

“Law and Language: How Words Mislead Us”

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Preface

The Frederick W. Thomas Chair for the Interdisciplinary Study of Law and Language was established through the generosity of the O’Connor & Hannan Law Firm, and the friends and colleagues of Frederick W. Thomas. During his 49 years in the practice of law and 29 years with O’Connor & Hannan, Mr. Thomas was well known for his expertise in the field of law and is especially remembered for his love of language.

Frederick Whitney Thomas died in 1986, many years before I took up this Chair, and I never had the opportunity of meeting him. However, I have had the honor and pleasure of speaking with his daughter, Sheila Thomas, and his son-in-law, John Jensen, both of whom have been kind enough to attend today’s Lecture, and I have also been in contact with his granddaughter, Molly Thomas-Jensen, who has followed her grandfather’s path to the Harvard Law School, and then on to a path of public service through the law.

Frederick W. Thomas graduated from the University of Minnesota with an A.B. degree in 1936, and earned his LL.B. from Harvard in 1939. He had overcome significant hearing loss as a child, and various other health issues, to graduate among the very top of his class at the University of Minnesota, before going on to Harvard for Law and then legal practice here in town. “Freddie,” as he was known to friends and colleagues alike, was a formidable figure in the Minnesota legal community, maintaining high standards of both ethical and collegial behavior, but he was also someone who loved to laugh and make others laugh, and never took himself too

¹ Frederick W. Thomas Professor of Law and Philosophy. This talk was given at the University of Minnesota on April 7, 2009, as the Reappointment Lecture to the Frederick W. Thomas Chair.

seriously. He had been the editor of “Ski-U-Mah,” the humor magazine at the University of Minnesota. I have seen copies of old limerick and satiric poems he wrote about colleagues and friends – many of which, I fear, could not be repeated in general company. At the same time, Frederick Thomas, for all of his joy in laughter and poking fun, was a wonderful leader and role model at his law firm, and a loving and beloved husband, father, and grandfather. The Law School is honored by having a Chair in his name.

The purpose of the Frederick W. Thomas Chair, which serves both the Law School and the College of Liberal Arts, is to promote interdisciplinary teaching and scholarship as it pertains to the relationship between law and language. I have tried to live up to the purposes of the Chair, and the ideals of the person after whom it is named, through my work on law and language, in both the Law School and the Philosophy Department.

Introduction

Our world is full of fictional devices that let people feel better about their situation – through deception and self-deception. In large hotels, the floor right above the 12th floor is labeled the 14th floor. For those with an irrational fear of all things 13th, this may give some consolation, though if there is any reasoning capacity left among those with such fears, certainly they must realize that the floor right above the 12th is still the 13th, whatever someone else may call it.

The legal realist, Felix Cohen, argued that law and legal reasoning is full of similarly dubious labels and bad reasoning, though of a special kind. He argued that judges, lawyers and legal commentators allow our own linguistic inventions and conventions to distort our thinking.²

² Felix Cohen, “Transcendental Nonsense and the Functional Approach,” 35 *Columbia Law Review* 809 (1935).

We have a tendency to create legal concepts and then turn around think that they do or should determine how social disputes must be resolved. It is like the ancient peoples who built idols out of stone and wood, named them, and then bowed down to them, asking them for assistance and guidance.

Cohen argued that something similar goes on with legal concepts – most of which are clearly human creations, not the discoveries of some special sort of entity whose nature we must discern and respond to. Cohen recounted how law created the idea of corporations as legal persons – a convenient fiction at best – but the courts then spent dozens of cases, and hundreds of pages of official reporters, arguing over where corporations “live” – an important question for diversity jurisdiction in the federal courts and personal jurisdiction in the state courts. The exploration went forward as though there were some truth of the matter to be learned, rather than a stipulation we ourselves should come up with, to make our legal fiction more useful to whatever purposes we think it might serve.

