Statutory Interpretation: The Uses and Anatomy of Context

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Statutory Interpretation: The Uses and Anatomy of Context

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Every communication that is generated by a written instrument consists of two elements which must be considered in arriving at the meaning of the communication. Those elements are: (1) the written vehicle itself, and (2) its surrounding context. The surrounding context which thus completes the communication consists only of those underlying cultural aspects which, when considered in relation to the written vehicle, are: (1) relevant to the written vehicle, (2) reliable, (3) shared by the author and the audience, and (4) relied on by both author and audience to complete the communication. The author suggests that those cultural elements which at first appear to be part of the context of a statute, but which do not meet the listed criteria, are not properly part of the context to which a court may look in its cognitive function of interpreting statutes.

I. INTRODUCTION

In the communication of meaning there are two main elements: (1) the vehicle of communication specially created and controlled by its author; and (2) the surrounding context within which that vehicle operates. No communication is complete without both.

Although the two elements are interdependent, an understanding of the distinction between them is important. In the search for the meaning of a particular communication, the vehicle occupies a central position in the field of relevant considerations and is thus inherently preeminent over the peripheral context. The functional difference is perhaps best described in terms of Polanyi's dis-
tinction, made in a different connection, between the area of "focal awareness" and the area of "subsidiary awareness." The simplest analog is our field of vision, where, despite the absence of a discernible line of demarcation, we make a crude distinction between central vision and peripheral vision. Objects seen only with the former lose much of their significance or meaning without the contextual cues provided by the latter. An analog with a sharper line of distinction would be the engagement ring — a precious stone enhanced by its metal setting.

Whether the line between language vehicle and surrounding context is easy or hard to draw, the distinction is significant, especially in statutory interpretation. Apart from the inherent preeminence of the focal over the peripheral, the standard criteria for interpreting statutes imply a vital distinction between what is enacted and what is not.

In the interpretation of a written document, the document itself plays the key role in directing, orienting, and organizing the total message, including the relevant elements of surrounding context. Therefore, the first step in interpretation is to gather all the related utterances by which the author has transmitted the particular message. Before we ask, "What does this document mean?", we must ask, "What documents are we interpreting?" In some instances, the legislative message is a part of a statute. In others, it is an entire statute, including its amendments. In still others, it is a group of statutes or of parts of statutes.

When there are two or more documents under consideration, it is significant whether those documents were intended to complement each other, and thus to constitute an integrated whole, or were uttered independently. In the latter instance, the document to be in-

or reference behind the language of a statute must be based on a painstaking endeavor to reconstruct the setting or context in which the statutory words were employed." Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 WASH. U.L.Q. 2, 3 (1939) (footnote omitted). Meaning is conveyed "by the aggregate of our symbols interpreted in the surroundings of their use." Horack, The Disintegration of Statutory Construction, 24 IND. L.J. 335, 338 (1949). "Any verbal declaration, oral or written, must be interpreted against the cultural background in which it is made. . . . This background is implied in all uses of language." B. SHARTEL, supra note 1, at 330.


4 If communication "is to be achieved at all (and the achievement is always imperfect at best) the common words must be chosen and contextualized with discriminating suitability. Much of the context is constructed in the act and by the manner of saying forth; it is not all previously given." P. WHEELWRIGHT, METAPHOR AND REALITY 170 (1962).
interpreted is, of course, the most recent relevant one. The earlier documents are, at best, merely parts of its context.

II. SURROUNDING CONTEXT

A. The Backdrop of Culture

What is the significance of the context in which a message is read? It is highly improbable that any document, considered entirely apart from the culture that it presupposes, can convey meaning, except in another culture that shares some of the same cultural elements. Indeed, to suppose an effective communication entirely apart from its cultural environment would be almost a self-contradiction. Obviously, any verbal communication must be expressed in the language peculiar to the culture in which the communication takes place. The essence of a language is to reflect, express, and perhaps even affect the conceptual matrix of established ideas and values that identifies the culture to which the language belongs.


6 "[T]he basic premise of the philosophy of language is that there is a strong relation between the form and content of language and the form and content of conceptualization." J. Katz, THE PHILOSOPHY OF LANGUAGE 4 (1966). Various commentators have discussed this point. Sapir takes the position that:

The world of our experiences must be enormously simplified and generalized before it is possible to make a symbolic inventory of all our experiences of things and relations; and this inventory is imperative before we can convey ideas. The elements of language, the symbols that ticket off experience, must therefore be associated with whole groups, delimited classes, of experience rather than with the single experiences themselves. E. Sapir, LANGUAGE 11 (1921).

