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CONTROLLING CONTEXTS: INTERPRETATION AND EXPERT TESTIMONY

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THE UNEXAMINED LIFE IS NOT WORTH LIVING. So said Socrates. But can we safely infer from his famous statement that he meant to imply its converse? Is it possible he was of the cynical opinion that the examined life was equally not worth living? We recall the hemlock.

Most readers of Plato would argue that judging from all the other things Socrates is recorded to have said, we can indeed conclude that he meant to imply the examined life was worth living. To interpret this famous piece of discourse—or any other piece of discourse—we are forced to go beyond the single statement to search out its context.

But when American courts of law attempt to plumb the depths of difficult statements in contracts or in statutes, they are often prevented from going beyond the writing in front of them to investigate contextual evidence that might affect interpretation; they are prevented by a principle known as the PAROL EVIDENCE RULE. In its simplest form, the rule states that PAROL CONTEMPORANEOUS EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY THE TERMS OF A VALID WRITTEN INSTRUMENT. The major exception to the rule: parol evidence may be allowed when the written document is AMBIGUOUS ON ITS FACE. This rule creates a vicious circle of illogical logic. On the one hand, the rule states, you cannot have recourse to certain kinds of information that preexist the written agreement unless the writing is "ambiguous on its face"; on the other hand, reality dictates, you may never be able to demonstrate that essential ambiguity without recourse to exactly the information the rule prohibits you from using.

In these pages I do not explore in detail the parol evidence rule; rather, I use a recent case to examine the variable nature of context and to demonstrate how writers of all types of legal discourse should pay even more attention to context than they now do. By manipulating context, either explicitly or structurally, a legal writer can gain greater control over the interpretation process of most readers.[1]

The parol evidence rule applies mainly in civil cases of contract law; but its underlying concept equally affects criminal cases that involve the interpretation of statutes. In contract cases, courts do not easily open themselves to explanations of what the parties had intended to say; they prefer to look

at what those parties actually said. There are complicated and far-reaching exceptions (especially in the case of implied warranties), and some states have nearly done away with the concept altogether (most notably California); but in many states, the rule still stands in principle.

In cases involving the interpretation of statutes, courts wish to assume that legislatures have said what they meant and only what they meant: the lengthy debates and the informed deliberation given by a large number of experienced elected officials, many of them lawyers, is presumed to have produced a document that transmits authorial intentions to the readers and users of that document. Even in the best and most competent of worlds, such an assumption can find little if any foundation in critical theory. (Interpretation remains ever an infinite possibility and mostly in the hands of readers, not writers.) But since we do not yet live in such a competent world, the resulting interpretive problems become even more complicated.

The parol evidence rule outlaws reference to certain of the document's contexts. Those contexts exist in numerous forms: the political milieu that informed the process of writing the document; the intellectual conceptualization that controlled the summoning of the concepts; the personal agenda that motivated the creation and use of the document; the logical connections which give it coherence; and the grammatical, syntactical, and structural connections which give it cohesion. All of these could have come into play in the case of *USA v. Tony H. H. T.* (Criminal #R-89-063, US District Court for the District of Maryland); but the judge had to decide which kinds of contexts he could allow himself to consider, given the restraints the parol evidence rule imposed on his curiosity. He eventually excluded political, intellectual, personal, and logical contexts, and relied instead on the syntactical and structural context to determine the extent of "ambiguity" in the controlling statute's wording.

The Tony T. Case

THE FACTS AND THE STATUTE. The facts of the Tony T. case were not in dispute. Mr. T. and a co-worker, both computer experts, had been fired by their company. They felt they had been unfairly treated. In revenge, they used their home computers to access the company's main computer in Texas, shutting down national operations for several hours. They realized that they might incur civil liability and have to pay damages to the company. That they were willing to risk. In fact, they had done the deed by the method most easily traceable to them, perhaps wishing the company to know who had been responsible. However, they did not know that there was a federal statute that might make their actions a federal crime and send them to jail,

thereby seriously and permanently affecting the fabric of their lives. The entire case came down to the interpretation of half a sentence of the relevant statute. It reads as follows:

> §1030. Fraud and Related Activity in Connection with Computers
>
> (a) Whoever—
>
> (1). . . . . .
>
> (2). . . . . .
>
> (3). intentionally, without authorization to access any computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects the use of the Government's operation of such computer;
>
> (4). . . . . .
>
> shall be punished as provided in subsection (c) of this section.