In general, Cohen observed courts trying to determine the nature of legal concepts like “corporate entity,” “property,” “fair value,” and “contract,” all in a way strangely disassociated either from factual claims, policy objectives, or moral evaluations. The philosopher, Ludwig Wittgenstein, spoke of the way we fool ourselves, when we use a noun for some matter, and then assume that because nouns usually name object that here as well there must be some entity that exists out in the world, whose nature can be discovered.³ Our grammar misleads us. In Cohen’s more colorful language, the courts and commentators of his time had made the analysis of legal concepts into “a special branch of the science of transcendental nonsense.”⁴

³ Ludwig Wittgenstein, *The Blue and Brown Books* 1 (New York: Harper Torchbooks, 1960).

⁴ Cohen, *supra*, at 821.

In this talk, I will explore some of the ways, particularly in contract law and family law, that we have been led astray by our legal language.

Contract Law

Oliver Wendell Holmes, Jr., the great judge and legal scholar, long ago warned us that misleading terms and rhetoric are pervasive in the law, and, as he pointed out, this occurs as much or more so in contract law as anywhere else.⁵ Regular references to “the meeting of the minds,” described in judicial opinions as a necessary step in contract formation,⁶ have misled vast numbers of law students, and more than a few judges, into believing that there can be no binding contract if the two parties understood their transaction differently. In fact, the law is otherwise: where the parties sign the same written document, or assent to the same oral description of contractual terms, then the parties are bound (with small exceptions not presently important), even if they understood those terms differently.

In general, Holmes argues, the moralistic and property-laden language of contract law seems destined to give citizens the wrong ideas, even if the misleading of the public was not intended. When you tell your clients that they have a “valid contract,” they think that they therefore have something real and substantial; and when you tell them that their valid contract was breached, they think that this means both that the law frowns on what the other party did, and that the other party will be subject to significant penalties (or at least that the innocent parties will be fully compensated).

However, as Holmes – and Karl Llewellyn, and other legal realists – have pointed out, all that a contractual right means is that some sum *might* be awarded in damages if the promised

⁵ Oliver Wendell Holmes, Jr. “The Path of the Law,” 10 *Harvard Law Review* 457 (1897).

⁶ E.g., *Dickinson v. Dodds*, (1876) 2 Ch. D. 463 (C.A.).

performance does not occur.⁷ And I trust that all the students here have already learned enough contract law to know that many breaches of contract law will lead to only nominal pay-outs – even less when one takes into account the significant legal fees one needs to pay to enforce one’s so-called “right” in court, not to mention the long delays. It was Holmes who wanted us to sidestep the moralistic and metaphysical language, even the references to “right” and “duty,” and explain instead – both to our law students and to our clients – that these terms mean nothing (*can mean nothing*) more than what a court will give you for them.

In contract law, as elsewhere, sometimes a court knows where it wants to go, and will not let mere doctrinal rules or the clear meaning of language get in its way. In the famous 1935 case of *Webb v. McGowan*,⁸ an employee had saved his employer from death or grievous injury, by using his own body to push away a heavy falling object; in the process, the employee caused himself significant injury. In gratitude, the employer promised the employee regular payments until the employee died, and the employer kept that promise until his own death, at which point, his executor refused further payments. The employee sued to enforce the promise, but the problem was that under conventional contract law doctrine, then as now, for a promise to be enforceable, one needed consideration, something of value (or the promise of something of value) to have been given in return for the promise – and that exchange had to have been simultaneous with the promise, or after it. To have the benefit come beforehand does not suffice, at least under the general rule.

The *Webb v. McGowan* court, straining to find a way to enforce the promise against the employer’s estate, offered the following argument: the employer’s “express promise to pay [the employee] for the services rendered [that is, saving the employer’s life] was an affirmance or

⁷ Holmes, *supra*, at 462.