Whorf complements this position, observing that: "We cut nature up, organize it into concepts, and ascribe significance as we do, largely because we are parties to an agreement to organize it in this way — an agreement that holds throughout our speech community and is codified in the patterns of our language." Whorf, Science and Linguistics, 42 THE TECHNOLOGY REV. 231 (1940). "Ordinarily, language is the chief evidence for the existence and character of thought... In the category which we have generically referred to as thought, perception must be included, as well as what may be called the conceptual organization of experience." P. Henle, LANGUAGE, THOUGHT, AND CULTURE 2, 3 (1958) (emphasis added). "Culture... is both a condition and a product of language." J. Dewey, LOGIC THE THEORY OF INQUIRY 56 (1938). "The world can be structured in many ways, and the language we learn as children directs the formation of our particular structure. Language is not a cloak following the contours of thought. Languages are molds into which infant minds are poured." Brown, Language and Categories, in J. Bruner, J. Goodnow & G. Austin, A STUDY OF THINKING 304 (1956) [hereinafter cited as Bruner]. "[T]he Hopi language and culture conceals a METAPHYSICS..." B. Whorf, LANGUAGE, THOUGHT, AND REALITY 58 (1956). "We dissect nature along the lines laid down by our native languages." Id. at 213. The Whorfian hypothesis, that language strongly influences the culture in which it operates, is now undergoing critical review. See 1 S. Hook, LANGUAGE AND PHILOSOPHY (1969). But, if or however they interact, there is no dispute that a language and its related culture are tightly interlocked. See also S. Ullmann, LANGUAGE AND STYLE 214-15 (1964). On class formation and the philosophical implications of nominalism...
For this reason, language has been called a "conceptual map of human experience." 7 As is characteristic of any map, it has little or no significance apart from the reality that it mirrors; and messages expressed in a particular language will have no significance apart from what that language mirrors.

The underlying cultural elements that provide the materials of context include: (1) the pervasive matrix or grid of concepts presupposed by the language of that culture; 8 and (2) the coordinate fund of habits, knowledge, values, and purposes that are shared by the great bulk of the speech community of which both author and audience are members.

The first of these two aspects of culture gives language its primary referents or meanings. 9 Besides providing the substance of dictionary meanings, it provides the meanings of those particular word combinations whose incidence has been high enough to create identifiable habits of psychological response. For the users of the particular language, this response to primary meanings is automatic and immediate, 10 without necessarily being behavioristic in the Pavlovian sense.

The primary or potential meanings of all utterances are inextricably woven into the second cultural aspect — the general fabric of basic knowledge and assumptions, express or tacit, that are shared by the users of the language. These cultural elements condition and color the primary and potential word-meanings furnished by the first cultural aspect. 11 This is perhaps the most important function of context in the dynamics of communication.

in this area, see 1. E. CASSIRER, THE PHILOSOPHY OF SYMBOLIC FORMS 278-302 (1953); BRUNER, id. at 1-24; W. QUINE, WORD AND OBJECT 233-76 (1960).

7 E. NIDA, supra note 2, at 80.
8 Id. at 70-71.
9 Id. at 58.
10 C. CHERRY, supra note 2, at 12.
11 "'[T]he 'larger context' — the whole discourse or the whole experience of the speaker or the whole language — cumulatively colors each word as it occurs against one background after another." D. BOLINGER, ASPECTS OF LANGUAGE 229 (1968). Furthermore, one author has observed that: "'[M]eaning' will depend upon the listener, upon the speaker, upon their entire experience of the language, upon their knowledge of one another, and upon the whole situation." C. CHERRY, supra note 2, at 10. Also:

Words are partly known by their backgrounds, their pasts, like men; and like men they do not have their full significance when standing alone but are known by the company they keep. A word is essentially contained in a context and the full effect of a word is felt only when it appears in context. Id. at 72.

See also G. STERN, MEANING AND CHANGE OF MEANING 144 (1931), where the author has stated that: "[C]ontext 'prepares' the correct interpretation of the words by indicating at least the direction or sphere in which the topic is to be sought, and in many
The following example will help identify the two aspects at work. If Congress enacts an income tax statute requiring the taxpayer to compute his tax according to a specified formula, the psychological response habits that give meaning and significance to individual terms such as "compute," or that identify the relevant syntactical elements, are derived from the first cultural aspect — the matrix of concepts. On the other hand, the generally accepted assumption (usually omitted from statutes) that fractions of a half-cent or more are to be rounded off to the next higher cent, exemplifies the second cultural aspect — the fund of commonly shared assumptions and knowledge. As part of the relevant surrounding context, it conditions the specified formula for computing the tax: unless a different rule is expressed in the statute, the normal taxpayer will assume that the statutory language intends fractional amounts encountered in the computation of his tax to be so treated. Here, the elements of surrounding context condition the primary meanings otherwise provided by the cultural matrix of concepts.

B. The General Nature and Workings of Context

Although the word "context" is sometimes used by lawyers to denote the cultural environment taken in its entirety, it is more properly used either (1) in the narrower sense of the surrounding coordinate fund of relevant assumptions taken into account by the language vehicle, or (2) in the still narrower sense of the internal syntactical structure of the message. It is in these two senses that the word "context" will be used in this discussion. Environment in its cases it indicates the topic much more precisely: we know what the other man is talking about."

