University of Dayton Law Review

Volume 4 | Number 1 Article 2

# The Meaninglessness of the Plain Meaning Rule

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# THE MEANINGLESSNESS OF THE PLAIN MEANING RULE

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The contemporary lawyer and judge confront, in the mine run of their daily work, a mountain of statutes. In an unprecedented way, law today is statute law, and few legal problems have escaped the tender mercies of the legislature. Statutory interpretation is a daily and pressing task for virtually every lawyer.

And yet, there is no generally accepted consistent theory to guide this work. The late Henry Hart and Dean Albert Sacks argue forcefully, "[T]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[1] This conclusion is embedded in several hundred pages of case excerpts proving the point beyond dispute.

Good legal theory is not an intellectual luxury. If we lack good theory, we will be unable to explain judicial decisions and "consumers" of the output of our court systems will not believe they have been justly treated. Without the discipline of good theory, we cannot even critique and reform our own work product as lawyers.[2]

My thesis in this article is that the so-called plain meaning rule is not only wrong in itself, but is also a major stumbling block hindering the adoption of a sound theory of statutory interpretation. Legal thinking in terms of the rule, whether to follow it or to find an "exception," structures our whole approach to statutory interpretation; its repudiation is a present necessity.

I wish in this article to summarize criticisms of the plain meaning rule, suggest why it has survived despite criticism, and sketch a theory and practice of statutory interpretation which should replace it.

## *A. The Rule Stated*

The plain meaning rule is the starting point for virtually every text treatment of the process of statutory interpretation. A typical example is found in 50 Ohio Jurisprudence 2d:

> The right of the courts to interpret a duly enacted statute is based upon some apparent uncertainty of meaning, some apparent ambiguity of

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1. H. HART, JR. & A. SACKS, THE LEGAL PROCESS 1201 (tentative ed. 1958) [hereinafter cited as HART & SACKS].

2. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 1-5 (2d ed. 1960).

> terms, or some apparent conflict of provisions. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rule of statutory interpretation. That which has no uncertainty of meaning, or ambiguity of terms, or conflict of provisions needs no construction. To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the General Assembly.[3]

Section 175 proceeds to prescribe the function of courts with respect to such clear statutes: "An unambiguous statute is to be applied, not interpreted." Citations of this rule can be found in the opinions of the highest courts of most American jurisdictions.[4] It has received recent confirmation in Ohio.[5]

Notice the structure of the rule as stated. The process of interpretation is said to be a judicial power, but its exercise in any way is dependent upon an initial finding of "ambiguity." It is assumed judges can successfully and convincingly distinguish between plain words and ambiguous words. Once a judge has found ambiguity, he or she is to apply a body of "rules" for statutory interpretation. The conclusion is that any other rule would threaten legislative supremacy and lead to judicial usurpation.

I contend that each of these premises is wrong. Furthermore, a judge can give appropriate deference to legislative authority while repudiating all of them.

### *B. The Linguistic Naivete of the Rule*

The plain meaning rule commands judges to apply unambiguous statutes without interpreting them. But no matter how much deference a judge has to the legislature, he or she simply cannot perform that feat. The nature of human language is such that one person understands another's communication only through applying to it an interpretative process.

When a person speaks even a simple declaratory sentence, he or she uses words to refer to and express thoughts in his or her mind. The language may more or less accurately reflect the thought. But an additional step is necessary before the communication process works; the spoken or written words must produce the same thoughts in the mind of the listener or reader as were in the speaker's mind. Words have no

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3. 50 OHIO JUR. 2d *Statutes* § 174 (1961).

4. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973) [hereinafter cited as SANDS].

