WHEN JUDGES USE THE DICTIONARY

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I HAVE A VAGUE MEMORY OF MISSPELLING *view* in elementary school and being told by my teacher to look it up in the dictionary. I couldn't find it. Unsympathetic as she was, the teacher eventually broke down and gave me the spelling. Her more or less religious attitude towards dictionaries was not lost on me, however. To the extent I was able, I regularly and obediently turned to the dictionary, which, often enough, taught me very little apart from how to write a word. I expect that most people had childhood dictionary experiences much like mine.

Linguists and psychologists of language now know enough about the psychology of word knowledge to shed some light on what dictionaries can do and what they cannot do. But our society's reverence for dictionaries is not driven by the latest discoveries in psycholinguistic research. Rather, it is deeply embedded in our culture. Samuel Johnson in his 1755 dictionary defined *lexicographer* as "a writer of dictionaries; a harmless drudge, that busies himself in tracing the original, and detailing the signification of words" (quoted in McAdam and Milne 1963, 233). Yet we commonly ignore the fact that someone sat there and wrote the dictionary which is on our desk, and we speak as though there were only one dictionary, whose lexicographer got all the definitions "right" in some sense that defies analysis.

It should not be surprising, then, to learn that judges often turn to the dictionary to find support for their decisions (see, e.g., Robinson 1982; Bailey 1984). That is, judges actually use the dictionary as an authority for deciding that one party should win instead of another. This sort of reliance on dictionaries has its problems, which have not gone unnoticed. Close to 50 years ago, Judge Learned Hand wrote, in a much-quoted passage:

> But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. [*Cabnell v. Markham*, 148 F. 2d 737, 739 (2nd Cir. 1945)]

An examination of instances in which judges do rely on the dictionary demonstrates the strength of Judge Hand's remark.

THE DATA. This paper is drawn from a larger study in progress of instances in which judges use the dictionary as authority. The data are decisions of the United States Supreme Court for the six-year period 1986–91. My search found references to the dictionary in 90 cases of the 804 that the Supreme Court decided during this period, or in about 11 percent of the cases.[1] Sometimes references to the dictionary were contained in the majority opinion, at other times in concurring or dissenting opinions, and occasionally in more than one opinion. In all, there were 99 opinions referring to the dictionary across the 90 cases. Of course, there were many more opinions than there were cases (2,168 opinions in total). The Supreme Court is rarely unanimous.

The justices regularly identify the dictionaries to which they refer, and they do refer to quite a variety. These can be divided into three groups. First, the justices refer to contemporary American dictionaries, most frequently *Webster's Third New International Dictionary*, a current American dictionary that purports to be unabridged. (For brief discussion of various dictionaries, see Miller 1991.) Second, the justices refer to old dictionaries, in an effort to determine what legislators meant when they used certain words in statutes decades and sometimes centuries ago. Finally, they make use of technical dictionaries. Perhaps not surprisingly, the most frequently cited technical dictionary is *Black's Law Dictionary*. Concerning technical dictionaries, I will say very little except to note that *Black's Law Dictionary* only purports to summarize briefly that which the courts have decided legally significant words to mean. For the most part, however, the members of the Supreme Court are our ultimate lexicographers when it comes to the meanings of legal words.

The justices also varied as to the frequency with which they turned to the dictionary. The leader was Justice Scalia, with 18 references (in 215 published opinions). Justice Brennan was second with 13 (in 213 published opinions). Justice Blackmun referred to the dictionary only four times (in 215 opinions), two of which were critical of his colleagues for overusing the dictionary.

DRUGS AND THE DICTIONARY: AN EXAMPLE

In *Chapman v. United States* (111 S. Ct. 1919 [1991]), the Supreme Court was presented with a statute that imposed a minimum sentence of five years in prison for the distribution of more than one gram of a "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)"; 21 U.S.C. §841(b)(1)(B)(v). Richard Chapman and others had

been convicted of selling blotter paper containing one thousand doses of LSD. The blotter paper with the LSD weighed 5.7 grams. The LSD had been mixed with alcohol and absorbed onto sheets of blotter paper, which then could be cut into squares and sold as individual doses. A dose of LSD weighs practically nothing. Blotter paper is relatively heavy.