12 A more significant, though less obvious, example is found in a case like Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), where under one approach the interpretative issue is whether a statute that permits beneficiaries to enforce wills according to their terms impliedly excludes those who murder their testators, the implication being based on the general legal assumption that wrongdoers are disqualified from benefiting from their wrongs.

13 "Communication can take place because a speaker encodes a message using the same linguistic rules that his bearer uses to decode it." J. KATZ, supra note 6, at 102.

The speaker must know the limits within which he may assume a correspondence of imagery. When the context of the item under discussion is in the physical view of both, or is shared because of similarity of past experiences, or is implicitly present by virtue of a history of former interaction, the problem of context is largely solved. But when the context is neither so provided nor offered by the speaker, the listener is confronted with knotty problems of interpretation. Schatzman & Strauss, Social Class and Modes of Communication, in COMMUNICATION AND CULTURE 444-45 (A. Smith ed. 1966).
total aspect is simply the cultural fund out of which specific context in each particular case is drawn.

From what has been said, it is not enough that author and audience share merely the document being interpreted. Author communicates to audience only so far as they also share the same general cultural environment and, within that environment, the same relevant habits, knowledge, values, and purposes. In the interpretation of the document, it must be assumed that the author has taken this necessary presupposition of communication into account. Actual meaning, therefore, is relative to particular presuppositions relating to both document and context. If we are interested in communication, we must not ask, "What does this particular document, taken by itself, mean?" We must ask, "What does this document mean in its proper context?"

The importance of context in the interpretation of statutes has long been recognized by the courts. The argot of the judiciary is laced with key phrases that reflect the effect of context on meaning. The canons reddendo singula singulis, ejusdem generis, and noscitur a sociis, for example, related to the meanings of words and phrases in the internal context of a sentence, paragraph, or section. The "whole-document rule" relates to the meaning of particular segments in the context of the rest of the statute. In pari materia relates, among other things, to the meaning of particular statutes in the context of other statutes. The rule that permits examination of legislative committee reports relates to the examination of segments in the supposed context of the legislative history. The principle that permits a court to take into account what is judicially noticeable relates to the meaning of particular segments in the total relevant social context.

But, although the law may affect the factual presuppositions of document and context, it does not affect the basic principles of

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15 "Successful communication involves a good deal of mutual adjustment, for the source must consider the backgrounds of the audience, and vice versa." E. NiDa, supra note 2, at 71. This is the essence of the editorial point of view. Although meaning thus presupposes that author and audience share the essential elements of communication, it does not, however, determine what is in fact shared, nor does it determine what is to be considered "message" and what is to be considered surrounding "context."

16 Black defines these Latin phrases as follows: reddendo singula singulis — referring each phrase to its appropriate object; ejusdem generis — of the same kind, class, or nature; noscitur a sociis — the meaning of a word is or may be known from the accompanying words. Black's Law Dictionary 1442, 608, 1209 (4th ed. 1951).
meaning as they apply to those presuppositions. Thus, judicial rules that determine what a court may look at, as distinct from how the court may look at it, may be rules of law that condition or otherwise set the stage for the later process of interpretation, but they are not themselves rules of interpretation in the sense of rules that reveal meaning. For example, the restrictive plain meaning rule and the English prohibition against resort to legislative history are rules of law that help to define the object of interpretation and select part of the context, but they are not themselves principles of interpretation.

It is important to note that some of the above rules of interpretation relate to matters of context that are internal to the document as a whole, while others relate to matters of context that are external to it. Matters of internal context — intra-language matters normally within the control of the draftsman — are custom-tailored to the purposes of the particular communication. Here, according to Professor Black, the "key problem is that of accounting for the interaction of symbols . . . .",17 a problem that philosophical grammarians and language theorists have not yet adequately solved. Matters external to the document — for the most part extra-language matters beyond the draftsman's direct control — must be accepted as they are, except so far as he can compensate in the document for their inadequacies.18 These include the matters that he assumes will be taken for granted by his audience as conditioning the message. In this sense, therefore, external context can be regarded as the part of a communication that has already been delivered.

1 What does the surrounding context consist of in a particular case? On one hand, if we look for the meaning of a statute as a whole, the context consists of related statutes and case law and the coordinate fund of shared habits, knowledge, values, and purposes external to that statute. In general, these are official or unofficial matters of which courts are willing to take judicial notice. That some relate to facts and others to legal and ethical norms is neatly summarized in Professor Hall's term "factual-normative contexts."19 On the other hand, if we look for the meaning of a particular word, phrase, sentence, paragraph, or section, the surrounding context also includes the relevant factors, outside the item under examination, contained in the statute itself. As a general statement then, one can say that

17 M. BLACK, LANGUAGE AND PHILOSOPHY: STUDIES IN METHOD 206 (1949).

18 See note 4 supra.

the material of proper context is the totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken into account by the particular communication.