The interpretive question concerns the identity of the owners of the computers involved. Does the language refer only to government-owned computers, or does it distinguish between government-owned computers and computers owned-by-others-but-used-by-or-for-the-government? Schematically, the language refers to one of the two following possibilities:

> (a). (i). government-owned computers used exclusively by the government and
> (ii). government-owned computers not used exclusively by the government;

Or:

> (b). (i). government-owned computers (which, by the way, are used exclusively by the government) and
> (ii). privately owned computers that are sometimes used by or for the government.

If the former is the clear intent of the language, then the statute does not apply to Mr. T.'s case (he having accessed a privately owned computer), and he goes free. If the latter interpretation prevails, Mr. T. (albeit unwittingly) has sent himself to jail. If the language is not clear in either direction, but considered "ambiguous on its face," then—and only then—would the court refer to the congressional debates at the time of the passage of the legislation. The prosecution pressed for this; Mr. T. filed a motion to dismiss the case, claiming that the statute unambiguously refers to government-owned computers in both cases.

Mr. T.'s chances of winning increase greatly if his lawyer can demonstrate that the language of the statute BY ITSELF supports an unambiguous inter-

pretation in their favor. To do that, the lawyer has to deal with the way language functions—as if "clear" language were capable of limiting the interpretive process to necessary agreement on the part of all sensible and competent readers. Courts are relatively comfortable with exploring linguistic contexts (how readers in general would interpret a document) but not with seeking out substantive contexts (factual indications of the drafter's intentions). That comfort is connected to our courts' long-held reliance on using "the reasonable man" as a standard by which to judge actions. Writing will therefore be considered "clear" or "unambiguous" if it convinces a great percentage of reasonable readers to interpret it in one and the same way.

POSSIBLE ARGUMENTS. I was asked by Mr. T.'s counsel for my opinions on the possible/probable interpretations of this troubled prose. I was presented with the fiction that there was actually a single right interpretation. I was asked to come up with the arguments that would allow Mr. T. to demonstrate that his side was "in the right." In reality, of course, I was dealing with persuasion, not argumentation. I offered a number of different approaches.

The Syntactic Context. In the statute, the object of the verb *accesses* is *such a computer of that department or agency.* I call that the GOVERNMENT-OWNED COMPUTER; it is then modified by a restrictive *that* clause, which establishes a subcategory of government-owned computers—those that are "exclusively for the use of the Government." Such a subcategory clearly implies the existence of the opposite subcategory—namely, government-owned computers that are NOT exclusively for the use of the government. The first half of subsection (3) (up to the words *United States*), when attached to the predicate that follows subsection (3)—"shall be punished as provided"—states that anyone who accesses this subcategory of exclusive-use government-owned computers will be punished.

The linguistic difficulty arises with the advent of the *or* provision that follows *United States.* It is easy enough to imagine that the drafters of the statute might have been trying to convey that similar detrimental access of computers NOT owned by the government will also be punished, as long as the privately-owned computer is used by or for the government; but it is equally possible to argue that the *or* clause brings on stage the expected opposite subcategory referred to above—that of government-owned computers NOT reserved exclusively for the use of the government. By referring to the first subcategory in a restrictive clause, the drafters raised the logical expectation that the second subcategory would soon appear. Since the language after the *or* speaks of *not exclusively for such use,* it therefore can be interpreted as fulfilling that expected arrival.

