interpreting this provision reflect awareness of this particular aspect of the provision’s legislative history.”296 Nevertheless, it is difficult to see how Cunningham/Levi’s legislative research and historical insight entail anything more than creative legal thinking.

More importantly, judges amenable to linguists’ input will have to adopt their analyses gingerly. As previously noted, Justice Ginsburg—who authored the majority opinion in Granderson—did look favorably upon Plain Meaning and Hard Cases. In Granderson

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291 See id. at 1581–82 & n.91 (inferring the usefulness of legislative history when interpreting statutes by revealing that the provision amending the Sentencing Reform Act of 1984 was added to the Anti-Drug Abuse Act of 1988 after the House had passed the bill and only one day before the Senate did).
292 See id. at 1581 (attributing the statutory inconsistency to the drafter’s expeditious addition of the amendment and probable oversight of the newer federal sentencing scheme).
294 See Cunningham & Levi et al., supra note 2, at 1581.
295 Id. at 1582. Again, Cunningham/Levi suggest that the atypical use of the verb sentence without a modifier and the unusual presence of the language original sentence indicates that the drafters may have held pre-1984 notions of “probation” and “sentence” in mind. See id. at 1581.
296 Id. at 1581–82.
she cited the article directly, as she did in her concurring opinion in *Staples*. But at first she was circumspect about it. At the beginning of the *Granderson* opinion, Justice Ginsburg acknowledged the possibility that the drafters of the probation revocation provision at issue may have employed the pre-1984 federal sentencing regime. Ginsburg later rejects this suggestion, however, and concludes that “[w]e cannot say with assurance that the proviso’s drafters chose the term ‘original sentence’ with a view toward pre-1984 law.” The better way to resolve the controversy, indicated the court, was by application of the *rule of leniency*, along with the other principles of statutory interpretation on which the court relied.

C. *Sedima, S.P.R.L.*

*Sedima*, the third Supreme Court case discussed in Part III, was the 1985 decision dealing with RICO’s civil treble damages remedy available to “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter.” The particular language at issue was that portion of section 1962 making it illegal to have or acquire any interest in an enterprise affecting interstate commerce if that interest derives from or through a pattern of racketeering activity. The Court split over whether a civil RICO plaintiff could recover under the statute merely by showing a business or property injury resulting from at least two predicate acts of racketeering (the liberal or broad interpretation), or whether the plaintiff, as the district court concluded, was required to establish “something more or different

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298 *Granderson*, 511 U.S. at 42. As support for this contention, Justice Ginsburg further hypothesized that Congress may not have closely scrutinized the amendment’s application under the current federal sentencing scheme. *Id.* at 52.
299 *Id.* at 53.
300 *Id.* at 54. In his concurring opinion, Justice Kennedy suggests that the majority had inappropriately flirted with the Cunningham/Levi analysis. He said that “speculation” about what Congress had “in mind . . . would be quite a novel addition to the traditional rules that govern our interpretation of criminal statutes” and also said that, “to [his] knowledge, none of us has ever relied upon some vague intuition of what Congress ‘might . . . have had in mind.’” *Id.* at 67 (Kennedy, J., concurring).
301 See *supra* notes 189–237 and accompanying text.
than injury that would result from the predicate acts\textsuperscript{305} (the
restrictive or narrow interpretation).

The earlier discussion of \textit{Sedima} demonstrated that the
underlying concern in the majority and dissenting opinions was
whether the statutory language would allow for an interpretation
cohering with the Justices’ beliefs about the policy driving RICO’s
civil liability prescriptions.\textsuperscript{306} Writing for the majority, Justice
White noted that the provision was aimed at giving victims of
organized crime access to a legal remedy\textsuperscript{307} and that Congress
intended RICO to “be liberally construed to effectuate its remedial
purposes.”\textsuperscript{308} Justice Marshall, writing for the dissenters, focused on
policy objections to the majority’s liberal reading. He emphasized
that such a reading was ill-advised, because it expanded federal
oversight of an area of traditional state common law and uprooted
well settled federal remedial provisions.\textsuperscript{309}

It should also be recalled that it was the conflict in appellate
and district court outcomes that formed the predicate for the Court’s
grant of certiorari in \textit{Sedima}.\textsuperscript{310} In this context, it is plausible that
the Justices hearing \textit{Sedima} charitably assumed that reasonable
minds could differ about how to construe RICO’s sections 1964(c)
and 1962—and this is ordinarily the defining feature of an
ambiguous statutory provision.\textsuperscript{311} Bluster in the majority and
dissenting opinions suggesting a lack of ambiguity\textsuperscript{312} are best seen
as rhetorical maneuvers.\textsuperscript{313}