Chapman argued that the blotter paper was only the carrier medium for the LSD and should not be added to the weight of the drug for purposes of determining whether the amount sold met the one-gram minimum required for the five-year sentence. Chapman lost. Chief Justice Rehnquist wrote the opinion on behalf of himself and six others. Ultimately, the decision turned on whether blotter paper impregnated with LSD is a mixture. To find out, the Chief Justice turned to the dictionary:

> A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." *Webster's Third International Dictionary* 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 *Oxford English Dictionary* 921 (2d ed. 1989). LSD is applied to blotter paper in a solvent, which is adsorbed into the paper and ultimately evaporates. After the solvent evaporates, the LSD is left behind in a form that can be said to "mix" with the paper. Thus, it retains a separate existence and can be released by dropping the paper into a liquid, or by swallowing the paper itself. The LSD is diffused among the fibers of the paper. [111 S. Ct. at 1926]

The dissent, which Justice Stevens wrote on behalf of himself and Justice Marshall, relied heavily on Judge Posner's dissent in the Court of Appeals. Essentially, the argument was that in enacting the law, Congress really had no idea how LSD is manufactured and marketed, and that the statute should be construed accordingly. For example, it would be surprising if Congress had intended that someone selling a single dose of LSD mixed in a small cup of orange juice should receive a much lighter sentence than an individual selling a single dose that is mixed in a quart of orange juice. The statute was not intended to punish a defendant's thirst. It appears that the statute was modeled after similar statutes dealing with cocaine and heroin, which are commonly mixed with inactive white powders before being sold.[2]

THE DRUG DEALER, THE LEXICOGRAPHER, THE PSYCHOLOGIST, AND THE JUDGE. Intuitively, the dictionary definitions of *mixture* seem sensible, but something feels wrong with their application in this case. I would like to explore these intuitions briefly here, making reference to what we know about word knowledge.

First, words denote concepts, and concepts are fuzzy at the margins. Philosophers and cognitive psychologists have their favorite examples:

When does a hill become a mountain? On a continuum of shapes, when does a cup become a bowl?—and many others. When we ask people to *Come here,* how close do they have to be before they have reached the state of herehood?[3] This is no doubt a very complicated question, which depends on context and on many other factors that are not readily accessible. Compare *Come here* spoken to a friend in Europe to *Come here* spoken to a misbehaving child across the room. In both instances there will be a range within which the hearer can be said to have 'come here', although that range is very different in the two different cases. *Webster's Ninth New Collegiate Dictionary* defines *here* as "in or at this place," which is really of no help in solving the problem of fuzziness at the margin. Nor can it be.

This leads to the second point about our knowledge of words. Not only do concepts become fuzzy at the margins, but the necessary and sufficient conditions for membership in a category denoted by a word are not readily accessible by intuition (see Jackendoff 1983). The best-known example of this phenomenon in the literature is Wittgenstein's discussion of the word *game* (1953, 31–32). If you were to ask me whether tennis is a game, I would confidently answer that it is. But if you were to ask me what a game is, I would have to answer that I am not really able to answer the question intelligently. Neither do I, for that matter, know how to say what makes a fox a fox, a bed a bed, a tree a tree, and so on.

The business of the lexicographer is to try, in a few lines, to do what I just said cannot be done: to describe the necessary and sufficient conditions for membership in a conceptual category based on examples of the word's usage in the past. To the lexicographer, the limitation of space is a very important issue.[4] Inevitably, the lexicographer's success will only be partial, even in the best dictionaries.

