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The Diseases of Legislative Language

REED DICKERSON*

In this article Professor Dickerson examines some of the most basic problems facing the legislative draftsman in his attempt to obtain clarity in statutes. He discusses the "diseases" of ambiguity, over-vagueness, over-precision, over- and under-generality and obesity, and distinguishes them from useful devices with which they are often confused.

INTRODUCTION

THE IMPORTANCE of clarity to statutes needs little urging. Clarity is important not only to the substance of the legislative message but to its adequacy as a means of transmission. A statute is a communication and thus subject to the principles applicable to communications.

What are the chances of achieving legislative clarity? The inadequacies of language are cause for misgivings, but hardly general despair. It is unfortunate that legal writers tend to express an overly pessimistic view of language in general,[1] even to the point of apparent defeatism toward language as an instrument for controlling human behavior. Some have even come close to saying that words are empty vessels into which the court may pour any appropriate judicial meaning.[2] Whether these writers are talking about language in general or only its trouble areas is not always clear.

The courts' and litigants' normal preoccupation with sick or uncertain language might lead to the belief that all language is as inherently weak and inadequate as the particular fragments of statutory language that are scrutinized in legal opinions. While even momentary reflection should dispel such a notion, the pre-

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[1] *E.g.*, "an inexact, clumsy tool," Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Va. L. Rev. 23 (1956).

[2] "Words in legal documents . . . mean, in the first instance, what the person to whom they are addressed makes them mean." Curtis, *It's Your Law* 65 (1954). "[A]fter all, it is only words that the legislature utters; it is for the courts to say what those words mean . . . . [A]ll the Law is judge-made law. . . . The courts put life into the dead words of the statute." Gray, *The Nature and Sources of Law* 124–125 (2d ed. 1921). Who puts life into the dead words of the court?

occupation has fostered an unwholesome depreciation of what language can be made to accomplish.

The professional legislative draftsman knows better. Despite what the courts have done with and to the language of statutes, he knows that it is worth his and the legislature's while to take every reasonable step to make the legislative message clear. At the same time, the job of writing a clear statute remains formidable. For the most part this is due to several important, and largely curable, diseases of language.

The Major Diseases of Language

A. Ambiguity.

Perhaps the most serious disease of language is ambiguity in the traditional sense of equivocation. Language is equivocal when it has "different significations equally appropriate" or is "capable of double interpretation," [3] that is, has two or more competing thrusts. A good example is the word "residence," which unless particular context resolves the doubt can refer equally to the place where a person has his abode for an extended period, or to the place that the law considers to be his permanent home, whether or not it is his place of abode.

To avoid the so-called "one word one meaning" fallacy, it is commonly assumed that all words are ambiguous in the equivocation sense because almost every word is used in various senses and thus has more than one meaning.[4] Does the existence of multiple dictionary meanings make a word equivocal and therefore ambiguous? The answer lies in the difference between an ambiguous word and a group of homonyms.

Groups of homonyms are easily confused with ambiguous words, because both have multiple thrusts of meaning. But the two are not the same.[5] On the one hand, the intended sense of a word designating a bundle of homonyms is almost inevitably revealed in use, whatever the peculiarities of context. The homonym's capacity for sense sifting is built in and automatic. Examples of these multi-purpose words abound: "If the bear escapes, the

[3] III *Oxford English Dictionary* E263 (1933).

[4] *E.g.*, Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259, 1263 (1947); Waismann, "Language Strata," *Essays on Logic and Language* 2d Series, 11 (Flew ed. 1953).

[5] On this difference, see Stebbing, *A Modern Introduction to Logic* 21 (6th ed. 1948); Dickerson, *Legislative Drafting* 62 n.3 (1954).

owner shall bear the cost." "If he can, the buyer shall return the empty can." This kind of multiplicity of meanings, often considered a defect of language, may actually be a benefit. At least, it makes possible an economy of symbols.

With the ambiguous word, on the other hand, the uncertainties of alternative reference are not resolved by mere use in context. In the statement, "His rights depend on his residence," it is not clear whether they depend on place of abode or on legal home. That, clothed in its broadest context, the uncertainty may in fact be resolved (as where the word "residence" appears in a divorce statute in which for jurisdictional reasons it seems probable that the legislature intended to refer to legal home) does not turn an otherwise ambiguous word into an innocuous bundle of homonyms. Intermediate are families of use patterns that, while related, are individually identifiable.