⁸ 168 So. 196 (Ala. App. 1935), cert. denied, 232 Ala. 374, 168 So. 199 (1936).

ratification of what [the employee] had done raising the presumption that the services had been rendered at [the employer's] request.”⁹ In other words, the court stated that, because of the employer's promise to pay, we should presume that there had been a remarkably quick and detailed discussion between the employer and employee *while the heavy object was falling*, negotiating the terms of compensation for the rescue that was in the process of occurring.

Now, not every judge graduated on the top of his or her class, but it is hard to believe that any judge actually believed that *there was the least chance* that contractual negotiations went on in this case as the employee was falling with the heavy object. Contract doctrine was later changed, establishing a limited exception to the requirement of contemporaneous consideration, to cover cases whose facts were very similar to *Webb v. McGowan*.¹⁰

The words here do not mislead, so much as we feel the need to stretch the words to get around doctrinal rules we do not like. One can see this also for certain contractual requirements, requirements the law has created, or whose use it has authorized, for good reasons, but where there, nonetheless, are occasions when the law would rather not enforce them strictly. One excellent example is contractual conditions: “on/off” switches of the obligation to perform for one or both parties. Under American contract law, the courts will generally enforce the conditions expressly agreed to by the parties – except, of course, when they don't. And when they don't, the courts sometimes blame the party seeking enforcement. If that party acted in any way inconsistent with its rights under the condition, it is said to have “waived” that right. In fact, that action will often be described as a “knowing waiver.”

But when the insurance company begins to investigate a claim that was in fact filed one day past the 30-day filing period, the courts may use that investigation as an excuse to enforce

⁹ Id. at 198.

¹⁰ See *Restatement (Second) of Contract* §86.

the rights of sympathetic policy holders, but it seems a mis-characterization, at least most of the time, to say that the insurance company “waived” its right to refuse payment based on the late filing. We may give it that description, but like the 14th floor in the hotel, we are just trying to make the outcome look more attractive by using the wrong label. I speculate that saying that the insurance companies must have been trying to be generous, waiving its rights not to pay (but somehow changed its mind later, for otherwise we would not be in court) is more attractive, to all concerned, then saying that we do not much like the strict enforcement of deadlines, and we are at best suspicious of insurance companies, so that we will make a game out of contractual enforcement, and insurance companies that make any mis-steps will be penalized.

I do not want to make the courts, or contractual doctrine, appear to be too flexible or too sympathetic. There are many other occasions in which the courts are much more willing to enforce contractual terms, even against sympathetic consumers. There has been, for some years, heated debates about the proper approach to electronic contracting – the contracts associated with the sales of computers, and the leasing and downloading of computer software. With the sale of computers, the contractual terms are often packed into the box, so the purchaser often has no opportunity to see them until long after the goods have been ordered and paid for. (The courts tell us that we are supposed to read the terms at that point, and then return the merchandise if we disagree with any of the contractual provisions.¹¹ I am sure that there must be “Youtube” videos of the surprised and uncooperative looks of store clerks in big box stores when someone actually tries to follow the courts’ advice.)

With downloaded software, the terms are sometimes displayed on a Web page that the person obtaining the software was already viewing; though, for some products, the terms are on

¹¹ ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

some other Web page, that the person would have had to actively seek out. Sometimes the purchaser or lessor of the software needs to click a box indicating agreement to the terms before he or she can obtain the software, and other times the consumer's assent to all of the terms is simply assumed.

One basic question has been whether such transactions should be analyzed under the common law of contracts, under the Uniform Commercial Code (UCC) articles that apply to the sale and lease of goods, under some entirely new set of standards, or some combination of the three.

Some years back, the American Law Institute, together with the National Conference of Commissioners on Uniform State Laws (NCCUSL) attempted to amend the Uniform Commercial Code, either through additions to Article 2 on the Sale of Goods, or through an entirely new article to the UCC, to deal with these sorts of transactions.