\textsuperscript{306} See \textit{supra} notes 201–209, 224–37 and accompanying text.
}(statement of Rep. Sam Steiger)). In his address, Steiger asserted that the availability of a
private damages remedy would enhance the effectiveness of RICO.
\textsuperscript{310} \textit{See id. at 485–86 nn.5–6} (attributing the Court’s determination to grant Certiorari in
\textit{Sedima} to the abundance of RICO decisions in the lower courts, the variety of the approaches
taken by the courts, and the importance of the issues involved); \textit{see also supra} notes 214–18
and accompanying text.
\textsuperscript{311} \textit{See, e.g., Lockhart v. Cedar Rapids Cnty. School Dist., 577 N.W.2d 845, 847 (Iowa 1998)}
(notting that, as a commonly accepted corollary within the interpretive project, a provision will
be deemed ambiguous when “reasonable minds differ” regarding the plain meaning of the
statute before looking beyond its express terms).
\textsuperscript{312} \textit{See Sedima, S.P.R.L.}, 473 U.S. at 495 n.13, 499, 509–10 (Marshall, J., dissenting)
(demonstrating the rhetorical jousting between the majority and dissenting opinions over the
statute’s “plain meaning”).
\textsuperscript{313} \textit{See supra} notes 219–22, 229–37 and accompanying text (examining the disagreement
between majority and dissent regarding the question of ambiguity as it relates to the
The linguists looking at Sedima elevate this rhetorical aspect of the case into a matter of substantial decision-making importance. Cunningham/Levi refer to "the seemingly embarrassing paradox . . . where all nine Justices agreed that the meaning of a provision was 'plain,' but split five to four over what that provision meant." As our discussion in Part II explained, false or deficient linguistic intuitions should engender a strong pull in the direction of psychological inquiry. Perceiving such a deficiency in the Justices' linguistic intuitions, Cunningham/Levi say that "even the threshold question of whether the statute was ambiguous presented a hard case."

Lawrence Solan, whom Cunningham/Levi review, explains the ambiguity inhering in section 1962. Solan shows that the phrase a pattern of racketeering activity is a complex noun phrase of the form "a noun[-]1 of noun[-]2." The ambiguity is over "which one of the two nouns is the semantic 'head' of the phrase, and which one is the modifier." A "nondistributive" reading of the phrase takes noun-1 to be the head; a "distributive" reading assigns this status to noun-2.

As an example, consider the sentence:

A series of rainstorms damaged the house.

Under a distributive reading, which emphasizes noun-2, here rainstorms, the speaker has conveyed the message that there were a number of rainstorms, each of which contributed to the harm. Under the nondistributive reading, which places a series at the semantic head, the idea is that the series itself, or the cumulative effect, is what did the damage.

So the linguists' point is that the Justices deciding Sedima were not cognizant of the "two-way ambiguity" characteristic of particular noun phrases, and thus, their interpretive, mental processes were not "brought to conscious awareness." According to

statutory language).

314 See Cunningham & Levi et al., supra note 2, at 1564.
315 See supra notes 42–48 and accompanying text (arguing that linguistic intuitions are important evidence useful in constructing linguistic theories and that linguists may prefer an examination of a speaker's intuition to other analyses).
316 See Cunningham & Levi et al., supra note 2, at 1571 (citing SOLAN, supra note 1, at 70–71).
317 Id. at 1583.
318 Id. (citing SOLAN, supra note 1, at 102 n.29); see also Elisabeth Selkirk, Some Remarks on Noun Phrase Structure, in FORMAL SYNTAX 285 (Peter W. Culicover et al., eds., 1977)).
319 Cunningham & Levi et al., supra note 2, at 1583–84.
320 Id. at 1584.
Cunningham/Levi, it follows that, had the jurists been aware of the ambiguity about whether a pattern or racketeering activity was the semantic head of the statutory phrase, "[t]hey might then have relied more explicitly upon interpretive strategies other than appeal to ordinary language to resolve that choice."321

As shown in Part III, however, the Justices deciding Sedima did fairly vigorously rely on interpretive approaches rather than appeal to the textual language. Interestingly, the dissent—which made the stronger plain-meaning claim—also most intensely focused on policy justifications for its narrow interpretation. So it is not evident that the contribution Cunningham/Levi claim linguistics could make to the adjudicatory process in such a case—encouraging broader use of alternative interpretive strategies—would, in the end, make a meaningful difference.