In order for subsection (3) to refer UNAMBIGUOUSLY in its second half to privately owned computers, ALL government-owned computers would have to be "exclusively for the use of the Government." In that case, the *that* clause would demonstrably be a nonrestrictive clause MISWRITTEN as a restrictive clause; that is, the restrictiveness of the restrictive clause would make no sense. It would be similar to a drafter miswriting, *In an hour that has 60 minutes*; since all hours have 60 minutes, this clause would clearly be a mistaken articulation for the nonrestrictive clause *In an hour, which has 60 minutes.* A clause that looks like a restrictive clause will actually function as a restrictive clause only if the negative or converse of that clause would still make sense in the sentence. *In an hour that does not have 60 minutes* makes no sense.[2]

An opposite example: *In a year that has 365 days.* Since one out of every four years has 366 days, this *that* clause is read as a restrictive clause, not as a probable mistake for the nonrestrictive *In a year, which has 365 days.* The negative of this clause makes sense: *In a year that does not have 365 days* clearly is capable of suggesting a leap year. Therefore, as long as there is the possible category of government-owned computers that are not exclusively for government use, subsection (3) can be read as a single object (*such a computer of the department or agency*) modified by two restrictive clauses (exclusive use and nonexclusive use).

The Immediate Structural Context. Taking another tack, we can abandon the syntactical argument and step back to consider the most immediate context in which the troublesome clauses appear. They follow these words:

> Whoever intentionally, without authorization to access any computer of a department or agency of the United States, accesses. . . .

The lack of authorization applies to computers "of a department or agency of the United States." We could argue that everything following this phrase is contextualized by it. The phrase does not actually CONTROL all that follows it, since any reader can do with the prose whatever he or she wishes; but its structural location acts as one interpretive clue to its use. Courts often place themselves in the fictional or utopian position of BEING CONTROLLED by prose, considering prose the representation and manifestation of legislative intent. Since this *without* phrase precedes everything else, it is a natural (if not necessary) reading act to perceive all that follows as referring to or being modified by that phrase.

Had the same information appeared at the outset of the subsection as a separate sentence, its contextualizing power would have been all the greater; most readers would probably accept its contents as the controlling context for the categorizing that followed.

This statute makes it illegal to access without authorization any computer of a department or agency of the United States.

Although its placement in a less prominent *without* phrase lessens its effect as a controlling context, its position of preceding the other material still offers that contextualizing possibility. As such it suggests, but does not insist, that the subsection throughout concerns only government-owned computers.

The Linguistic Context: Equi-Deletion. Yet another argument could be made from the perspective of a bit of linguistic logic (borrowed from transformational grammar), the principle of equi-deletion. This principle concerns the detection of what might exist in the underlying structure of a sentence when either a substitute or a void appears on the surface.

John was singing and dancing.

With only this sentence to consider, most readers would assume that John was doing the dancing. It is difficult to imagine another interpretation that makes sense of the sentence's syntax. We assume that no "error" has left out other clues (such as the presence of *Mary was* before *dancing*). The deletion sends us back to the subject of the parallel companion verb phrase.

A more evidently problematic example:

John saw his face in the mirror.

Here we might well assume on first reading that the word *his* refers to John's face, since John is the nearest and therefore most easily recognizable candidate for such a reference. A majority of readers would settle for that meaning, I would argue, because we tend to cease the act of interpretation as soon as we are able. Once something makes SOME sense, we assume that it makes PERFECT sense and move on (until such later time when that sense loses its gloss of perfection). The same reasoning explains why you always find your car keys in the last place you look: after you find them, you cease looking. How many of us, having finally found the car keys, ask ourselves "Now if they hadn't been on the table, where else might they have been?" and then proceed to look there? In other words, we all tend to obey our private parol evidence rule on a daily basis.

I can imagine a context of previous discourse that might make John's candidacy as face-owner rather less impressive:

> Dracula alighted on the window sill, changing from his bat form into the cloaked demon of that horrible face—the face that made the weak weep and the strong cry out; the face that made its indelible mark on the mind of all who saw it; the face that faced so many follies but had yet to be outfaced by any Transylvanian Bolingbroke. Dracula glided over to the bathroom door and discovered John, who was shaving. John saw his face in the mirror.

Apparently equi-deletion can be overcome by other factors of discourse.[5]

If we borrow equi-deletion as a principle to use in statutory interpretation, we have not solved the problem of context. We would still have to decide how far into context we could travel or what different kinds of contexts we could or should consider. Still, the results are interesting when we apply the principle to the statute in the Tony T. case. It works in two ways to support Mr. T.'s cause. First, it suggests that the second computer category mentioned refers backwards in the same way that the first category refers backwards. In that case, they both belong to the government.