5. Board of Educ. v. Fulton County Budget Comm'n, 41 Ohio St. 2d 147, 324 N.E.2d 566 (1975).

single, unequivocal, unique meanings. The word "chair" does not evoke the same image or concept in every person to whom it is spoken. Rather, my concept of chair is abstracted from thousands of chairs I have seen in my life. Your experience of chairs has undoubtedly been different from mine, so that your concept of chair has been abstracted from that different experience. We belong to the same broad linguistic community of English-speaking peoples, so that we can communicate with each other about our two concepts of chair with the same word. But the word "chair" conveys no meaning to someone outside that linguistic community. The word is given meaning by the custom and usage of the linguistic community in which it is used.[6]

Ogden and Richards, in their seminal work, *The Meaning of Meaning*, point out:

> Normally, whenever we hear anything said we spring spontaneously to an immediate conclusion, namely, that the speaker is referring to what we should be referring to were we speaking the words ourselves. *In some cases this interpretation may be correct*; this will prove to be what he has referred to.[7]

This passage demonstrates that interpretation is always involved in understanding the words of another: we always supply from our own thought the referents which, in our minds, match the referents intended by the speaker. We always add to the words, however plain they may be, understandings of linguistic conventions and symbolizations which we share (we believe) with the speaker.

How could the judge's task in interpreting a statute be any less complex? Words surely do not acquire intrinsic meanings by being used in statutes. The context in which the words are used must still be consulted to understand their meaning.

In fact, the interpreter's task in dealing with statutes is more complex than that of the ordinary listener.

First of all, a statute is the collective voice of the legislature, not that of a single person.[8] The referents in the mind of the judge may match those in the minds of most, some, or none of the enacting legislators.

Secondly, statutory language is highly abstract, but judges deal with cases with concrete facts. Every time a statute is applied, the

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6. SANDS, *supra* note 4, § 45.01.

7. C. OGDEN & I. RICHARDS, THE MEANING OF MEANING 15 (Harvest reprint of 8th ed. 1946) (emphasis added).

8. The problem is noted in Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940).

9. McBoyle v. United States, 283 U.S. 25 (1931).

judge and counsel must decide if those facts fit within the referential categories of the statute. Whether a corporation is a "person" or whether an airplane is a "motor vehicle"[9] are two of the classic examples.

Finally, the context of statutory words is broader than that of the usual conversation. Every statute is enacted in a context which includes at least the prior existing law, the socio-legal conditions sought to be addressed by the change in the law, and the purpose of the legislature in making the change.

In sum, the judge confronted with a statute must inevitably interpret it if he or she is to understand it at all. "Even when a judge claims not to be construing a statute nor to consider anything but the text of the act, he cannot help putting to use whatever he has learned, through common experience or otherwise, about customary language usage and common understanding associated with the relevant text."[10]

Since a judge cannot but supply some of the context for the statutory language, he or she ought to be forthright and open in approaching all of the context. But more of this below.

### C. *The Survival of the Rule*

Sixty years ago the plain meaning rule commanded the support of an overwhelming majority of American courts. Perhaps the highwater mark of the doctrine in this country was *Caminetti v. United States*[11] where the Supreme Court applied the Mann Act to interstate travel for fornication. The Act forbade the taking of a woman across state lines for purposes of "prostitution or debauchery, or for any other immoral purpose." The Supreme Court majority rejected evidence that Congressional intent was limited to commercial vice, saying:

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports, accompanying their introduction or from any extraneous source. . . . The language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.[12]

A more wholehearted adoption and statement of the rule can scarcely be imagined.

Federal court reliance on the rule was roundly criticized on the linguistic grounds given above and also for frustrating legislative in-

10. SANDS, *supra* note 4, § 46.02.
11. 242 U.S. 470 (1917).
12. *Id.* at 490.

tent. The Supreme Court appeared to repudiate the rule in *United States v. American Trucking Associations.*[13] Mr. Justice Reed's opinion held: "When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "[14] Yet despite the *American Trucking* case, the Supreme Court continued to cite the rule. In 1975 Arthur Murphy analyzed a number of cases in which the Court had appeared to give weight to the rule, and, more distressingly, other cases where the lower federal courts seemed to follow it in its full *Caminetti* rigor.[15]

It is beyond the scope of this article to examine in detail the contemporary scope of the rule in each jurisdiction. I do wish to illustrate its continued vitality in Ohio.

