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Is Law a Technical Language?

FREDERICK SCHAUER*

“Before rebushing the lower trunnion banjos, you must remove the bonnet fascia and undo the A-arm nut with a #3 spanner.”¹

I am reliably informed that the above quotation is in English. But it is far from obvious that the language of the quotation is the English that is spoken by ordinary English speakers, even those resident in the United Kingdom. Rather, it appears to be an example of technical English, here a subset of the English presumably spoken and understood by those who are in the business of, or familiar with, repairing or performing maintenance on the British cars of the 1950s and 1960s. Yet even though the sentence is an example of a technical language largely incomprehensible to those outside the relevant technical community, it does appear to be in English and not in Japanese, Swahili, or Esperanto.

Therein lies the problem I seek to address on this occasion. Of course law is replete with technical terms. Some of them announce their technicality by being in Latin, as with terms such as *habeas corpus*, *res ipsa loquitur*, *assumpsit*, and *quantum meruit*. Other terms are equally obviously technical because, although existing in something that looks like English, they have no ordinary uses. Nonlawyers simply do not use

* © 2015 Frederick Schauer. David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article is the written version of the Nathaniel L. Nathanson Memorial Lecture, delivered at the University of San Diego School of Law on February 19, 2015.

1. Don Hayward, *The Laws for British Sports Cars*, MOSS MOTORS NEWSL. (Moss Motors Ltd., Goleta, Cal.), Summer 1985 (quoting BRITISH MOTOR CORP., MGA SHOP MANUAL 132 (1961)), <http://www.brokenkitty.com/home/britcars.htm> [<http://perma.cc/9YDJ-X5VS>].

terms like *interpleader*, *covenant running with the land*, *letters rogatory*, *deposition*, or *desuetude*. And still other terms resemble ordinary words, but have meanings in law that appear to diverge sharply from at least some of their ordinary language meanings, as with *contract*,² *party*, *witness*, and even *speech*.³

All competent lawyers are no doubt familiar with what we call “terms of art,” and for a lawyer to suggest that the meaning of *actual malice*⁴ or *substantial evidence*⁵ could be found by looking in Webster’s dictionary would be ample evidence of professional incompetence.⁶ But implicit in the view that certain legal terms are terms of art is the corollary—that most legal terms are not terms of art, and are therefore to be understood in a nontechnical or nonspecialized sense. But is this true? My agenda on this occasion is to examine the extent to which legal language—all of it, and not just the epiphenomenal corner we designate as *terms of art*—is a specialized language demanding interpretation in light of the particular goals of a legal system.

It is not my intention here to offer strong—or even weak—normative conclusions about the issue I propose to analyze. But if I can succeed in raising an issue that is often ignored, I will consider this lecture a success. Yet as will become apparent, one application of the question whether law is a technical language is in supporting a skeptical view about the now-common distinction between interpretation and construction. For many years, first in the literature on the interpretation of contracts,⁷ then in

2. On *contract* as a technical term—or not—see Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271 (1989), an important but unfortunately neglected article on the circumstances under which legal language is or is not to be treated as technical language. Also highly valuable, although more narrowly focused on the parol evidence rule, is PETER M. TIERSMA, *PARCHMENT PAPER PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION* 116–31 (2010).

3. On *speech* in the First Amendment as a technical term, see Morrison, *supra* note 2, at 321–35; Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) [hereinafter Schauer, *The Boundaries of the First Amendment*]; Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of “Speech,”* 1993 WIS. L. REV. 1525 (1993).

4. *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 251 (1974).

5. *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 815 (2015).

6. And this is even truer of those terms that are constitutive, in the sense that they mark an institution or idea that is created by law and not simply regulated by it. *Trust* and *corporation* seem like good examples. On law’s constitutive dimension, see the summary in FREDERICK SCHAUER, *THE FORCE OF LAW* 27–31 (2015).

7. The leading article is Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964). See also E. Allan Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 YALE L.J. 939, 940 (1967) (distinguishing contract construction from contract interpretation). Insofar as the distinction between interpretation and

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discussions of statutory interpretation,⁸ and these days especially in the debates about constitutional originalism,⁹ it is often claimed that determining legal meaning and applying that meaning to particular cases and controversies is a two-step process. The first step—interpretation—is the step in which the lawyer, judge, or commentator determines what some piece of legal language simply *means*. This is, it is said, a semantic enterprise, where we are trying to determine, in the abstract, what some word or phrase means according to the rules and practices by which we determine meaning in everyday life. But having determined the meaning of some item of legal language—having interpreted it—the lawyer or judge or commentator must then apply it in the resolution of the particular legal matter at hand. This, it is said, is the process of construction, and it is an inevitably legal task drawing on legal tools, legal ideas, and legal goals, without which the process of construction will fail to serve the institutional aims of a legal system.