There was significant opinion that the new standards regulating electronic contracting should include procedural and substantive restrictions on the terms that could be imposed on those who purchased computers or downloaded software, especially in contexts where the terms were only given in the box to be shipped later or hidden on a Web site in a non-conspicuous way.

The vendors of computers and computer software were not happy about this development, and, through legal representatives and sympathetic (and compensated) law professors, complained that the proposed restrictions would interfere with the "freedom of contract" of both the vendors and the users of the computers and computer software.

In a world where contracts are often long, intricate, and cryptic, on standardized forms not subject to negotiation or re-negotiation, and given on a "take it or leave it basis," where there may be little choice but to work with this vendor, or where all vendors offer identical terms; and

where sometimes transactions occur in ways such that one of the parties may be unlikely to know that there even are binding and restrictive contractual terms, and even less chance of understanding them correctly if they were brought to his or her attention: in such situations, it is an interesting question whether there is “freedom of contract” at all, and whether there is any “consent” or “assent” to the terms, in any meaningful sense of those terms.

It is like the question of whether there was meaningful “freedom of contract” for the bakers and other workers in *Lochner v. New York*¹² and the related cases in the early decades of the 20th century. In those cases, constitutional challenges were brought against legislation purporting to protect workers. Those challenging the statutes claimed that the laws unconstitutionally infringed the workers’ “freedom of contract,” their freedom to enter agreements to labor particularly long hours, for particularly low wages, and in doubtful working conditions.

My rhetorical excess aside, I *really do* mean to say that *it is an interesting question* whether “freedom of contract” is present, in a morally significant sense, either for the users of software in so-called “clickware” and “browseware” transactions and other forms of electronic contracting, or for the workers who were the subject of paternalistic legislation. One can understand the argument that bakers can sometimes reasonably and autonomously choose to work longer hours, even at a low rate and in poor conditions, and one can understand an argument that people sometimes rationally choose to remain ignorant of the terms that bind them contractually, believing that they can trust the companies with whom they are dealing, and that they think learning about the terms that bind them would take time that could be better spent on other concerns.

¹² 198 U.S. 45 (1905) (invalidating New York’s statute setting maximum hours for bakers).

At the same time, for many consumers -- perhaps *most* consumers -- what goes on in the acquisition of computer hardware and software is at most a caricature of free and knowing assent to terms, analogous to the caricature of voting that occurs when there are “elections” in totalitarian, one-party states.¹³ And when we pretend that consumers’ inaction in responding to long boilerplate clauses sent in the box, or hidden in a web site, is the same -- or should be treated the same -- as two sophisticated parties negotiating out each significant term of an agreement, we are fooling ourselves ... or at least allowing ourselves to be fooled.

You can call it “consent,” you can call it “freedom of contract,” but most of the time, I think it is just the 13th floor.

Let me be clear on what I am NOT saying here. I am *not* saying that vendors of computer hardware and software are always -- or even most of the time -- acting in bad faith. I am *not* saying that because electronic contracting often lacks consent in its fullest form that we should never enforce these transactions, or that there are not good, pragmatic reasons to allow companies to present terms in the way they currently do. Perhaps Judge Easterbrook, writing in a well-known electronic contracting case,¹⁴ is right that the only alternative to current practices would be a sort of chaos that would discourage vendors and users alike (though the American Law Institute seems to think otherwise, in its recent work on the subject¹⁵). In any event, I think that there is a discussion to be had about greater regulation of form contracts in general, and electronic transactions in particular -- perhaps along the lines of what is done in the European

¹³ See Andrew Robertson, “The Limits of Voluntariness in Contract,” 29 *Melbourne University Law Review* 179 (2005).

¹⁴ ProCD v. Zeidenberg, *supra*.

¹⁵ See American Law Institute, *Principles of the Law of Software Contracts* (Proposed Final Draft, March 16, 2009).