In *Sears v. Weimer*,[16] the Ohio Supreme Court was required to determine the applicability of General Code section 11646 which permitted service by publication of a motion to revive a judgment "but only for judgments or findings in which personal service originally was made on the adverse party." In the case before the court, service in the original action had been by publication, but the defendant had subsequently entered a voluntary personal appearance and filed a cross-claim. Another section of the procedural code provided that a voluntary appearance was the "equivalent" of "service." The Supreme Court found the second service by publication to be inadequate, relying principally on the plain meaning rule. Paragraph 5 of the syllabus is a classic statement of the rule: "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."[17]

The *Sears* case continues to be good authority. It was relied upon by Justice Paul Brown in the 1973 decision of *Provident Bank v. Wood.*[18] The case dealt with deposits of county interim funds pursuant to "awards" of such funds to various banks under the Ohio Uniform Depository Act, Revised Code chapter 135. The question in the case was whether the bank, having issued a certificate of deposit for six months for such interim funds, could refuse to renew it at the same interest rate. The relevant section, 135.14(C), provides in part that, "any

13. 310 U.S. 534 (1940).
14. *Id.* at 543-44.
15. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).
16. 143 Ohio St. 312, 55 N.E.2d 413 (1944).
17. *Id.*
18. 36 Ohio St. 2d 101, 304 N.E.2d 378 (1973).

eligible institution receiving an interim deposit award may, upon notification that said award has been made, decline to accept said interim deposit."

After reciting the plain meaning rule and citing *Sears*, Justice Brown quotes Black's Law Dictionary definitions of "award" and "deposit." He concludes the statute permits the bank to decline a renewal. How this conclusion is embedded in the "plain meaning" of the statute is obscure at best. Justice Brown notes almost as an afterthought that the county is given the power to solicit new bids for interim funds if the interest rate goes up. This would seem to be a correct and adequate ground for the decision without any reference to the plain meaning rule.

In 1975, in a *per curiam* opinion, *Board of Education v. Fulton County Budget Commission*,[19] the court followed the plain meaning rule to what it admitted was an illogical result. The statute in suit, Revised Code section 5713.11(B), provided in part:

> Until January 1, 1978, when the people of any city, local, or exempted village school district have voted additional levies for any purpose in the year of reassessment or any year prior thereto, or when the board of tax appeals has increased the aggregate value of the real property in the district in any year under sections 5715.24 to 5715.26 of the Revised Code or when the aggregate value of the real property has been increased by the application of a uniform taxable value per cent of true value pursuant to the order of the board of tax appeals and said additional levies are to be effective in the year of reassessment or thereafter *or when the valuation is increased by or pursuant to an order of the board of tax appeals* to be effective in any year, and the levies are to be calculated on a total valuation of property higher than that of the year before reassessment or the year before the valuation is increased by or pursuant to such order, the rate of said additional levy shall be adjusted downward by the budget commission in the same proportion in which the total valuation of property in the school district is increased by the reassessment or is increased by or pursuant to such order over the total valuation of the year preceding the reassessment or order. . . . *No reduction shall be made under this division for increases in valuation which occur after a sexennial reappraisal and which result from action taken by the auditor following his annual determination as to whether the true value in money of each parcel of real property in his county has changed from the value established for the preceding tax year.*

County auditors had a mandatory duty to determine each year whether the property values in their county had increased or decreased and to

19. 41 Ohio St. 2d 147, 324 N.E.2d 566 (1975) (emphasis added).

adjust the tax values accordingly. In 1973, the auditors of Fulton, Greene, Ashtabula, and Montgomery Counties failed to do their duty and the Board of Tax Appeals (BTA) imposed changes in the tax values by order. The budget commissions of the four counties then reduced the tax rates in the counties, pursuant to the first sentence of section 5713.11(B), since the increases were brought about by an order of the BTA.

Various school boards brought suit, alleging the last sentence of section 5713.11(B) demonstrated a clear legislative policy to preserve for the schools the taxes resulting from the annual inflationary increase in property values.