The distinction between interpretation and construction, however, presupposes a distinction between a principally nonlegal or pre-legal focus in the interpretation stage followed by a legally infused process at the construction stage. But to the extent that legal language is itself a technical language, legal ideals and aims come in at the interpretation stage and not just at the later point of construction. Consequently, identifying even the possibility that legal language may be a pervasively technical language has the potential for seriously undercutting the ubiquitous interpretation–construction distinction. Or so I shall suggest on this occasion.

construction in the contracts context arises from language produced by the contracting parties, it bears an affinity with the same issue arising from claimant-produced language in the patent context. See Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation–Construction Distinction in Patent Law*, 123 YALE L.J. 530 (2013).

8. See Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014).

9. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 3–9 (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 2–14 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

I.

The issue I address here can usefully be highlighted by contrasting two diametrically opposed views about the possibility that legal language might pervasively be a technical language understood only by those steeped in the law and knowledgeable about its techniques. And at one pole of this opposition we find Jeremy Bentham, for whom the very idea that legal language could be considered as technical or specialized was anathema.

Bentham, as is well-known, was a vehement—which might put it too mildly—critic of the English law of his time, and of the common law even more generally.¹⁰ And because his ire was based substantially on the view that lawyers and judges were participants in a conspiracy—Judge & Co.¹¹—to make law unnecessarily complex for the purpose of increasing the income of lawyers and the power of judges, he became especially incensed about the frequency with which legal language diverged from ordinary usage.¹² This divergence was frequently manifested in the phenomenon of the legal fiction—the use in law of propositions that are not literally true but which achieve what the law generally or some legal actor believes to be the legally desirable result.¹³

Among the classic examples of legal fictions is the presumption of paternity, by which the husband of a mother is presumed to be the father of a child born during the marriage, even though, as a biological matter, he might not be.¹⁴ Similarly, there is the fiction of corporate personhood,

10. See generally GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 207–17, 266–311 (1986) (describing and analyzing Bentham’s critique of the common law).

11. 6 JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence*, in *THE WORKS OF JEREMY BENTHAM* 5, 22–24 (John Bowring ed., 1843).

12. Bentham’s views about legal fictions were part of a larger project partly about law, but also partly about language generally. See C.K. OGDEN, *BENTHAM’S THEORY OF FICTIONS* (1932); see also Nomi Maya Stolzenberg, *Bentham’s Theory of Fictions—A “Curious Double Language,”* 11 *CARDOZO STUD. L. & LITERATURE* 223 (1999) (discussing Bentham’s critique of legal fictions).

13. On legal fictions generally, see *LEGAL FICTIONS IN THEORY AND PRACTICE* (Maksymilian Del Mar & William Twining eds., 2015); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE L.J.* 1 (1990); Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 *ST. THOMAS L. REV.* 1 (2010); Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 *TEL AVIV UNIV. STUD. L.* 33 (1990). The classic work remains LON L. FULLER, *LEGAL FICTIONS* (1967), about which much more will be said in the following section.

14. See *Succession of Cosse*, 608 So. 2d 1092, 1097–98 (La. Ct. App. 1992) (describing presumption of paternity as a legal fiction); *Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997) (same); Jacquelyn A. West, Comment, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 *DUQ. L. REV.* 577, 577 (2004).

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although corporations are not persons in any literal sense,¹⁵ the fiction declaring juvenile trespassers to be invitees, even though they were decidedly not invited onto the premises,¹⁶ the fiction that a joint owner of property who kills the other joint owner has predeceased the victim,¹⁷ and the fiction underlying the doctrine of ejectment, which allows courts to try the title to land even though no one has been ejected from anything.¹⁸ And perhaps most famous is the fiction in *Mostyn v. Fabrigas*,¹⁹ in which Lord Mansfield declared the Mediterranean island of Minorca to be in London so as to take jurisdiction under a statute limiting jurisdiction to cases in which the claimant was a resident of London.²⁰

An essential feature of a legal fiction is that the very fictionality of a legal fiction is based on the literal untruth of the fiction. The presumption of paternity is a fiction because the husband is deemed a father even if he is not, just as corporate personhood is a fiction because corporations are not persons. As a result, the individual unlearned in the law, and thus inclined to read the law literally, would not be able to understand that when law said *person* it did not really mean *person* in the ordinary literal sense and when the law said *father* it meant something other than what laypeople meant by *father* in their everyday talk. The legal fiction thus exemplified all—or at least most—of what Bentham despised about law, because a legal fiction would obscure true legal meaning from someone not versed in the law.