Union countries¹⁶ – and that we might also consider the more modest suggestions of the ALI to create greater pre-purchase notification of terms.¹⁷

We like to talk about “consent”: “consent” relates to allowing parties to make their own commercial and life choices, rather than having the state impose those choices upon them. In medical decision-making law, the courts stretch very far indeed to be able to conclude that the decision whether to have medical treatment or not, is based on the patient’s own choices, and not based on some controversial value judgment made by the court or the hospital or the legislature.

Of course, this is relatively easy and straightforward when the patient is conscious and competent, not depressed or under duress, and the patient makes a clear expression of preference for or against certain medical treatments. Additionally, where the patient is presently *incompetent*, but there is a clear prior expression of preference, through an advance directive or living will or similar document, it is entirely reasonable to say that honoring that prior expressed preference is a way of allowing the patient to choose, even though the patient is currently incompetent to choose.

Courts will go still further. Even if the patient has not made a prior express determination in a living will, or even in private conversation, sometimes it will be enough if a close friend or close relative testifies as to what choice the patient *would have made*, given other choices the patient had made previously, or other things that the patient seemed to value. It is more of a stretch, to be sure, but there still seems to be a sense in which we are trying to protect

¹⁶ See, e.g., Jane K. Winn. & Brian H. Bix, “Diverging Perspectives on Electronic Contracting in the US and EU,” *Cleveland State Law Review* 54 (2006): 175-190. There have been a series of EU directives relating to consumer protection in this area, including Dir. 91/13/EEC, on unfair terms in consumer contracts; and Dir. 97/7/EC, on consumer protection in “distance contracts”; and Dir. 2005/29EC, on unfair business-to-consumer commercial practices. See generally Hugh Collins, ed., *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Wolters Kluwer, 2008).

¹⁷ See American Law Institute, *supra*.

the patient's own choices – or, at least, what we think the patient *would have chosen* – rather than simply expressing our own values as to what would be best for that patient.

However, courts will not let go of the claim that in medical decision-making cases they are only enforcing the wishes of the patient, even when it is clearly a myth. In the well-known case of *Superintendent of Belchertown State School v. Saikewicz*,¹⁸ the Massachusetts Supreme Judicial Court dealt with a medical decision for a patient who was not competent, and had never been competent. The patient in question was 67 years old, but with an IQ of 10 and a mental age of just under three years old.¹⁹ There were thus no competent prior directives or competent prior values and beliefs upon which to ground any sort of claim of protecting the patient's own choice. Nevertheless, the court in *Saikewicz*, unhelpfully, offered the following standard for guardians *ad litem* and judges to follow in making medical decisions for the permanently incompetent:

“[T]he decision in cases such as this should be that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person.”²⁰

Now, let's make sure we are all following this: figure out what the incompetent patient would have wanted, *if the patient had been competent*, but also remembering that this hypothetical competent version of the incompetent patient must take into account at all times the knowledge of the patient's present and past incompetency. Either this is a desperate misuse of words – wanting to pretend that we are merely enforcing a subjective choice rather than making an

¹⁸ 370 N.E.2d 417 (Mass. 1977).

¹⁹ *Id.* at 420.

²⁰ *Id.* at 431.

objective quality-of-life judgment – or else the court is hoping for a level of mental acuity and flexibility among judges and guardians never seen this side of the string theory physicists who speak confidently of 10 dimensions of space.

There are many reasons to favor protecting the autonomous choices of contracting parties and medical patients, but sometimes autonomous choice – consent – is simply not present, or present in such a weak or distorted form that it cannot carry the moral weight that it usually demanded of it. And we need simply to admit that, to be honest about that, and choose both another word, and another sort of justification.