Whereas homonyms present no significant danger, the ambiguous word carries the threat, in specific use, of competitive thrusts of meaning that are almost never desirable or justifiable. Because of its potential for deception or confusion, the draftsman should not use an ambiguous word in a context that does not clearly resolve the ambiguity. Indeed, he should avoid the ambiguous word (e.g., "residence") whenever his intended meaning (e.g., legal home) may be adequately expressed by an unambiguous word (e.g., "domicile"). References to the "purposive use of ambiguity," sometimes found in legal literature, are usually directed to the purposive uses of vagueness or generality,[6] discussed below.

Because the line between homonyms and ambiguity depends on their respective potentials for deception and confusion in use, differences in degree sometimes make it hard to tell on which side of the line a particular word falls. But mere naming is not the important thing. What is important is that the draftsman determine whether, in the particular context, there is likely to be a significant uncertainty of reference. If there is, he should resolve it by using another word or by taking the precaution of adjusting the context or adding explanatory language.

The ambiguities discussed so far are called "semantic ambiguities." [7] Their uncertainties of meaning, not inevitably resolved by context, are traceable to the multiplicities of dictionary meanings,

[6] *E.g.*, Miller, *supra* note 1, at 39.

[7] On the detection and resolution of semantic ambiguities, see MacKaye, *The Logic of Language*, ch. 5 (1939).

which exist independently of context. That their evils are felt, nevertheless, only in specific context makes it desirable to distinguish them from a second kind of ambiguity.

By far the most prevalent kind of ambiguity is syntactic ambiguity. Syntactic ambiguities are uncertainties of modification or reference within the particular statute.[8] Simple examples include squinting modifiers ("The trustee shall require him promptly to repay the loan") [9] and modifiers preceding or following a series ("charitable corporations or institutions performing educational functions").[10] These are usually ambiguities in the original etymological sense of alternatives limited to two.

A third, and likewise prevalent, kind of ambiguity is contextual ambiguity. Even when the words and syntax of a statute are unequivocal, it may still be uncertain which of two or more alternatives was intended. An internal contextual ambiguity may result, for example, from an internal inconsistency: when one provision plainly contradicts another, which is intended to prevail? Contextual ambiguities may also be external. Thus, a statute may bear a similarly ambiguous relationship to another statute with which it is inconsistent.

Perhaps the most troublesome contextual ambiguity, and one of the most frequent, is the uncertainty whether a particular implication arises. This is often true of "negative" or "reverse" implications,[11] covered by the maxim *expressio unius est exclusio alterius.* Sometimes the maxim applies and sometimes it does not, and whether it does or does not depends largely on context. Unfortunately, context tends in its particulars to be unique, and therefore does not always supply a clear answer. Even so, a person who has

[8] On the detection and resolution of syntactic ambiguities, see Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents,* 66 Yale L.J. 833 (1957); *Interpretation of California Pimping Statute,* 60S M.U.L.L. 114 (1960); Montrose, *Mock Turtle: A Problem in Adjectival Ambiguity,* 59D M.U.L.L. 28 (1959). "Circuit and isomer diagrams may make explicit the ambiguity involved, but they do not assist in the resolution of the ambiguity . . . . Allen considers that the arrow diagram is a procedure 'for the systematic detection of such syntactic ambiguity' . . . . It is submitted, however, that the construction of a diagram is possible only after the ambiguity has been detected. It is of course true, as Allen has pointed out, that the attempt to construct a diagram helps in the discovery of an ambiguity." Montrose, *Syntactic (Formerly Amphibolous) Ambiguity,* 62J M.U.L.L. 65, 69, 70 n.R3 (1962).

[9] Does "promptly" modify "require" or "repay"?

[10] Does "charitable" modify "institutions"? (Or, does "performing educational functions" modify "corporations"?).

[11] This is also called "coimplication." Allen, *supra* note 8, at 840.

watched the currents and eddies of usage develops an eye for these things. The ascertainment of implied meaning, like that of express meaning, is largely the recognition of familiar language patterns and use situations.