The problems of fuzziness at the margins and inaccessibility of the necessary and sufficient conditions to membership in a conceptual class conspire to set limits on what a lexicographer can accomplish. I do not mean by this to imply anything negative at all about lexicographers or their art. Dictionaries, at least nontechnical ones, appear to be directed toward potential users who come across a word whose meaning or spelling they do not know. No one would look up *here* in the dictionary to find out whether a Belgian friend traveling to Philadelphia has honored my request when I asked him from my office in New York to *Come here.*

Returning to the *Chapman* case, the discussion thus far points to a single conclusion: the majority opinion in the Supreme Court has misused the dictionary. There is nothing wrong with the dictionary definition of *mixture,* as far as I can see, so long as we do not pretend that everything that meets the conditions set forth in the definition is a mixture and everything

that does not meet these conditions is not a mixture. Rather, the dictionary entry should be seen as a decent two-line approximation of the word's meaning, which is just what the lexicographer intended to accomplish. It does not capture all that we, as native speakers of English, know about the word.

Calling the blotter paper impregnated with LSD a mixture seems odd for the same reason that it seems odd to call a pancake soaked with syrup *a pancake-syrup mixture*; or to call a wet towel *a water-cotton mixture*; or to call a towel that one has used to dry one's face during a tennis game *a cotton-sweat mixture,* or later, after the sweat has dried, *a cotton-salt mixture.*[5] The last two of these examples I would call *a wet towel* and *a dirty towel,* respectively. In all of these examples, both substances have kept their character in a chemical sense, but one of the substances seems to have kept too much of its character for us to feel natural using the word *mixture.* Again, I doubt that any lexicographer would be offended by any of these observations.

Sorensen (1991) discusses "precisifying definitions"—definitions that are more precise than the term they purport to define. As Sorensen points out, a definition's failure to be just as imprecise as the word being defined constitutes a distortion of the word's meaning. To take Sorensen's example, for ordinary usage of the word *kitten,* 'an immature cat' is a better definition than 'a cat younger than six months' because the latter definition is too precise. Returning to our earlier example, a definition of *here* that tells us exactly where someone is 'here' (say, within three feet of the speaker) would not accurately capture our sense of what the concept 'here' means, including its vagueness. While we can sometimes stipulate a precise definition of a concept, say, for scientific purposes (e.g., "for purposes of this study on cognitive development in kittens, we define a kitten as a cat younger than six months"), the concept loses its added precision as soon as the context of the stipulation is abandoned, as Sorensen further points out. Fodor et al. (1980) and Fodor (1981) make the point somewhat differently, arguing against the definability of concepts generally but recognizing that the existence of fuzzy cases does not itself impede definition as long as both the term and its definition are equally vague.

Throughout most of our daily endeavors, none of these difficulties with definitions matters very much. We are satisfied when a dictionary gives us a good two-line approximation of a word's meaning, and we have no reason to expect any more. The problem becomes more than a philosophical one, however, when courts take advantage of precisifying to convert a borderline, seemingly improper use of a word, into a clear case.

As an analytical matter, the Supreme Court in *Chapman* has erred by taking a concept that is fuzzy at the margins and substituting for it a

definition that is subject to more refined application than the concept itself. Of the cases that I have examined, there are many in which the argument suffers in much this way.[6]

The problem of conceptual fuzziness is especially pronounced when judges attempt to divine what a legislature meant in a very old statute by looking at old dictionaries. Justice Scalia's use of an 1828 dictionary to determine whether the word *department* in the Constitution included the Tax Court more or less acknowledges the problem—while making the argument anyway.[7] The danger of misuse is aggravated by the fact that in these cases our own intuitions about meanings of words cannot be used effectively as a reality check. (For discussion of other devices that judges use to avoid fuzzy concepts see Solan 1993).

Some Better Uses

In other cases, the dictionary is used to give the reader a general sense of the word, which seems to me an appropriate use of the dictionary, whether or not it is necessary. Consider Justice Scalia's dissent in *Moskal v. United States* (111 S. Ct. 461 [1990]). In *Moskal,* the Court interpreted a statute that makes it illegal to

> transport . . . any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited. . . . [18 U.S.C. §2341]

Raymond J. Moskal had been convicted of violating this statute by transporting "washed" automobile titles from Virginia to Pennsylvania. By giving the Virginia authorities misinformation, Moskal and his colleagues had obtained from the Virginia authorities automobile titles that were authentic titles but which contained false information about the mileage. Under the statute, an automobile title counts as a security.