Family Law

In time, we have learned the power of mere labels. Perhaps the sensitivity to names, and the power they can have, is greatest in family law. For example, when we divide up the care of children after divorce, it was, and still is, common to divide up the care unevenly: for children to stay much of the week in one parent's house, and only the weekend, or every other weekend, in the other parent's house. The further away from each other the two parents live, the more there is a necessity for a sharply split, and uneven division of the children's physical presence: when the parents live very far apart, the children may spend the entire school year with one parent, seeing the other only for the summer and perhaps a holiday or two. As stated, the practicality of long-distance travel plus the requirements of schooling makes this uneven division inevitable where the parents live far apart. (And even when they do not live far apart, some experts claim that children do better with more continuity and not too much shuttling back and forth between parents, though this position is controversial.)

Where there is an uneven division of the physical custody of children, for a long time we called the parent with most of the time, the “custodial parent,” while the other parent was said to have “visitation” rights. Not that many years ago, it occurred to some commentators and lawmakers that being the “visitor” with one’s own children might *not* be a description that encouraged connection and good feeling, so that a number of jurisdictions (including Minnesota) have generally switched to referring to “parenting plans” rather than “custodial parent” and “visitation.”

A game of names with even larger stakes is happening all over this country, relating to the legal recognition of same-sex unions. Currently, four states (Massachusetts, Connecticut, Iowa, and Vermont) recognize marriages between same-sex partners. A handful of other states recognize a status for same-sex couples that has all the same state-law rights and obligations as marriage, but goes under a different name: usually “civil union” or “domestic partnership.”

Whenever opinion polls are taken about the public support for the legal recognition of same-sex unions, a strange thing happens. The level of support for civil unions or domestic partnerships is consistently much higher than the level of support for same-sex marriages, even when it is clearly explained that the legal rights and obligations would be identical, at least as a matter of state law. For example, a recent *Newsweek* poll, from December 2008, showed that the support for legal recognition for same-sex unions basically doubled, from 31% to 63%, as one went from “marriage” to “civil unions.”²¹

That a significant portion of American adults would change their views, in a substantial way, on a controversial legal status, just because the name has been changed (from “marriage” to something else) strikes many observers as more than a little irrational. “I don’t care what you

²¹ *Newsweek Poll*, Dec 5, 2008, Question 11, available at <http://www.newsweek.com/id/172399/output>.

do, or what the State does for you, as long as you do not call it ‘marriage,’” seems hardly the sort of thing which would justify going to the barricades, or which would make an icon of cultural conservatism, like Edmund Burke or Friedrich Hayek, proud. It becomes a fight over symbols – not that symbols are not important, but they do seem distinctly secondary to the rights and obligations that shape our lives.

To a significant portion of the population, to give same-sex couples the ability to enter civil marriage is a horrible thing, but to give them exactly the same set of rights and obligations under a different name is “just fine, thank you.” Of course, one might note that the strangeness runs in both directions. California had already granted same-sex couples all the same state-law rights and obligations as opposite-sex married couples under the rubric of “domestic partnerships.” However, gay rights advocates went to the California Supreme Court to seek – and, temporarily, to obtain – the right for same-sex couples to marry.²² That right was subsequently removed by a state referendum (“Proposition 8”). And just today, the Vermont Legislature, overriding the veto of its Governor, voted to allow same-sex couples to marry, changing only the title for a set of rights and duties that same-sex couples had already had in that state for 9 years under the label, “civil unions.” These are just further examples of both sides of the debate fighting over labels. It is not precisely that nothing mundane and practical is at stake, but it is so little (where the federal government will not recognize the unions as marriages, and no other state will do so either, except perhaps New Hampshire, New York, and the District of Columbia) that it hardly grounds or explains the strong feelings on both sides.

Here it is perceptions that make it so. Because both opponents and supporters treat same-sex “marriage” as significantly different from, and significantly better than, any recognized

²² In re Marriage Cases, 43 Cal.4th 757, 183 P.3d 384 (Cal. 2008).

status for same-sex couples under a different name, then it is the case. Same-sex couples who can enter “civil unions” or “domestic partnerships,” but not “marriage,” perceive such unions, not as “separate but equal,” but as being relegated to “second class status,” even if there is no legal differences as a matter of state law. And it seems likely that some significant percentage of heterosexuals think so as well, or it would be hard to explain the wide differential in the opinion polls. Of course, here, it is not so much that words mislead us as it is that we let words stand in for differing attitudes towards certain non-traditional ways of living.