What is the relationship between the document being interpreted and its surrounding context? The document is central, because it is the main instrumentality relied on by the author to carry his message. Having received his closest attention, it is the strongest and most dynamic element among those on which an understanding of the communication depends. Under normal circumstances, nothing else has equal dignity or significance in marking out the content of his communication. Surrounding context plays a supporting, subordinate role.

Although subordinate, the role of surrounding context is highly significant. An utterance taken out of the specific context that it presupposes is at best inadequately oriented and over-general. Not only does the surrounding context limit the normal sweep of primary (semantical) meaning, but it often selects among the alternative potentialities of primary meaning.\(^{20}\) The elements of context that perform this latter function are usually factual assumptions or ethical norms that are either expressly recited in the document or, more usually, judicially noticed. They affect meaning by turning the potentialities of multiple, or alternative, primary meanings into the actualities of a single relevant primary meaning. For example, they may resolve ambiguities ("To be eligible to vote, your residence must be in the State") or merely select the appropriate alternative in a bundle of homonyms ("He means to use illegal means").

The most useful, indeed almost indispensable, function of surrounding context is to narrow the range of reference of otherwise over-general words.\(^{21}\) Without it, all but the simplest communica-

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\(^{20}\) "[T]he immediate context, by cancelling out those known meanings of a word that are inappropriate, leaves the one meaning that fits." D. BOLINGER, supra note 11, at 229. However, "context may serve an extremely subtle function — as with puns, or double entendre." C. CHERRY, supra note 2, at 10. "The most important safeguard against homonymic ambiguity is . . . the influence of context." S. ULLMANN, supra note 6, at 79.

\(^{21}\) See E. NIDA, supra note 2, where the author stated that:
[A] word in isolation (i.e., without context) begins with a very wide area of meaning, for it may occur in many hundreds of situations and may be used as a label for scores of objects; but by means of the practical and linguistic contexts in which it is used we can "whittle it down" to precisely that subarea of meaning it must have in any specific utterance. Id. at 77.
tions would be intolerably long. Consider Wittgenstein’s famous example:

Someone says to me: “Shew the children a game.” I teach them gaming with dice, and the other says “I didn’t mean that sort of game.”

Although Wittgenstein was questioning whether the speaker consciously adverted, in his request, to the exclusion of gaming with dice, his example well illustrates the point. The shared expectations likely to exist in such a situation strongly imply the qualification, “suitable, under our common standards of value, to children of their ages, abilities, and temperaments.”

The benefits to communication resulting from being able to rely on habits, knowledge, values, and purposes that are already shared by the participants have never been illustrated more vividly than in Lieber’s example, from which the reader is invited to pick out the underlying tacit assumptions.

Suppose a housekeeper says to a domestic: “fetch some soup-meat,” accompanying the act with giving some money to the latter: he will be unable to execute the order without interpretation, however easy, and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper’s meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or, if he be directed to do so in the evening, that he should go the next day at the usual hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such parts of the animal, as, to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family, with whom the domestic resides, with meat, or to some convenient stall, and not to any unnecessarily distant place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding any thing disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself. Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all possibility of misunderstanding. For, the various specifications would have required new ones. Where would be the end? We are constrained then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.

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22 L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (1953).
23 F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 28-30 (1839).
In the above example, as in all communications, context could perform its function of narrowing the range of reference only because the specific communications that it conditioned were grounded on commonly understood purposes. The relevant assumptions that the hearer needed to make were cued by the implicit purpose of the speaker's words. An understanding of this role played by purpose is indispensible to an understanding of the interplay between a specific message and its context.

In general, the relevant context is ascertainable only from the criterion of relevance provided by the purpose or intent of the message. The latter, in turn, is discoverable in most cases mainly from the document that is itself the object of inquiry, but only as that document is conditioned by its proper context. In such cases, therefore, we can ascertain the meaning of a document only if we already know what it means! The paradox dissolves, however, when we realize that every communication has some clear elements of primary (semantical) meaning that imply shared elements in the underlying culture and specific context. Together, the clear elements and relevant surrounding context tend to disclose the immediate purpose or group of purposes that the document is intended to accomplish. This, in turn, aids in resolving the residual uncertainties.

Some effects of the interaction between context and primary meaning are automatic. Others are aided by conscious inference or deduction. Because primary meaning tends to merge with meaning attributable to context, it is hard or impossible to differentiate sharply between them in specific instances.

It is arguable, for example, that the meaning of the phrase "parol evidence rule" is for the most part contextual (syntactical), because it transcends the primary meanings of the words "parol," "evidence," and "rule." The meaning of the phrase "interpretation of statutes" also is partly contextual, because the meaning of a phrase or sentence is normally a function not only of the primary meanings of its

24 E. NIDA, supra note 2, at 63.
25 What we now hear on every side is that the boundary between syntax and semantics is not a sharp one; that the interplay of syntactics and semantic features is a general phenomenon in language. . . . The rules constituting the meaning of a word are — up to a point — not different in principle from those establishing its "syntactic" status. Nyiri, No Place For Semantics, in 7 FOUNDATIONS OF LANGUAGE 56, 58 (1971).