Moreover, unlike their prospective exercises with regard to Staples and Granderson, in which the linguists' comments implicated the drafters' mental states, here they are inquiring into the psychology of the interpreter. Although a legal opinion may reveal a jurist's propositional attitudes more readily than a statute will expose a legislator's mental states, the linguist is likely ill-equipped in either case to account for the specialized factors that condition these respective linguistic outputs. The linguists are summoning their own intuitions, derived from research in mostly—or entirely—nonlegal settings, to the judiciary's legal reasoning processes. Legal reasoning, though, is permeated with policy, advocacy, and performance considerations that may substantially obscure the view into the authorial psychologies.

Apart from this general skepticism about what role linguists may play in a legal case such as Sedima, we should ask some probing questions about their linguistic analysis itself. The most pressing issue is whether Solan and Cunningham/Levi have accurately identified the ambiguity that divided the court.

More specifically, the linguists—all writing well after the Supreme Court issued its decision in Sedima—believed that the case rested on an interpretation of the complex noun phrase a pattern of racketeering activity. According to Solan and Cunningham/Levi, as just seen, the ambiguity that the Justices

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321 Id. at 1584–85.
322 Sedima, S.P.R.L., 473 U.S. at 508–10 (Marshall, J., dissenting). Marshall argued that the majority opinion permits recovery whenever there has been a violation of section 1962, whereas the plain meaning of the statute permits recovery only when the injury occurs "by reason" of a violation of section 1962. Id. (Marshall, J., dissenting).
failed to discern concerns whether noun-1, *pattern*, or noun-2, *racketeering activity*, is the “semantic head” of the phrase.\(^{323}\) For the linguists, then, the majority and dissenting opinions respectively assigned a different interpretation to the same ambiguous phrase “without recognizing what [they] had done.”\(^{324}\) In other words, the majority, by their distributive interpretation, saw *racketeering activity* as the semantic head of the phrase; the dissenters, reading the phrase nondistributively, took *pattern* to fulfill that role. And neither side realized what it was doing.

The linguists’ assessment of the ambiguity dividing the court may apply to the decision in another case, *Bankers Trust Co. v. Rhoades.*\(^{325}\) The Supreme Court in *Sedima* discussed the prior decision in *Bankers Trust*, and noted that the divided Second Circuit had therein “held that [section] 1964(c) allowed recovery only for injuries resulting not from the predicate acts, but from the fact that they were part of a *pattern*.”\(^{326}\) The *Sedima* Court, however, did not take this to be the issue with which it was concerned. The Court did not divide whether RICO civil injuries had to result from predicate acts or from a pattern.\(^{327}\) Most significantly, it is not apparent that the Court split in its assumptions about which portion of the statutory phrase must be emphasized.

In his majority opinion, Justice White acknowledged RICO’s requirement of “harm caused by predicate acts sufficiently related to constitute a pattern.”\(^{328}\) And Justice Marshall, in his dissenting opinion, did not contend that any injury from a pattern of predicate acts would suffice for a civil recovery under the statute; instead, he stressed that the requisite injury must be such that other civil and criminal statutes could not provide an adequate remedy because it was “different in kind” from injury caused by the predicate acts.\(^{329}\)

\(^{323}\) *See supra* notes 317–19 and accompanying text (discussing different meanings one could derive from a distributive, versus a nondistributive reading of a complex noun phrase).

\(^{324}\) *See Cunningham & Levi et al., supra* note 2, at 1584.

\(^{325}\) 741 F.2d 511 (2d Cir. 1984).

\(^{326}\) *See Sedima, S.P.R.L.,* 473 U.S. at 485 n.5 (citing Bankers Trust Co. v. Rhoades, 741 F.2d 511, 517–18 (1984)).

\(^{327}\) *See id.* at 500 (noting *specifically* that its decision does not address the issue of whether defendants’ alleged racketeering acts fell into a pattern). Instead, the Court acknowledged that the split involved the type of defendant against whom RICO could be used and whether financial loss resulting from mail fraud was sufficient to support a cause of action. *Id.*

\(^{328}\) *Id.* at 497 (supporting a “less restrictive” reading of the statute allowing recovery for injuries both directly caused by proscribed activities as well as injuries indirectly resulting from such activity).