For semantic and syntactic ambiguities, it is important to remember that their characterization as such normally depends on their demonstrated potentiality for giving trouble in particular uses rather than on their producing an actual ambiguity in a particular instance. As with some unesteemed kinds of women, classification is by established reputation rather than by specific performance. Thus, the word "residence," taken in isolation, is properly classed as "ambiguous," even though in a particular context the notion of domicile clearly emerges. Similarly, a squinting modifier may be syntactically ambiguous in the isolation of a particular phrase or sentence, but unambiguous in its broadest context. Because the typical reader usually sees the details of a statute before he feels its total impact, what first appears to be an ambiguity may disappear on a more careful, comprehensive reading. If so, the ambiguity is apparent rather than actual. If not, the ambiguity is actual and can be resolved only by judicial fiat; that is, by an act of judicial law making.

The difference between apparent ambiguity and actual ambiguity is important. The draftsman's highest responsibility is to see that the final text, when read in its proper context,[12] contains no unresolved ambiguity. It is also highly desirable, though not so critical, that he see that the effectiveness of the statute is not impaired by unnecessary uncertainties of reference that, although resolvable, risk misreading at the hands of unperceptive courts or, at best, require time and effort to resolve. It is also desirable that he avoid the needless use of terms and configurations of syntax that, whatever their immediate impact, are known to carry the general risk of real or apparent ambiguity.

Fortunately, once an actual, apparent, or potential ambiguity has been recognized, it can almost always be avoided or minimized. Beyond human fallibility, there is no reason why a legal instrument need be ambiguous. Although ambiguity is ipso facto bad, it is also avoidable.

[12] In view of the common practice of relying on even the shabbiest aspects of internal legislative history to condition or supplement express statutory meaning, it should be emphasized that under general communication principles, context properly includes only those aspects of total environment that are available to both legislature and legislative audience.

B. Over-vagueness and over-precision.

It is unfortunate that many lawyers persist in using the word "ambiguity" to include vagueness.[13] To subsume both concepts under the same name tends to imply that there is no difference between them or that their differences are legally unimportant. Ambiguity is a disease of language, whereas vagueness, which is sometimes a disease, is often a positive benefit.[14] With at least this significant difference between the two concepts, it is helpful to refer to them by different names.

Whereas "ambiguity" in its classical sense refers to equivocation, "vagueness" refers to the degree to which, independently of equivocation, language is uncertain in its respective applications to a number of particulars.[15] Whereas the uncertainty of ambiguity is central, with an "either-or" challenge, the uncertainty of vagueness lies in marginal questions of degree. This uncertainty is said to result from the "open texture of concepts." [16]

Language can be ambiguous without being vague. If in a mortgage statute, for example, it is not clear whether the word "he" in a particular provision refers to the mortgagor or the mortgagee, the reference is ambiguous without being in the slightest degree vague or imprecise. Conversely, language can be vague without being ambiguous. An example is the word "red."

Most words that denote classes or categories (these words include most of the words of which statutes are composed) have elements of vagueness. Terms such as "near" and "intentional" have wide margins of uncertainty, whereas terms such as "male" and "natural child" have narrow ones. A few terms of general reference, such as "the first day of the calendar month," have no significant margins of uncertainty. Most non-vague terms, on the other hand, are terms of unique reference, such as "the current President of the United States."

As with ambiguity, vagueness may be semantic in that it attaches by uncertain usage to particular words and phrases, as in the examples just given, or it may be contextual. Contextual vague-

[13] *E.g.*, Jones, *Extrinsic Aids in the Federal Courts*, 25 Iowa L. Rev. 737, 739 (1940).

[14] Curtis, *op. cit. supra* note 2, at 59–67; Dickerson, *Some Jurisprudential Implications of Electronic Data Processing*, 28 Law & Contemp. Prob. 53, 62 (1963).

[15] For the interesting development of a "vagueness profile," see Black, *Language and Philosophy* 25–58 (1949).

[16] Waismann, "Verifiability," *Essays on Logic and Language* 117, 120 (Flew ed. 1951).

ness, which likewise is either internal or external, arises, for example, where one relevant provision prevails generally over another but the extent of prevalence remains uncertain. Similarly, where it is clear from context that an express grant of authority is intended to be exclusive and thus to carry a negative implication, it is likely to remain uncertain how far the implied withholding of authority to act extends in the broad reaches beyond the express coverage of the statute.