The extent, if any, to which these fields interact or overlap need not detain us here. Syntax is, of course, part of the microcontext.
constituent words but also of the syntactical rules by which they are combined.

On the other hand, the phrase "parol evidence rule" differs from the phrase "interpretation of statutes" in that the former has a meaning that cannot be derived from constituent primary meanings and syntactical rules. The whole transcends its parts. It may be preferable, therefore, to say that the meaning of the phrase "parol evidence rule" is for the most part primary and only incidentally contextual. Conceivably, the latter might even be represented by the one word, "parolevidencerule," or preferably (but for established usage) by a word whose elements did not suggest an aggregate meaning so significantly different from its actual meaning.

If this analysis is correct, contextual meaning, so far as it depends on the internal structure of a document, is the meaning that is based on the special though systematic ordering of verbal elements that have primary meaning — the smallest of which are called "morphemes." Primary meaning, on the other hand, is the meaning or potential meaning, other than contextual, that usage attaches to particular words and phrases and that persists even when the language unit is viewed apart from surrounding context. (This distinction corresponds generally to that between the implied and the express.)

This differentiation does not imply that a phrase such as "interpretation of statutes," unlike the phrase "parol evidence rule," is grasped in three visual acts instead of one. Each of these phrases, having a high degree of recurrence, is normally read as an established unit, just as in the performance of music a recurrent cluster of notes is read as a unit rather than note by note. The important distinction between the two phrases is that a person unfamiliar with the unit but familiar with its constituent elements can construct its correct meaning in the one case but not in the other.

Primary meaning is also related to contextual meaning in another, and different, sense. Like all habits, the psychological response habit that constitutes the primary meaning of a particular language element exists only because of its recurrence in a succession of earlier,
similar contexts. Thus, the primary meaning of a word or phrase is a continuing echo of a general theme previously heard in many specific and generally similar contexts. Words in the isolation of a vocabulary list, says Benjamin Whorf, "derive what meaning they have from the patterned 'potentials of linkage.'"29 Any assertion that language is meaningless apart from specific context or that "words . . . 'mean' nothing by themselves"30 denies Whorf's theory by falsely implying that language conveys meaning only through: (1) current syntactical relationships (context internal to the document); and (2) the specific relationships between the language used and other relevant factors, existing in the given speech community, that are shared by the author and his audience (context external to the document).31 It is more accurate to say that an utterance taken out of the specific context that it presupposes is at best overgeneral or uncertain.

Although primary meaning, like other habits or conditioned responses, is thus rooted in past recurrences, contextual meaning is meaning that, whether or not recurrent, flows from current configurations or words, collateral facts, and express or tacit collateral assumptions. To say that unique messages can be communicated only by unique combinations of language elements in unique surroundings does not, however, mean that the syntactical strands by which such elements are combined in a specific case are themselves unique. The meaning of a unique utterance is a function not only of established verbal patterns but also of established syntactical patterns, and both reflect the general patterns of surrounding context. Those syntactical patterns result in relationships that can be said to carry primary meaning in the same sense and in the same way as particular concrete verbal elements such as nouns and verbs.

In the sentence "Man bites dog," the applicable syntactical rule can be roughly described as one requiring the word denoting the actor to be placed before the word denoting transitive action and the word denoting the person affected by the action to be placed after it. Although syntactical rules are not included in the usual dictionary, they are analogous to the definitions of words or phrases.

29 B. WHORF, supra note 6, at 67 n.4.
30 E.g., C. OGDEN & I. RICHARDS, THE MEANING OF MEANING 12 (1923); C. ALLEN, LAW IN THE MAKING 474 (6th ed. 1958); J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4505 (3d ed. 1943); A. ROSS, ON LAW AND JUSTICE 113 (1959).
31 "[A]ll familiar words carry some meaning even when uttered in isolation. . . . Their meaning is potential rather than actual until they are linked to other words." J. DEWEY, supra note 6, at 349. See also note 21 supra.
Together, the primary meanings of words and phrases and the primary meanings of particular syntactical arrangements make it possible to form unique combinations and meanings that draw their uniqueness from those contexts.

C. Sharing the Elements of Context

As the author has mentioned above, communication is possible only when the response habits and collateral assumptions necessary to an understanding of that communication are shared by the author and his particular audience. Furthermore, in the case of a legal communication such as a statute or regulation, that communication cannot be officially applied or interpreted unless the underlying response habits and collateral assumptions are shared also by the enforcing or interpreting authority.\(^2\) Author, audience, and monitoring authority must all operate within the language system presupposed by the particular communication. All three must be users of the same language and to this extent members of the same general speech community. This is important in the interpretation of statutes, particularly with respect to: (1) statutes whose relevant cultural environment has changed significantly since their enactment; (2) statutes that have been enacted in imitation of statutes in other jurisdictions or otherwise use terms that have already been judicially defined; and (3) the use of legislative history and other extrinsic aids.