Words also have significance when we move from the rules about entering marriage to those relating to its exit. Considering that it is a long-standing and pervasive aspect of the law of marriage and divorce, alimony (also called “spousal maintenance” or “spousal support”) is thoroughly under-theorized. It is the historical residue of a time, hundreds of years back, when the vast majority of women had no practical means of supporting themselves in the Market. At that time, adult women went from having been the financial dependents of their fathers to being the financial dependents of their husbands. Divorce back then was either very rare or entirely forbidden.

When a movement arose to make divorce more easily accessible – if only on fault grounds to the innocent and wronged spouse – one practical necessity was to create some provision for the wives (at least the innocent ones). Otherwise, divorce would leave wives destitute. And the awkward compromise that was reached was that when a divorce occurred, though the marriage was dissolved, the husband’s obligation to support his wife would continue, and this would be called “alimony.” That obligation would end, however, if the wife found another husband – and thus, the long-standing rule, still valid in many states, that alimony terminates automatically upon remarriage. As the father “gives the bride in marriage” to her first

husband, so the first husband, in a sense, gives the woman away to her second husband, at least in terms of financial duty.

Time passed, and alimony, this residue of a former historical period, continued, even if only granted in a fraction of divorces. However, a new justification was sought. Many courts began to speak of alimony being appropriate where, and to the extent that, the spouse (almost always the wife) could prove “need.”

This is the terminology and rhetoric that one finds in a large proportion of alimony cases to this very day. However, in a vast majority of those cases, “need” is not used in a conventional way. The court does not inquire as to whether a spouse has been left without the means to meet even basic minimal requirements of life – though that would usually justify alimony (if only to prevent the State from having to support that spouse; family law doctrine is generally protective of the public fisc).

When the courts speak of spousal “need” in alimony case, the reference is often, indirectly, to the standard of living within the marriage. A long-term spouse is basically held to have a right to something like the quality of life she or he enjoyed during the marriage, and may receive alimony if that spouse’s income-earning capacity will not rise to that level after the marriage is over. However, again, courts rarely venture to articulate *why* spouses in long-term marriages should be thought to have such rights.

Because “need” is used in alimony cases in a way that sharply differs from the conventional meaning of that term (references to spouses “needing” \$100,000 rankles almost as much as certain corporate bailout bonuses, and NBA star Latrell Sprewell’s comment²³ that he was rejecting a contract offer of \$27 million over 3 years because he needed to “feed his

²³ Made on or just before November 2, 2004.

family”), and because courts have generally failed to offer a coherent justification for alimony – with or without reference to “need” – it is perhaps not surprising that legal doctrine and practice are chipping away at alimony. At least one state, Texas, does not allow permanent alimony (except where the recipient or a dependent child is mentally or physically disabled), and places strict time and dollar constraints on what the courts can award. Also, many states, by legislation or court practice, have moved from preferring permanent (that is, indefinite) alimony, to preferring temporary (or “rehabilitative” alimony). We understand the description “rehabilitate” in the context of alimony – give the spouse the time and resources needed to retrain and re-enter the workforce – better than we understand the word “need.”

Some commentators, and the American Law Institute – through its *Principles of the Law of Family Dissolution*²⁴ – have in the last few years tried to establish a more sensible grounding for alimony. Alimony is presented as an entitlement a spouse in a long-term marriage earns based on sacrifices that spouse made giving up a career, staying home to take care of house and family, and so on, sacrifices that meant both that this spouse lost earning capacity, and that the sacrifices made helped the other spouse increase his or her earning capacity. With that understanding, suddenly alimony is an entitlement rather than charity, we no longer have to stretch the word “need” to cover middle class and upper class standard of living payments, and – by the way – there is no reason to have alimony terminate automatically upon the recipient’s remarriage.