The budget commissions, the BTA, and the Supreme Court had a plain meaning answer for the schools. The Court recognized the strange effect of its decision: if auditors complied with the law, there would be no rate reduction; if they disobeyed the law, they could thereby "instigate reductions in the rates of voted school levies."[20] The Court admitted that no rationale for such a result had been offered. "Nevertheless, this court does not sit as a superlegislature to amend Acts of the General Assembly. Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute."[21] Three plain meaning cases, including *Sears*, were cited in support.[22] The Court concluded: "The remedy desired by appellants must be obtained from this source of their problem—the General Assembly."[23]

The Ohio Supreme Court thus continues to rely on the plain meaning rule as a decisive principle of statutory construction.[24] It is not alone in adhering to the doctrine.[25]

What accounts for the rule's continued vitality in the face of criticism? Several suggestions have been made.

It may be merely habit. Sometimes the rule is invoked and violated in the same opinion. Thus, as stated and applied for many years, it forbids the court to consult indicia of legislative intent other than the text itself.[26] Indeed, in the *Sears* opinion, no extrinsic aids are referred to. But in *Fulton County Budget Commission*, the court in a footnote refers to a proposed piece of legislation which was introduced but not

20. *Id.* at 156, 324 N.E.2d at 571.
21. *Id.*
22. Cleveland Trust Co. v. Eaton, 21 Ohio St. 2d 129, 256 N.E.2d 198 (1970); Wallace v. Celina, 29 Ohio St. 2d 109, 279 N.E.2d 866 (1972).
23. 41 Ohio St. 2d at 156; 324 N.E.2d at 571.
24. *See* note 22 *supra.*
25. SANDS, *supra* note 4, § 46.01 n.2.
26. *See, e.g.*, text accompanying note 12 *supra.*

enacted which would have solved the problem the case presented; the court obviously concluded the legislature intended the absurd result because it did not adopt the available cure.[27] Similarly, in the *Provident Bank* case, the court notes the parallel power of the depositor to seek a higher interest rate rather than being committed to the lower rate, in support of its conclusion that the "plain meaning" of the uninterpreted words give a depository the right not to continue paying the higher than market interest rate.[28]

Another explanation of the rule's strength is its verbal deference to legislative supremacy. There is appealing judicial humility in the traditional formulations, whether or not the results in the cases represent real deference to the legislature. In the *Fulton County Budget Commission* case, for example, the court disclaims any authority as a "superlegislature." It purports to be following the statute simply as the legislature enacted it. Of course, it may be ignoring legislative policy in doing so—only the boards' of education position makes any sense of the statute adopted by the legislature. And the court takes the opportunity to point a finger at the legislature as the source of the school boards' problems.

Use of the rule may also be a response to heavy judicial workloads. Especially with respect to federal legislation where the sources of legislative history are so voluminous, discerning a purpose from the multitude of expressions of intent is a laborious task. Finding a plain meaning enables judges to avoid work as well as political responsibility for the outcome.

Finally, and most dangerously, incantation of the rule may be used to cover a judge's own unexpressed and unrationalized interpretation of the statute. Sands argues that use of the rule may "result in giving effect to a judge's unrationalized conception as to what a statute means, arrived at reflexively or intuitively and without reference to any considered choice."[29]

If, as suggested above, every act of statutory application involves interpretation—supplying in the interpreter's mind the context in which the legislature spoke—then this use of the rule completely masks that process of supplying context. Readers of the opinion cannot effectively criticize the judge's supplying of context because they do not know what he supplied. His supplying of context is unconscious or at least hidden from public view.[30]

27. 41 Ohio St. 2d at 156 n.8, 324 N.E.2d at 571.

28. 36 Ohio St. 2d at 107, 304 N.E.2d at 382.

29. SANDS, *supra* note 4, § 46.02.

30. Use of the rule in this way may result in what the late Arthur E. Sutherland, Jr., while a professor at Harvard Law School, called the "any damned fool can see" opinion.

### D. *"Repeal" the Plain Meaning Rule*

I have a modest proposal: the plain meaning rule should be repudiated by Ohio's judiciary. Its function of encouraging deference to legislative policy can be performed better by a more adequate theory of statutory interpretation. Abolition of the rule will remove the constant temptation to rely on it to the detriment of clarity and forthrightness in judicial thinking and opinions.

