

Rafael Salkie, Professeur, Université de Brighton
Linguistics must challenge 'textualism'!

The field of legal linguistics has blossomed in recent years: cf. Solan et al. (2015) for a rich and elegant overview. This has been an excellent opportunity for linguistics to show that it has important practical applications (but see chapter 10 of Shuy (2015) for some sobering remarks about the limits of linguists as expert witnesses in legal cases).

Much of the work in this area has been critical of aspects of the legal systems in Western democracies, but has assumed that the core of these systems is justice and human rights. It is time for linguists to challenge this assumption. The notorious miscarriages of justice in England, such as the Birmingham Six and the Guildford Four, were unfortunately not aberrations.

Textualism is a theory of legal language promoted by US Supreme Court Judge Antonin Scalia, which appeals to 'the plain meaning' of laws: this and similar expressions (everyday language, ordinary meaning, etc.) occur frequently in Scalia's judicial pronouncements and in his co-authored book *Reading Law* (Scalia and Garner 2012).

I argue here that Scalia's appeals to 'plain meaning' conflict with recent work in lexical semantics, and that they are a politically motivated effort to promote his conservative politics. A scrutiny of Scalia's own use of language supports these claims.

The suggestion that judges are generally less than honest when they appeal to language has been elaborated before (cf. Solan 1993); and legal scholars such as McGowan (2008) have criticised Scalia for hiding the real basis of his judicial reasoning behind a façade of textual exegesis. My research goes further by analysing a corpus of Scalia's own words using Critical Discourse Analysis (Wodak & Meyer 2001). Consider as an example this extract from a Scalia dissent:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business. It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be. (*Webster v. Reproductive Health Services* 492 U.S. 1989).

Note here:

Emotional references to language (words no longer have meaning; normal)

The deliberate use of the passive (heralded, self-awarded, disassembled, brought down) to hide agency.

Use of a loaded word for the opposite point of view (heralded) or a law that he dislikes (mansion)

The rhetorical device apodioxis [trivialisation] (a triumph of judicial statesmanship)

Metaphor (mansion / doorjamb)

Recurrent expressions (statesmanship / statesmanlike); many other examples are revealed in the corpus.

Textualism is dishonest and unsustainable: this study will help to resist it.

References

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