Second, it suggests by negative implication that any other interpretation leads to a result highly unlikely to have been intended by the drafters of the legislation: if the two categories suggest different computer owners, then the statute covers (i) government-owned computers used exclusively by the government; and (ii) privately owned computers sometimes used by the government. By negative implication, the statute would delete coverage for government-owned computers that were used on occasion by someone other than the government. All such computers could be tampered with at will. A single nongovernmental use of a government-owned computer would then "contaminate" it for the purposes of this statute and put the computer at risk. That, we could argue, is a far more damaging result than the exclusion of privately owned computers from this particular statute. They, after all, could be covered by a separate piece of legislation.

Arguing for the Other Side. I have asked a number of people to read the statutory language involved in the Tony T. case. Without exception, they have decided that Mr. T. is headed for jail. Though the language has struck them as distinctly UNclear (they all had to read the passage several times to form any opinion whatever), they all eventually pronounced the outcome to be clear. None of them, however, could discover an argument based on principles of syntax, semantics, or structure that seemed as rational as the above arguments for the less popular conclusion. Nor can I. The best I can do is to argue for the LACK of clarity of the statutory language, which would therefore trigger the exception to the parol evidence rule and send the judge back to the legislative debates.

That argument would run something like this. It is clear that there is a mistake in syntax in this subsection. The two halves of it do not accord with each other grammatically and therefore make no actual sense as written. The presence of a second *that* would have made the second half of subsection (3) more clearly a restrictive clause: *that is exclusively for the use . . . or* THAT *is not exclusively for the use.* Of course, it would have been (writing) grace and (reading) ease itself had the drafters explicitly labeled the second *computer*

either as government-owned or as privately owned. We also wish that trains would run on time.

Lacking the semantic indicators of the clarity we seek, we have no way of telling whether the grammatical "mistake" takes place in the FIRST clause of the passage or in the SECOND; we do not know which needs repair. If we were free to undo the restrictive qualities of the first clause, rather than the nonrestrictive qualities of the second, we could make the statute speak clearly for the prosecution. Lacking that power, we can declare the passage hopelessly error-ridden and therefore "ambiguous on its face." That in turn would free us to seek out the drafters' original intentions in the legislative records.

Choosing Contexts

We are left with the question whether the kind of linguistic play I have been engaging in differs in any significant way from the investigation of prior factual contexts that might uncover legislative intention. How far can we stray from the text in the act of interpretation? Is "stray from the text" even a helpful concept? Are not multiple contexts always present in every interpretive act? The question then becomes WHICH contexts—or HOW MUCH context. Are we "straying from the text" when we consider linguistic assumptions about semantics, syntax, and grammar? or logical implications? or questions of the parties' character, that might define the nature of actions? or just "facts" concerning drafters' intentions (as if those were any more capable of being ascertained with certainty)?

At its worst, the parol evidence rule seems linguistically and rhetorically naive; at its best it appears a realistic attempt at damage control. We are dealing with "degrees" of ambiguity, which is something like dealing with degrees of pregnancy: on the one hand, you are or you are not; on the other hand, some are more than others. The former is a phrase signifying a state; the latter is a phrase signifying a measurement of development within a state. This concept of "degrees" itself requires contextualization in order to be interpreted—as does everything else.

There are several explanations for why the parol evidence rule might make some sense of continuing rationality:

1. The parties knew what they were doing—or should have; so they are left with their text, for better or worse.

2. Once the door is even slightly open to oral reconfiguration of writing, it is open all the way—leading eventually to fascism; they who control the power can control the text, which in turn furthers their control of the power.

3. Context is not only variable but endless. Any limitation of context will

eventually appear in its true light—artificial and arbitrary. Given that, it is reasonable to draw the artificial, arbitrary line at the New Critical boundaries of the text.

4. Especially where statutes are concerned, readers/users need to be able to know that what they are looking at is all there is; they cannot be held accountable for contexts unseen.

5. The Law knows that lawyers are trained as experts in intentional ambiguation; the parol evidence rule is an attempt to say "Now THAT will do."