Unlike ambiguity, vagueness is often desirable.[17] How desirable it may be in a particular instance depends on whether and how far the legislative client believes it desirable to leave the resolution of uncertainties to those who will administer and enforce the statute. (This is apparently what the advocates of "purposive ambiguity" have been trying, inartistically, to say.) [18] Fortunately, through a careful choice of terms and definitions and a partial control of context, the legislative draftsman has wide control over the areas and degrees of vagueness. Even though he may be unable to avoid it altogether, he can usually reduce it to the point where the residual uncertainties are no longer significant for the legislative client's purpose. Ideally, the legislative draftsman should try to make the statute no more nor less vague than is indicated by his client's desire to leave the resolution of uncertainties of meaning to the discretion of those who will administer or officially interpret the statute.

Leaving more uncertainties (and the discretion to resolve them) than the client wishes to entrust to the persons who will administer or officially interpret the statute — that is, creating more vagueness than the substantive policies of the legislature call for — is the language disease of over-vagueness. And what about a statute that is *less* vague than those policies call for? Here we have the disease of under-vagueness, more conventionally known as "over-precision."

Although the competent legislative draftsman almost always tries to achieve the greatest possible clarity, this is not the same as saying that he almost always tries to achieve the greatest possible precision. The optimum clarity for the legislative draftsman is language that achieves a degree of precision commensurate with the definiteness of the legislature's objectives.[19]

[17] Curtis, *op. cit. supra* note 2, at 59–67; Dickerson, *supra* note 14.

[18] *E.g.*, Miller, *supra* note 1, at 39.

[19] "[H]is words should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable. . . . A lawyer's words should be no more precise

Over-precision and over-particularity not only needlessly circumscribe the actions of those who are affected by the statute but make it harder to read, understand, and administer. The draftsman not only should avoid introducing unnecessary complexities of his own, but should weigh the appropriateness of taking up with his legislative client the substantive policy question whether the legislature will best serve its objectives by pressing matters of apparently unnecessary detail. Over-precision tends especially to afflict old statutes that have been amended many times.

C. Over-generality and under-generality.

A third concept, often confused with vagueness and sometimes even with ambiguity, is that of generality. A term is "general" when it is not limited to a unique referent and thus can denote more than one. It would be hard to imagine a statute that did not contain at least one general term.

The confusion of generality with ambiguity[20] is most likely to occur with respect to heterogeneous classes that include different referents that it is often useful to distinguish. For example, the general term "grandmother" is not ambiguous merely because it includes a paternal grandmother as well as a maternal one. Similarly for the general term "brother-in-law," which includes both a wife's or husband's brother and a sister's husband. The difference between such hetero-generality and ambiguity is that the former permits simultaneous reference, whereas the latter permits only alternative reference. Which is present usually depends on the context in which the term is used. In the sentence, "A grandmother sometimes has heavy responsibilities," the word "grandmother" is general. In the sentence, "My grandmother sometimes has heavy responsibilities," it may well be ambiguous, if both grandmothers are living.

Generality, like vagueness, is not necessarily a disease of language. It is an indispensable tool of communication. The diseases, rather, are over-generality and under-generality. The classes denoted in a statute should be neither broader nor narrower than those appropriate to carrying out the legislature's objectives. Thus,

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than his client's control of the future is both practicable and desirable." Curtis, *op. cit. supra* note 2, at 64.

[20] "If therefore a group of events is described in a statute, there must be at least two which will fit that description, and since events are unique, any description of a group is almost by definition ambiguous." Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 868 (1930).

unless context reaches the intended result, the legislative draftsman should be careful not to say "crime" when he means felony. And conversely.

Generality is more easily confused with vagueness than with ambiguity.[21] That most general terms are also vague in their marginal applications makes it easy to overlook that the leeway permitted by vagueness is not the same as the leeway permitted by generality. The word "many," for example, is both vague and general. So also the word "automobile." The generality of the latter is exemplified by its capacity for simultaneously covering both Fords and Chevrolets without a tinge of uncertainty. Its vagueness is exemplified by the uncertainty whether it covers three-wheeled Messerschmitts, which bear a strong resemblance also to motorcycles.

The most important difference between ambiguous or vague language and general language is that ambiguity and vagueness constitute uncertainties of meaning, whereas mere generality does not. As a means of granting leeway to those who will administer or officially interpret the statute, it is preferable (where there is a choice) for the draftsman to rely on the generality of language rather than its vagueness, simply because, other factors remaining neutral, certainty is normally preferable to uncertainty. Vagueness, on the other hand, is a proper (though second-choice) vehicle for granting leeway where the legislative client's uncertainty as to specific results is matched by the marginal uncertainty in the language and context of the statute.