Unfortunately, the civilized world is not composed of discrete, mutually exclusive cultures, uncomplicated with subcultures. Rather, it is composed of vaguely defined, sometimes overlapping, and sometimes competing cultures that on closer examination subdivide into at least as vaguely defined, overlapping, and competing subcultures and sub-subcultures. Each of these progressively smaller subcultures is a correspondingly more diminutive congeries of partly shared and partly divergent assumptions and moral attitudes, ending at the microcosmic extreme with the assumptions and attitudes shared by a single author and a single reader or listener.

Specific context, therefore, always relates to a particular audience in a particular culture or subculture identified by a particular speech community. A speech community or relevant language system is usually defined, not by a group of specific people, but by kinds of activities or fields of interests.\(^3\) This is not only true of

\(^2\) See notes 2, 13 supra.

\(^3\) On the general concept of speech community, see L. BLOOMFIELD, LANGUAGE 42-56 (1933).
major speech communities and languages identified with radically differing cultures but is especially true of the secondary speech communities and special languages and technical dialects that exist in highly complicated cultures such as our own. The same person may participate in more than one speech community or be the user of more than one language. For example, a botanist may call a tomato a "fruit" when talking with a colleague but a "vegetable" when talking to his grocer.

For these reasons, the legislative draftsman should carefully appraise the audience or audiences to which his statute is addressed and the speech communities in which those audiences are found. A statute addressed primarily to government officials may need to be written differently from one addressed to a part of the business community or to the public at large. As with communications generally, the nature of the author's audience affects not only his choice of language and appropriate sublanguage or technical dialect, but his estimate of the range of relevant assumptions he can take for granted as already shared by the particular audience. Understanding this audience is important also for one who presumes to declare what the communication means.

This concept of "legislative audience" and the broader concept of "the users of a language" are complicated by the irregularity with which habits, knowledge, values, and purposes tend to be shared even within the same speech community. The concepts of legislative audience and users of the language are further complicated by the fact that some statutes are not normally read or intended to be read by the persons to whom they directly apply. Such statutes become known mainly through instrumentalities such as the bar or the executive branch of the government, or through private editorial services operating with legal advice. Perhaps the best example is the federal income tax laws. Although these laws affect almost everyone, few laymen understand or even become acquainted with their terms

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84 R. DICKERSON, supra note 5, at 19.
85 M. BLACK, supra note 17, at 29, 49.
86 This irregularity often goes unnoticed. "We remain unconscious of the prodigious diversity of all the everyday language-games because the clothing of our language makes everything alike." L. WITTGENSTEIN, supra note 22, at 224. Some writers, on the other hand, do notice and make allowances for the problem. Recognizing the fact of variant usages and individual aberrations, Professor Black has tried to develop appropriate principles of exclusion leading to a more discriminating, if not wholly scientific, selection of the persons whose usages should be accepted in determining what particular language usages and factual assumptions should be taken into account in statutory interpretation. M. BLACK, supra note 17, at 49, 51. For the foreseeable future, however, courts will have to content themselves with having to operate on a curbstone basis.
from a direct reading. Most tax information is delivered by word of
mouth or through official instructions of the Internal Revenue Ser-
dvice, private periodicals or services, or private legal or accounting
advice. Because this process is inevitable, such laws need not be
couched in a form that makes easy reading for the public at large,
nor need their factual presuppositions be made obvious to the public.
It is enough that the statutes are understood by the governmental
and private lawyers and accountants who specialize in the field and
on whom the public customarily relies. For the purpose of interpre-
tation, such of the terminology and total relevant environment as is
shared by legislature, tax bar, and tax accountants generally can be
taken as shared on behalf of the general public.

At this point, it would be easy to be carried away by the desire
to be "realistic" and to overemphasize the obvious fact that few
members of a legislative audience ever read any of the legislative
provisions that directly affect their activities, including those of a non-
technical nature that contemplate no intermediary. It would then
be tempting to conclude that all references to "actual" or "true"
meaning are as fictitious and baseless as the fictitious assumption
that the legislative communication is in fact received in the form in
which it was enacted. But one should not forget that the legislative
audience is ultimately informed about the statute by the few mem-
bers or intermediaries who do read it. Moreover, the legislature is
concerned only with providing a reasonable opportunity to read the
legislative message. If a typical member of the legislative audience
chooses not to enjoy this opportunity, that is his privilege. But if
he does choose to read the statute, he is entitled to read it in a
manner normal to the language used and the context in which it has
been presented to that audience.