Insofar as the rule is given only ritualistic observance—cited to be ignored or supplemented with heavy consideration of legislative history—it may be thought to be harmless. But I believe it encourages a whole approach to statutory interpretation which is misguided.

That approach is characterized by beginning with the plain meaning rule as the touchstone of one's interpretative theory and treating the rest of the theory as "exceptions" to the rule. With that approach, a judge looks first to the narrow statutory provisions to be applied—to the narrowest set of words involved in the case. Only if the judge does not find a clear meaning within those words does he or she look beyond them to the broader context, even to the other provisions of the same statute.

If one accepts the premise upon which the plain meaning rule is criticized above—that understanding language is as much a matter of context as of text—then the initial focus of any statutory interpretation problem must be the context in which the provision to be construed was enacted.

Hart and Sacks suggest that the best approach to statutory construction begins with examining the legislature's purpose in adopting the statute under consideration. They argue that "the enactment of every statute is, of necessity, a purposive act, . . . no statute can be properly interpreted without considering the purpose which ought to be attributed to it. . . ."[31] This is so because the legislature's purpose is the core of the context of an enactment.[32]

If it can be agreed that legislation is always a purposive act, then the value of an approach which emphasizes first the general purpose of the statute should be clear. If we ask ourselves first of all what it was the legislature was trying to accomplish by the statute, we shall have the most important clue to understanding what they meant when they enacted certain language.

Once the court has attributed a general purpose to the legislature, it should proceed to "interpret the words of the statute immediately in

31. HART & SACKS, *supra* note 1, 1153.
32. *Id.*

question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either a meaning they will not bear or a meaning which would violate any established policy of clear statement."[33]

Here, then, in a brief paragraph, is the suggested replacement theory of statutory interpretation: discern the legislature's purpose and attempt to carry it out, but do not prostitute the language in doing so and do not construe the words in a way which would result in unfairness to those who have had to interpret them for themselves.

Of course, the task will involve use of the established canons of statutory construction. But here they will be viewed not as rules of law, but as generalizations about customary language usage, indicating meanings for language which are linguistically permissible, not compelled.[34]

Of course, judges cannot interpret language to carry out a meaning which the words will not bear. In refusing to do so, even when a legislative purpose to go further than the enacted words is clear, the courts are serving another function for which the plain meaning rule is sometimes used. In an eloquent passage, Hart and Sacks describe the responsibility of the judiciary for protecting the integrity of language:

> Language is a social institution. Its successful functioning depends upon commonly accepted responses to particular verbal symbols used in particular contexts. A particular user of the language may play tricks with it, and assign his own private meanings to particular symbols in it. But he cannot unilaterally alter the social facts of other people's responses.
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> . . . .
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> The role of language in the settlement of problems of group concern depends upon the integrity of language as a social institution.[35]

If judges repeatedly find statutory words to have meanings beyond their ordinary signification, then the utility of statutory language for communicating to those who understand words by their ordinary signification will be lost.

Judges must also protect policies of clear statement. Especially in the area of criminal law where the addressees are the general public and the consequences of a mistake of law may be loss of liberty, the policy of clear statement is and should be of constitutional dimensions. Hart and Sacks show that the vagueness doctrine is properly related to a general theory of statutory interpretation.

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33. *Id.* at 1200.
34. *Id.* at 1221.
35. *Id.* at 1219, 1226.

This sketch of an alternative theory of interpretation is only suggestive. But if the literalist approach is rejected, it must be replaced with a theory that has a convincing touchstone. Legislative purpose is that touchstone in the Hart and Sacks approach. Surely it is logical for the interpreter to begin where the legislature began—with a general purpose. By beginning with the legislative purpose and attempting to carry it out, courts will respect best their role of subordination to legislative policy. Where carrying out that purpose would do violence to the language generally or violate a policy of clear statement, the courts can rightfully refuse to enforce the purpose, mindful of their more basic role as guardians of the Constitution and the general fabric of the law.