Although the legislative draftsman cannot eliminate vagueness entirely, there is no inherent reason why he cannot find in the resources of current language a degree of generality substantially coextensive with the sweep of substantive policy that the statute is intended to express.

D. Obesity.

Obesity, another major disease of language in statutes, is not a matter of size but of fat. It consists of prolixity, circumlocution, avoidable redundancy,[22] and other unnecessary language. Obesity

[21] "Russell's definition of vagueness . . . as constituted by a one-many relation between symbolizing systems is held to confuse vagueness with generality . . . . The finite area of the field of application is a sign of its *generality*, while its vagueness is indicated by the finite area and lack of specification of its boundary." Black, *op. cit. supra* note 15, at 29, 31.

[22] Some redundancy is unavoidable, because it is built into the language. See Cherry, *On Human Communication* 115, 185 (1957).

is a disease because it impedes rather than facilitates understanding. As Johnson has said of wills, "Prolixity is much like obesity: in order to achieve a cure, each mouthful must be watched." [23]

No word or phrase should be used in a statute unless there is good reason for including it. If none appears, it should be eliminated. Every word should pay its own way.

How Full the Cure?

It is sometimes said that every statute should be drafted so that no one reading it in bad faith could possibly misunderstand it. This made good sense so long as courts were generally antagonistic or unfriendly to draftsmen. However, as Conard has pointed out,[24] the climate in which statutes are judicially examined has greatly changed. Today, it may be assumed that courts make an honest, generally unprejudiced attempt to extract the meaning of a statute as it would be read by a typical member of the legislative audience to which it is addressed. This means that the draftsman's main problem is to say what he means according to the standards of communication prevalent in the relevant speech community.

This means also that a legislative draftsman need not go to extremes to reduce the risk that his statute will be misread. He is entitled to rely on the normal ways of reading language, even in the face of minority, competing usages. The law now accepts, for the most part, the normal presupposition of communication that language has been used in its usual sense. This presupposition is generally valid, in and out of the law, because usage is what makes language.

If there is an evenly poised doubt whether the language will be read one way or another, the legislative draftsman should be sure that he tips the scales toward the meaning that he intends to convey. If the doubt is unevenly poised and the draftsman considers that there is a significant possibility that his language will be misread by the typical reader, he should try to remove the uncertainty or reduce it to relative insignificance. In such matters there are few rules of thumb. There is no substitute for the judgment of an experienced draftsman sensitive to the nuances of text and context. In any event, an editorial point of view is essential. The draftsman must have a feeling for how specific language hits the eye of a reader who has no access to the subjective intent of the

[23] Johnson, *A Draftsman's Handbook for Wills and Trust Agreements* 9 (1961).
[24] Conard, *New Ways to Write Laws*, 56 Yale L.J. 458, 468 (1947).

draftsman except through the statute and its shared environment.

It is sometimes said that a legislative draftsman should leave nothing to implication. Nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express (dictionary) meaning. The draftsman is entitled, therefore, to rely on any normal implication that attaches to the features of the legislative message that he has made express. The only reservation here is that implications, like express language, should be made as clear as reasonably possible without prolixity. Implications can be ambiguous or vague. In general, they are subject to the same diseases, and respond to most of the same cures, as express language.

Although for the most part the legislative draftsman can safely rely on the same probabilities of meaning as the writer of non-legal documents, areas remain where the courts read statutes with an unfriendly bias. An example is the criminal statute, which courts are said to interpret "strictly." Although this kind of law making may be a justifiable exercise of the judicial power, it can hardly be classed as legislative communication. Similarly for other instances of "strict construction." The draftsman should know when he is dealing with such an area so that he may know when to take the added precautions of expressness that those areas require.

The legislative draftsman does not seek absolute clarity. He seeks the greatest practicable degree of clarity, not involving an inordinate expenditure of words, that gets the legislative message across to the typical member of the legislative audience and to the skeptical reader in those situations in which courts want to be doubly sure that a probable result of some severity was actually intended. If he can do this, the draftsman has successfully overcome the diseases and limitations of legislative language. In most cases, it is not only possible but practicable.