To what extent is a court itself a representative member of the
legislative audience, or an intermediary on behalf of that audience?
Are not all statutes addressed to the courts as judicial intermediaries
and the official arbiters of meaning? If so, it should be enough that,
in any particular case, the relevant habits, knowledge, values, and
purposes are shared by the legislature and the court, because this
provides means by which the legislative message may be sent in
clearer form to the persons to whom the statute is ultimately directed.
Such a conclusion would make sense to anyone operating under
the view that legislation is meaningless until it passes through a
judicial filter. But this view — that the court is the ultimate law
giver even in the case of statutes — is not widely held, and some of its factual assumptions are false. Most statutes are enacted and obeyed with no help from the courts. Legislative draftsmen do not ordinarily address their legislative communications to the courts, nor do they assume that the courts are the normal channel to the legislative audience. Judges may participate in the interpretation of a statute as members of a broader professional group which, it is reasonable to suppose, the legislature took into account in framing the statute. But any special knowledge that the court may have concerning the circumstances of the legislation, including the reasons for its enactment, is not a part of proper context for the purposes of ascertaining the meaning of the statute, if that knowledge is not shared by the persons to whom the statute is primarily addressed.

Anyone engaged in even a preliminary ascertainment of the meaning that a statute will have for the persons to whom it is ultimately addressed, must examine it against the habits, knowledge, values, and purposes that are assumedly shared with the legislature by typical members of that audience or the intermediaries to which the audience normally looks for enlightenment. For this reason, information that is not available to the legislative audience, no matter how relevant and reliable it may be, and even though it may be available to the court, cannot be considered part of the proper context of the statute. To treat it as part of that context would be to subvert an essential presupposition of communication, that of shared environment. This is the problem that haunts the users of at least some elements of legislative history.

Normally, context consists of information and assumptions already shared by the sender and his audience. However, to be part of context it is unnecessary that the audience have the specific mate-


38 Gray's theory has been attacked by many commentators. One writer has said: [Gray's] view of statutes seems narrow and misleading. First, it over-emphasizes the "trouble case" that leads to litigation. Statutes are law, are used by laymen and counsellors and officials . . . in many instances without the aid of judicial interpretation. When the federal income tax law is amended, most men pay their taxes without waiting to see whether, in a test case, the court will hold that John Doe has to pay. E. Patterson, JURISPRUDENCE — MEN AND IDEAS OF THE LAW 199 (1953).

"[T]here are many parts of many statutes which have never been the subject of judicial interpretation at all, but which are unquestionably the law of the land." C. Allen, LAW IN THE MAKING 486 (6th ed. 1958).

39 See, e.g., United States v. Public Utilities Comm'n of California, 345 U.S. 295 (1953). In particular see the concurring opinion of Mr. Justice Jackson. Id. at 319.
rial already in mind, so long as another shared assumption can reasonably be expected to lead to it. For example, the sender may use a word of established meaning, knowing that the audience is unfamiliar with the word, because it is reasonable to expect that the audience will or can consult a standard dictionary. Here, one shared assumption (that the recipient will consult an accepted dictionary) functionally incorporates another (the intended, accepted meaning of the word in question). The meaning of the word is a part of particular context, even though the recipient does not yet know what it is.

Similarly, a person may effectively communicate in code with one who cannot read the message directly, if the recipient knows about and has access to the applicable code book and shares the assumption that it will be referred to. Here, too, the meanings of the various symbols are part of the context of the message, because the means of access are shared and it is understood by both parties that those means are to be used. Context, therefore, consists of shared knowledge and the established shared bridges to such knowledge.

D. "Taking into Account": The Reliance Factor

Of all the aspects of context, perhaps the most subtle is the fact that it is something that both parties to a successful communication not merely share but subjectively take into account. Relevant assumptions may remain tacit if the author is correct in assuming that he already shares them with his audience and that the express aspects of the message will be read in the light of those assumptions. Thus, a communication is invariably a combination of the express and the implied. The system works so long as author and audience share not only the relevant semantic and substantive assumptions but also the habits of association that make it probable that those assumptions will have the same conditioning effect on express meaning for audience that they have for the author.

In view of the necessary function that this aspect of communication performs, it is remarkable that it is almost never expressly recognized, at least in print. Professor Shartel touched upon the matter while emphasizing the importance of shared context: "[T]he ideal we hope that both legislator and interpreter act in the light of the same context."40 The noted Danish commentator, Alf Ross, was perhaps closer to the target when he said:

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40 B. SHARTEL, supra note 1, at 330 (emphasis added).
The context extends just as far as one may assume that one utterance was formulated with another in mind. . . . The situation comprises all facts and circumstances which can provide an indication of what the author's intention was. This can include . . . the whole factual, physical and social situation of living which conditioned the utterance.41

Professor Fuller has reminded us that the parties may take tacit assumptions into account without being fully conscious of doing so; a person is not always aware of what he takes for granted.42 But that fact in no way lessens his actual reliance, and this is true at both ends of the communication process. Being based ultimately on habit, the conditioned responses involved in the communication of meaning are for the most part automatic. That they may also be inadvertent does not weaken their effect or lessen their importance.