For Bentham the ubiquitous legal practice of using fictions of this type to achieve what lawyers or judges thought was an equitable or just result was despicable. And lest there be any doubt about Bentham's feelings about legal fictions and thus about the way in which legal language frequently diverged from ordinary language, consider the following articulation of

15. See Sanford A. Schane, *The Corporation Is a Person: the Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987).

16. See FULLER, *supra* note 13, at 66.

17. *In re Sparks' Estate*, 15 N.Y.S.2d 926, 931 (Sur. Ct. 1939).

18. See JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 252 (2009).

19. (1774) 98 Eng. Rep. 1021; 1 Cowp. 160.

20. *Id.* at 1026, 1030; 1 Cowp. at 170, 176–77. Lest the audience suppose that legal fictions are a thing of the past, see Roderick Munday, *The Bridge That Choked a Watercourse or Repetitive Dictionary Disorder*, 29 STATUTE L. REV. 26, 26–28 (2008), describing the case of *R v. Torridge Dist. Council* [2006] EWHC (Admin) 877; [2006] 3 All ER 1148 (Eng.).

his view about the fundamental dishonesty of the legal fiction: “Every criminal uses the weapon he is most practiced in the use of: the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys: licensed thieves use fictions.”²¹ And at other times he observed that “[I]n English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.”²² Or that “the pestilential breath of Fiction poisons the sense of every instrument it comes near.”²³

Behind Bentham’s invective was a serious point. For Bentham the audience for law was not judges, nor was it other lawyers. Rather, the audience, or at least the principal audience,²⁴ for law was the public whose behavior was to be guided or controlled. If lawmakers, who for Bentham resided ideally in the legislature and not on the bench, could issue law’s directives in a way that those being directed would have no need for lawyers to advise them and judges to determine what the language meant, then the corrupting influence of the legal profession would be eliminated, and law’s unnecessary complexity could be reduced or even eliminated. Accordingly, when Bentham, with his tongue decidedly not in his cheek,²⁵ suggested that it might be made unlawful for people to give legal advice for money,²⁶ his goal was to remove the incentive from Parliament to help lawyers, who were well represented in Parliament, by making law increasingly complex.

Bentham’s excoriation of legal fictions was thus merely one aspect of his larger desire for law to be understood by ordinary people without the intervention of lawyers and the interpretation of judges. As a result, the very idea of legal language as technical language stands opposed to Bentham’s visions, and we can therefore take Bentham as the exemplar of the view that legal language, at least ideally if not in reality in Bentham’s time, should be understood as plain, everyday, ordinary language and not as the specialized discourse of a specialized profession.

21. 4 JEREMY BENTHAM, *Thirteenth Device—Fiction*, in RATIONALE OF JUDICIAL EVIDENCE 300, 307–08 (Fred B. Rothman & Co. 1995) (1827).

22. 5 BENTHAM, *The Elements of the Art of Packing*, *supra* note 11, at 65, 92.

23. 1 BENTHAM, *A Fragment on Government; or a Comment on the Commentaries*, *supra* note 11, at 221, 235 n.s.

24. Bentham did recognize that law was at times aimed at the officials and not directly at the public, although we might suspect that he wished it were otherwise. On law’s two audiences in just this sense, see especially Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–27 (1984).

25. Which apparently it never was: “Bentham was not gifted with a strong sense of humor . . .” GEOFFREY TREASURE, *WHO’S WHO IN LATE HANOVERIAN BRITAIN: 1789–1837*, at 56 (Stackpole Books 2002) (1997).

26. 5 BENTHAM, *Scotch Reform*, *supra* note 11, at 1, 5–6.

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II.