Perhaps if we followed the ALI, and started speaking of alimony in terms of what a spouse has “earned,” rather than “charity” given to meet spousal “needs,” there would also be less felt pressure to reduce the frequency, length, and amounts given in those awards. Not that

²⁴ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002), ch. 5.

every marriage and divorce should include alimony, but for longer marriages where one spouse *has* sacrificed significantly, the claim should not be quickly dismissed.

As we leave the rights and duties between spouses and ex-spouses in family law and look at parent-child rules, the standard heard often – indeed, constantly – is “best interests of the child.” It is almost a laugh line: for any family law question in a course exam or the bar examination, one will rarely go far wrong to simply say, “best interests of the child,” whatever the actual questions inquired. And perhaps this is the problem: “best interests of the child” is *so* familiar, *so* well rehearsed, and *so* politically palatable (it is not a coincidence that debates about same-sex marriage end up turning into arguments about the best context in which to raise children, although this is largely tangential to the subject).

Like “consent” in electronic contracting, “subjective choice” in medical decision-making, and “waiver” in insurance contracts, we say “best interests of the child” even when we do not mean it, because we like the way it sounds.

When courts say that parents should be given a very strong presumption in any custody fight with non-parents, when we say that grandparents and same-sex partners who have helped to raise a child have no standing even to request visitation, when we say that a very strong showing of harm will be required to cut off an even quite bad parent from visitation rights, and when we say that as a matter of public policy we will not consider as a factor in a custody decision whether a child will be placed in child care or whether a child might face harsh discriminatory feelings in a community, these are all decisions that courts often defend in terms of “the best interests of the child.”

I should add that I think that many of these decisions (though not all of them) are right, or at least reasonable choices between equally good and equally bad options. However, I think

most of them have little to do with “the best interests of the child.” Frequently, they involve an intentional indifference to what will be in the child’s interests. These decisions, instead, are about protecting parental rights and prerogatives, or about trying to further certain collective social goals, which we believe to be more important than the interests of the individual children in question. And we should say as much, even if being forthright about sometimes being willing to sacrifice “the best interests” of children for other objectives may make our conclusions seem more vulnerable, more subject to criticism and debate, than they had been. Persuasion is not the only objective, or even the highest objective. We need to be more transparent in our moral and policy arguments, even where this makes us less likely to persuade.

Conclusion

I am told that Frederick W. Thomas – prominent Minnesota lawyer – was a stickler for clear and simple language, and younger members of his firm who presented work that was pompous and obscure – in just the way that legal language can so often be pompous and obscure – had their legal work returned to them covered with red ink corrections.

Because we only rarely have a Freddy Thomas – or an Oliver Wendell Holmes or a Felix Cohen – to keep us in line, we need to learn to do the important work ourselves.

And it is not just that there is so much unnecessary jargon, hopelessly cryptic language, and obscurity for its own sake -- though ridding legal practice of that would be a monumental effort and greatly to be welcomed. The greater danger, it seems to me, is the way that inaccurate language can so easily change our substantive views about what is natural or what is right.

If transparency is difficult in legal language, much of the fault may lie with lawyers and judges who simply want to make their conclusions sound more reasonable, less controversial,

and more appealing: so we call it “consent” and “waiver” and “meeting of the minds,” when it is in fact something quite different.

Also, law, at least the common law system we have inherited from England, is a process of reasoning and law-making that is tied strongly to the past. The new case has to fit into the categories and concepts that we created for a prior case – or for cases that came up hundreds of years before, in a different society, with different technology, facing a different set of problems. So judges often end up stretching the meaning of concepts, or using legal fictions to bridge the old rule with the new equities.

We may never entirely escape the tendency of our own language to mislead us, but clarity in thought and analysis is something towards which we should struggle constantly, and with determination. Do it for Freddy!

Thank you.