The concept of "taking into account" is important because, if valid, many of the elements of legislative history that some courts have been routinely taking into account under the banner of legislative "context" may need to be reevaluated. The full range of problems involved in examining "legislative history" deserve fuller treatment than is appropriate on this occasion. The point to be emphasized here, and of which legislative history is merely the most dramatic example, is that the way a particular language vehicle takes into account the appropriate elements of context determines to a large extent the success or failure of the communication. Lack of attention to this factor is the reason why so many legislative communications have failed to convey what the legislature intended or have required judicial interpretation in their application. For example, a statute that relies significantly on collateral assumptions that are unshared, or only imperfectly shared, with the legislative audience is likely to misfire. Similarly, a statute that fails to suggest the affinity between the legislature's language and the shared assumptions that it has relied on to supplement that language may be seen off-center by the legislative audience. An editorial point of view is as critical for the manipulation of the external context as it is for the manipulation of the language itself.

One final comment should be made concerning this reliance fac-

41 A. Ross, supra note 30, at 116 (emphasis added).
42 The absent-minded professor stepping from his office into the hall as he reads a book "assumes" that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not "occur" to him, that is, is not present in his mental processes. L. Fuller, Some Fallacies in Theories About Interpretation 5 (mimeo. paper for Legal Philosophy Discussion Group, Feb. 3, 1959).
tor. If a collateral statement is not taken into account by the written document, it cannot be part of the intended message, no matter how relevant, reliable, and fully shared it may be. Thus, a collateral statement of what a statute means is not part of its context, because, instead of buttressing the statute, it competes with it as an expression of legislative intent. If it has force, it can have it only as an independent legislative statement, in which case it has direct force only if it has been enacted.

E. Compromising the Ideal

How detailed and refined should the examination of contextual materials be? As one commentator has noted: "The full effect of a word upon its hearers may depend not only upon the [internal] context but upon the whole physical and psychological environment and, on many occasions, upon his experience of the culture of which the language forms an integral part."\(^{43}\) This has been dramatically illustrated in the translations of the Bible, which have appeared in more than 200 languages. Here, according to Nida, "the exegetical analysis of any message consists in reconstructing, in so far as possible, all the significance of the communicative event within the totality of the cultural framework."\(^{44}\) He adds, however, that it is false "to assume that in order to communicate one must reproduce all the circumstances of one culture within some isolated segment of another . . . ."\(^{45}\) It is enough that he "select . . . these features which are culturally relevant . . . ."\(^{46}\) What is true for the communicator is true also for the interpreter.

For a court, the attempt to reconstruct the author's relevant environment poses an additional problem. Here the aim is not so much to capture every nuance of true meaning as it is to maintain standards of determinability reliable enough to provide a working basis for resolving particular controversies, predicting their probable outcome, and planning generally for the future. Considerations such as these have forced the courts, and the readers of statutes generally, to be highly selective when looking beyond the document being interpreted, hopefully avoiding subtleties that are hard to capture and thus minimizing the risk of great controversy. Fortunately, the compromise is not as great as it might appear at first glance. The sub-

\(^{43}\) C. Cherry, \textit{supra} note 2, at 75.
\(^{44}\) E. Nida, \textit{supra} note 2, at 39.
\(^{45}\) \textit{Id.} at 58.
\(^{46}\) \textit{Id.} at 59.
sidiary elements in the broader context that may have to be ignored probably contribute more to the emotive aspects of language than to the non-emotive aspects of which legislative pronouncements are almost entirely composed.

The foregoing considerations are important in determining what elements, outside the statute itself, the interpreter may or should look at in performing the cognitive function. Only by a discriminatory evaluation of the materials of context can the interpreter arrive at a pronounced meaning that adequately approximates true meaning.

It is in the area of practical compromise that the cognitive rules for ascertaining legislative meaning tend to merge with the creative rules for assigning judicial meaning, thus blurring the vital distinction between them. This blurring usually results when relevant information that should be rejected for the purposes of cognition may later be useful to the creative function of judicial law-making in supplementing the statute. By considering a factor that has been denied to the legislative audience, the court in effect supplements or changes the true meaning of the communication as enacted. Whether this is appropriate under the circumstances depends on principles other than those that govern cognition.

III. Conclusion

Whenever the House of Representatives, the Senate, or the President puts an imprimatur on an otherwise properly processed bill, that imprimatur supports, not the written document taken in isolation, but the document as conditioned by the surrounding context of relevant shared assumptions that it takes account of and that together with it comprise the total communication. On the other hand, a collateral utterance, however relevant and reliable, that is not assumed to be shared by the legislative audience is necessarily excluded. Such an element is not part of what has constitutionally been put before that audience and mere relevance cannot make it such a part. It cannot affect the true meaning of the statute being interpreted because it cannot comply with the standards of proper context. If it is taken into account, it must be handled as an aspect of judicial law-making subject to the principles governing that activity.

If this analysis is correct, courts in the performance of their cognitive (as distinct from creative) function with respect to statutes should pay closer attention to whether the extrinsic materials that
they consult meet the tests of "context." This is particularly true of the materials of legislative history.