If Bentham can serve as the model for one pole of what is plainly a spectrum and not a dichotomy, then at the other pole we can place Lon Fuller. In the course of writing sympathetically about legal fictions,²⁷ Fuller explicitly discussed the divergence between legal language as ordinary language and legal language as technical language, and, albeit with some number of qualifications, suggested that law advances to the extent that it develops its own language and to the extent that its language is understood in a technical or specialized sense rather than an ordinary one.²⁸

Fuller's sympathy for the idea that all or most of legal language should be understood in a law-specific sense, despite nonlegal connotations, is apparent from his other writings. Thus, in famously debating with H.L.A. Hart about how a "No Vehicles in the Park" rule should be interpreted,²⁹ and in challenging Hart's claim that the rule had a core of settled meaning determinable by reference to the plain—and nontechnical—meaning of the language of the rule, Fuller appeared to suggest, although somewhat obliquely, that what counted as a *vehicle* in ordinary language might still not be a vehicle when understood as part of a legal rule.³⁰ To the extent that he was making that claim, Fuller can be understood as arguing that all of legal language is technical language and that to try to interpret law without understanding this important fact is to make a fundamental mistake. Indeed, much the same suggestion appears in the voice of Justice Foster—who is almost certainly Fuller himself—in Fuller's enduring "Case of the Speluncean Explorers."³¹ For Justice Foster, the legal meaning of a legal rule was not the literal meaning as perceived by the layperson, but rather was a "meaning that is not at once apparent to the casual reader

27. FULLER, *supra* note 13.

28. *Id.* at 11–27.

29. Lon L. Fuller, Response, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958); *see generally* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (examining the "most famous hypothetical in the common law world").

30. Fuller, *supra* note 29, at 663. A far more sophisticated version of the claim is in Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 381–96 (1985).

31. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 620–26 (1949).

who has not studied the statute closely or examined the objectives it seeks to attain.”³²

Fuller’s concerns with the problems of understanding legal language as ordinary language are by no means unique to him. In an unpublished speech entitled *Law and Language*, Karl Llewellyn recognized that much of the language of law was appropriately divergent from ordinary language and thus suggested that there might even be something like a Committee on Translation to enable disciplines to understand each other.³³ Similarly, the contracts, insurance law, and jurisprudence scholar Edwin Patterson, in an unfinished and unpublished treatise on contract law, lamented the fact that much confusion was sown by the way in which the language of contract law resembled, but was not identical to in terms of meaning, the language of ordinary English.³⁴ And thus, he proposed, only half seriously, that the word *contract* be replaced by a term unique in the law, such as *spikbond*, and that similarly confusing terms such as *offer* and *acceptance* be discarded in favor of terms from Roman law that had no ordinary English meaning, such as *spondesne* and *spondeo*.³⁵ And finally, Oliver Wendell Holmes lamented that the words of law had confusing moral connotations, and he too suggested that law might be better off were such confusions to be eliminated:

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.³⁶

The view of Fuller, Llewellyn, Patterson, Holmes, and others thus stands at the opposite pole from Bentham’s position. For the former group, law is a technical, specialized discipline, with its own history and its own goals.³⁷ And although law must for them be written in something that

32. *Id.* at 625.

33. Karl N. Llewellyn, *Law and Language* 23–24 (May 1961) (unpublished manuscript) (on file with the D’Angelo Law Library, University of Chicago).

34. Edwin W. Patterson, *Treatise on the Law of Contracts* ch. 3 (unpublished and undated manuscript) (on file with the Columbia Law School Library).

35. *Id.* at ch. 3, § 18. Patterson also discussed legal technical language in *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 252–58 (1953).

36. Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 464 (1897).

37. I do not claim that Fuller and others ignored the importance of law speaking plainly when it is speaking to ordinary people, as with, for example, jury instructions. See Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 *HOFSTRA L. REV.* 37 (1993).

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resembles ordinary English,³⁸ the existence of technical terms in law and the existence of technical meanings of ordinary words in law is more something to be celebrated than lamented, more to be fostered than stifled. To see legal language as technical language is to understand law's complexity, to understand law's goals, and to appreciate the way in which law has developed to facilitate those goals. And because law operates with and through language, it would be unfortunate, they appear to believe, if the desire to make law more publicly accessible were to become the vehicle to make law less responsive to the functions it has been created and developed to serve.

III.