\(^{329}\) *Id.* at 511 (Marshall, J., dissenting).
Therefore, the *Sedima* decision does not obviously bear out the linguists' claim that the Justices were unwittingly divided over whether a civil RICO recovery must be predicated upon injury caused by a *pattern* of racketeering activity versus *racketeering activity* itself. The different point of contention was whether the statute contained some "distinct 'racketeering injury' requirement," or merely required injury caused by a *pattern* of racketeering acts.

Justice White stated that the harm caused by the racketeering activity must be "sufficiently related to constitute a pattern" and added that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." There is thus little practical reason to suppose, as did the linguists, that Justice White did not view *pattern* as the semantic head of the statute's complex noun phrase.

Nor is it apparent, notwithstanding the linguists' analysis, that Justice Marshall's interpretation rested merely on a nondistributive reading of a *pattern of racketeering activity*. Justice Marshall stated that, under section 1961, "a pattern' of racketeering activity requires proof of at least two acts of racketeering within 10 years," yet harm resulting from such a pattern is precisely the minimal requisite to recovery that he was arguing against.

What Justice Marshall was arguing for was injury, different in kind, that could be linked directly to the ultimate goal that the predicate acts had been "designed to accomplish." Marshall explained that "[i]n each case, the predicate acts were committed in order to accomplish a certain end," and it was for injury resulting from the attainment of that end—and not incidentally from the pattern of predicate activity itself—that RICO plaintiffs could recover. RICO will not provide compensation, for example, for bodily injury or property damage as these are actionable under existing state common-law. Yet, RICO will allow recovery for the negative economic results of the finally desired monopolization or competitive advantage.

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330 Id. at 495.
331 *Sedima, S.P.R.L.*, 473 U.S. at 497.
332 Id. at 495.
333 Id. at 508 (Marshall, J., dissenting).
334 Id. at 521 (Marshall, J., dissenting).
335 Id. (Marshall, J., dissenting).
336 Id. (Marshall, J., dissenting).
337 Id. at 521–23 (Marshall, J., dissenting) (suggesting that RICO should not be employed to compensate those directly injured by racketeering methods for gaining unfair advantage
It therefore seems plausible that both the majority and dissenting opinions in *Sedima* read the phrase *a pattern of racketeering activity* nondistributively, and thereby deemed *pattern* to be the semantic head of the phrase. More likely still, the competing sides were effectively indifferent—even at the subconscious level—to this linguistic issue, which was simply beside the point. For Marshall, even if the commission of several predicate acts resulted only cumulatively in a destructive fire, and did no harm individually, there could nevertheless be no recovery for the arson damage. For Justice White, no racketeering act that was not part of a pattern, as defined in the statute, could result in compensable harm under RICO.

V. CONCLUSION

This article has not opposed the idea that linguistics or psychology can play a role in the interpretive project, as the new textualists maintain. To the extent that a controversy comes down to an issue of everyday usage, linguistic analysis might enlighten. Justice Scalia’s de-emphasis of nontextual factors makes this seem more likely in some cases. Notably, however, he narrows his inquiry to “clear ordinary meaning” only once he is satisfied that *legal* meaning does not diverge and that *legal* *convention* has not superseded “normal usage.” 338 Even so, the received view constructs a richer conception of legal meaning than Justice Scalia’s interpretation, and courts will have qualms about a minimalist plain-meaning approach in most instances. Inclined toward a robust idea of legal meaning, this article has urged judicial circumspection about linguists’ contributions, which tend not to assess *law’s* semantics with sufficient precision.

In general, Cunningham/Levi’s influential recommendation that linguists be brought into legal cases complements the increasing concern among legal scholars that law lags behind, and fails adequately to comprehend, science and social science. 339 Courts

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338 See Holloway v. United States, 526 U.S. 1, 15–16 (1999) (Scalia, J., dissenting) (arguing that because the word *intent* does not have an accepted legal meaning different from its ordinary meaning, the ordinary meaning should be applied to statutory construction).

339 See, e.g., Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 Yale L.J. 1535, 1677 (1998) (recommending the “two hat” method to ensure that a decision-maker has both legal legitimacy and epistemic competence—the latter providing the essential tools of scientific analysis); Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts*
should be wary, however, about assigning non-legal experts an enhanced role in adjudication. These experts will likely overlook many of the policy and interpretive factors that inform law's public outcomes, and that subtle legal training and experience have taught jurists to synthesize.

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*After Daubert*, 78 MINN. L. REV. 1387, 1439–40 (1994) (proposing various alternatives to achieve optimum usage of science in the courtroom).