Moskal argued that the titles that he was accused of transporting were not forged, altered, or counterfeited, and that they were not "falsely made" either, since *falsely made* should be read as a synonym for *counterfeit.* The majority of five justices disagreed with the last point in an opinion written by Justice Marshall. The majority held that *falsely made* is most easily read as 'made to be false'.

Justice Scalia's dissent (on behalf of himself and two others) relied on a host of dictionaries, new and old, general and technical. According to the dictionaries, one meaning of *falsely made* is 'forged'. In fact, 'forged' may well have been the prevalent meaning in 1939 when the statute was enacted. Thus, the dissent argued, the statute is at best ambiguous, and the defendant should prevail under the rule of lenity, which requires that

ambiguities be resolved in favor of a defendant under these circumstances. Regardless of how one comes out on the ultimate issue, it seems clear to me that the use of the dictionary was legitimate: to get a quick sense of what a word is used to mean. For this reason, a dictionary can also sometimes be useful in trademark cases, in which the generic use of a word is in issue.

Conclusions

Most frequently courts are concerned with appearing to have based their decisions on some neutral authority. What is more neutral or authoritative than a dictionary? Unfortunately, the question is more than a rhetorical one. Turning to dictionaries may help courts establish a seemingly principled basis for their decisions. However, inappropriate resort to the dictionary does nothing to advance judicial argumentation and in the long run detracts from, rather than promotes, the legitimacy of the courts.

Notes

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1. Actually, there were 804 decisions in which one or more of the justices wrote a signed opinion during the 1985–90 terms. I did not count other, unsigned decisions of the Court in the survey. Since the database search covered the calendar years 1986–91, and the numerical statistics cover the period beginning October 1985 and continuing for six years, the statistics are not exact, but they are close enough for our purposes. In addition, I have counted in the survey instances in which a justice wrote critically of his colleagues for relying too heavily on the dictionary, often quoting Learned Hand.

2. More recently, a panel of the United States Court of Appeals has decided in a 2-1 decision that cocaine mixed with creme liqueur is not a mixture since the cocaine would have to be distilled out of the liquid before it could be distributed; *United States v. Acosta,* 963 F. 2d 551 (2nd Cir. 1992). The court's attempts to distinguish the case from *Chapman* are largely unconvincing, for reasons pointed out in the dissent in *Acosta.* The decision appears to reflect the lower court's discomfort with its obligation to follow *Chapman.*

3. This example was pointed out to me by George Miller.

4. See Landau (1984) for discussion of both practical constraints and substantive issues in the composition of definitions.

5. I owe the *towel* examples to George Miller.

6. For other examples, see *Board of Education of Westside Community Schools v. Mergens,* 110 S. Ct. 2356 (1990), in which the Court (per Justice O'Connor) relied

on the dictionary definition of *curriculum* to decide whether a religious after-school club was a "non-curriculum related student group"; and *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (per Justice Scalia), which used the dictionary to interpret the word *irregularity* on an airline ticket.

7. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2660 (1991), J. Scalia concurring in part and concurring in the judgment.

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RESPONSE. THE TERM *SOCIOLINGUISTICS* BEFORE 1952

Konrad Koerner, in "Toward a History of Modern Sociolinguists" (*American Speech* 66 [1991]: 57–70) asserts, "The term *sociolinguistics*, however, did not make its appearance before 1952 . . . created by Haver C. Currie" (65). Koerner has neglected to consult the *Oxford English Dictionary*, which records earlier usages of *sociolinguistics* by Currie (in 1951), Einar Haugen in 1951, and T. C. Hobson in 1939. The adjective *sociolinguistic* is first attested from Eugene A. Nida in 1949.

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