Obviously my contrast between Bentham and Fuller and others is more than a trifle exaggerated. To repeat, the distinction between legal language as ordinary language and legal language as technical language is much more a spectrum than a dichotomy, more scalar than polar. Nevertheless, it does represent a genuine issue that pervades all of law. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, for example, Justice O'Connor, writing for a Supreme Court majority, understood the terms "any national currency" and "gold at the standard of fineness of nine hundred thousandths" in Article 22 of the Warsaw Convention as essentially technical terms to be interpreted in light of the broad purposes of the Warsaw Convention itself.³⁹ Justice Stevens, in an angry dissent, complained that much of the very idea of law itself is jeopardized when courts assume that the words of law mean something other than what they seem straightforwardly and nontechnically to mean.⁴⁰

Similarly, many of the debates about the proper interpretation of the Confrontation Clause of the Sixth Amendment⁴¹ can be seen as debates about whether the phrase "confronted with the witnesses against him"

38. A valuable but inconclusive series of reflections on the puzzling relationship between ordinary language and technical language is Charles E. Caton, *Introduction to PHILOSOPHY AND ORDINARY LANGUAGE*, at v (Charles E. Caton ed., 1963). For Caton, although perhaps not for Fuller, Patterson, and Holmes, "technical language is always an *adjunct* of ordinary language." *Id.* at viii.

39. 466 U.S. 243, 247, 256 (1984) (quoting Convention for the Unification of Certain Rules Relating to International Transportation by Air, art. 22, Oct. 12, 1929, 49 Stat. 3000).

40. *Id.* at 261, 282 (Stevens, J., dissenting).

41. U.S. CONST. amend. VI.

should be understood as ordinary or technical language,⁴² just as longstanding debates about the compatibility of obscenity law with the First Amendment have been framed in terms of whether *speech* should be understood as ordinary language or instead as a technical term whose extensions vary from those of ordinary usage.⁴³ More recently, the Supreme Court's decision in *NLRB v. Noel Canning*,⁴⁴ dealing with the definition of *recess* in Article I of the Constitution, considered not only whether the term *recess* should be given its ordinary or technical meaning, but even whether the word *the* might be understood in ways other than how it might be understood by the ordinary person on the street. And, most recently of all, in determining whether a fish was a *tangible object* for purposes of the antishredding—and thus antidestruction of evidence—provisions of the Sarbanes-Oxley securities law amendments,⁴⁵ the Supreme Court was forced to decide whether *tangible object* meant what it would mean in ordinary language, in which case it would include a fish destroyed in order to prevent its use as evidence, or whether it too was a technical term whose meaning was derived from the statute of which it was a part, a statute that had nothing to do with fish or any of the laws preventing the taking of undersize fish from federal waters.⁴⁶

IV.

Although the issue of whether legal language should be interpreted as ordinary or technical language is thus all around us, it has a particular

42. Compare *Crawford v. Washington*, 541 U.S. 36, 42–43, 51–52 (2004) (holding that although “one could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial,” the Confrontation Clause applies not only to in-court, but also to out-of-court statements), with *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (applying the literal language of the clause would result in a result “unintended and too extreme”), *abrogated by Crawford*, 541 U.S. at 68–69. See also *Michigan v. Bryant*, 562 U.S. 344, 370 (2011) (examining “the statements and actions of the parties to the encounter” in determining if there was an interrogation); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–11 (2009) (*testimony* includes affidavits based on their evidentiary purpose); *Giles v. California*, 554 U.S. 353 (2008) (*testimony* does not include an exception for “forfeiture by wrongdoing”); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (applying the colloquial sense of *interrogation* to hold statements assisting police in addressing an ongoing emergency are not testimonial).

43. Compare Schauer, *The Boundaries of the First Amendment*, *supra* note 3, at 1773–75 (discussing how the ordinary language meaning of the word *speech* cannot plausibly delineate the boundaries of the First Amendment), with Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005) (criticizing overly technical definitions of *speech*).

44. 134 S. Ct. 2550, 2560–61 (2014).

45. 18 U.S.C. § 1519 (2012).

46. *Yates v. United States*, 135 S. Ct. 1074 (2015).

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importance for some current debates about the theory and practice of constitutional interpretation. As I observed earlier,⁴⁷ a persistent theme in many of these debates is that there is an important distinction between the activity of interpretation, the stage at which a court—or advocate—determines what some provision means, and the stage of construction, the stage at which the court applies that meaning to the particular controversy at hand. And at least one purpose of drawing the distinction is to suggest that interpreting the Constitution in an originalist manner, say, still leaves open the question as to how the original public meaning of some provision should be applied—constructed—to the matter at hand.

Implicit in the interpretation–construction distinction, however, is the view that the meaning of the relevant terms can be determined without taking into account how they might actually be applied within the legal system and to a particular controversy involving a particular set of facts. But for Fuller, among others, the former task cannot be separated from the latter. If we understand all of legal language as incorporating law’s goals, law’s values, and law’s purposes, then the very act of determining meaning, as with the meaning of *vehicle* or *recess* or *tangible object*, must take account not only of the fact that such words exist in legal rules or legal documents, and not only that they are being interpreted by a court, but also of the outcomes that one or another interpretation would produce. For Fuller, at the very least, to interpret legal language without being aware of the consequences, within law, of one interpretation or another was to fail to understand the nature of legal language and the very nature of law.

At the very least, therefore, we suspect that Fuller would have had little patience for the interpretation–construction distinction.⁴⁸ But the question is not whether Fuller was right. Indeed, those of us with sympathies for the idea of legal language being understood literally and acontextually believe that Fuller was mistaken.⁴⁹ Rather, the question is that of locating the point in the adjudication process at which an advocate or a judge determines

47. See *supra* text accompanying notes 7–10.

48. Although this is only a suspicion, it is worth noting the plainly Fullerian observation that the interpretation–construction distinction in contract law might collapse if meaning is understood to include the circumstances of application. See David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 617 n.3 (2001).

49. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 53–76 (1991); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

whether Fuller was correct or incorrect. Or, to put it differently, when in the process of deciding a case does the judge determine whether the language she is called upon to apply is to be understood as ordinary or technical language, and, if the latter, just what does it mean to say that a word has a legal meaning that diverges from its ordinary meaning? If a word has a legal meaning, and if to have a legal meaning entails a meaning that incorporates law's goals and purposes, then law—in its full breadth and depth—intrudes on the process at the first stage and cannot be held in abeyance until some supposed second stage of construction. So even if a judge believes that Fuller was mistaken and believes as well that some term should be understood without reference to the consequences that some particular application of that term would produce, the judge must make that determination at the outset. So whether the judge believes that Fuller was correct, in which case issues of application arise in the interpretation stage, or that Fuller was incorrect, in which case issues of application can be delayed, the judge must still resolve *this* question at the outset. And this means that every interpretation of a legal item, whether it be a contract or a statute or a provision of the Constitution, involves the choice whether the term to be interpreted is ordinary or technical, and, if the latter, just what it is for a term to have a technical legal meaning.

The collapse of the interpretation–construction distinction, which I have just nondefinitively suggested, would not exist if it were the case that all terms in law were to be understood as ordinary language and thus without regard to the circumstances or consequences of their legal application. And although Jeremy Bentham might well have applauded such a state of affairs, it is not the law we have. We have a law that at the very least includes some technical terms, even if we acknowledge, *contra* Fuller, that many of the terms of law are in no way technical. But as long as at least some terms are technical, then any interpretive act within law will have to confront at the outset whether the term to be interpreted is one of those terms. And as long as that is so, believing that we can delay the consideration of legal applications and the nature of legal interpretation until some second stage in the process is either to make a mistake about the very nature of the process or at least is to assume, controversially, that the terms to be interpreted should be interpreted as ordinary language. This is a conclusion that Bentham, and maybe I, would endorse, but it may be more of a commitment than most of the proponents of the interpretation–construction distinction seem willing at this point in the debates to acknowledge.

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Is Law a Technical Language?

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V.

Although I believe that the collapse of the interpretation—construction distinction follows from some of what I have argued here, that conclusion is, at least for me, decidedly secondary. Far more important is recognition of the importance of the question of technical language in law and of the relationship between that question and the purposes of and audiences for law. If we are to understand what law is and how it operates, we need to understand to whom it speaks. If it speaks to everyone, as Bentham urged, then technical language in law is something to be lamented and expunged. But if law is substantially the internal dialogue of a professional culture with public goals but a nonpublic way of achieving them, then seeing law as a largely technical language, as Fuller and Holmes urged, is the natural corollary. I cannot resolve this tension on this occasion, but I can, at the very least, suggest that the entire subject of law as, possibly, a technical language needs much more attention than it has received to date.