6. Law is the mid-point of a spectrum ranging from lower mathematics to poetry. In the ultra-humanist field of poetry, there are no right answers, no unvariable interpretations. In the relatively closed system of lower mathematics, right and wrong answers are both desirable and demonstrable. Like poetry, law is constantly dealing with human situations which admit no certainties; but like lower mathematics, law is constantly being called on for answers (since someone always has to win, lose, pay, collect, be controlled, or be freed). Between these two poles, the law is stretched as if on the rack.

Courts therefore are of necessity followers of Gorgias, who fashioned a three-fold argument about truth: there is no truth; if there is truth, we can never know it; if we can ever know truth, we cannot communicate it to others. Courts may sound like they are practicing Argumentation (the proof of an assertion's truth); but they are essentially engaged in practicing Persuasion (getting an audience to agree with the persuader's perspective and interpretation). As such, the law is already used to limiting its enquiry—since it knows it can never delve far enough to obliterate all chance of conflicting interpretation. Once any such limitation is acceded to, then the concept of being limited by the parol evidence rule becomes far easier to accept.

However, the parol evidence rule ignores the actuality of the reading/interpreting process — that such re- and de-contextualizing is a natural and necessary part of reading anything. Since every reader is always making contextual assumptions, the question for a court as reader becomes HOW FAR it should allow itself to wander in seeking out a context that resolves a particular interpretive dilemma. It is perfectly reasonable to draw the arbitrary line at the borders of the text, knowing that the line will always contain gaps, leaks, discontinuities, when examined under a microscope of high enough power. Controlling that leakage is no more (or less) difficult and no more (or less) logical than trying to control the extent to which context is allowed to expand through history, politics, psychology, or personal opinion. As a result, it is equally reasonable not to draw the arbitrary limit at the borders of the text. It is also equally reasonable to argue that text has no borders. It is difficult to perceive why linguistics, grammar, or rhetoric should or should not be privileged over other types of contexts.

THE CONCLUSION OF THE CASE OF TONY T.

As spectators, we can satisfy ourselves with the raising of problems in Tony T's case. The judge could not indulge in that luxury; he had to make a decision. The judge held for Mr. T. (choosing to rely on the argument discussed above as THE IMMEDIATE STRUCTURAL CONTEXT): since the government-owned computer was mentioned first, before the two clauses in question, he read the entire sentence as referring only to government-owned computers. He put it most simply: "The statute makes it illegal to access without authorization any computer of a department or agency of the United States." Period. With that established as the sole organizing fact for the statute's subsection, the rest was relatively easy. He dismissed any facts of legislative drafting intent as unknowable because the parol evidence rule made it inappropriate for him to take note of them. The fiction remained confused, but Mr. T. did not go to jail.

The interpretive act here, complicated by inept draftsmanship, remains hopelessly complex and variable. Either side could reasonably have been supported in its theories. We wind up trying to root for the good guys. But in this case, we cannot tell with confidence who the good guys are. In the end, despite all the linguistic bases for argument, the question became one not of linguistics, but of rhetoric.

Therein lies a lesson for all legal writers. Take the opportunity to make your chosen context as explicit as possible, as often as possible. Technology is making this all the more possible—for example, prenuptial agreements are now beginning to be videotaped, so that we can actually SEE whether a party was acting under duress or had a bad cold or seemed to know what was happening. But technology is not essential. Legal writers have always had the means at their disposal: preambles, headings, different type sizes, lists, spacing, good grammar, effective syntax, and (perhaps above all) meaningful structure. It is not enough that a piece of discourse be capable of being interpreted in the manner the writer intended; it must actively seek to persuade the reader to do so.

The rhetoric offered in the Tony T. case persuaded the judge which of the several available contexts to valorize above the others. Had the drafters of the statute made more clear their choice of contexts, either the case would never have come to court, or the defendant would have pled guilty. We can never entirely restrict a reader's ability to interpret; but by asserting greater control over the contexts of the discourse, we can exert far greater influence over the interpretive process of the reader. More we cannot ask.[4]

NOTES

1. It is impossible to gain absolute control over the interpretation process. Any unit of discourse (be it word, clause, sentence, paragraph, or whole document) is infinitely interpretable, simply because there are an infinite number of interpreters out there to offer their opinions. The best we can do in any document, legal or otherwise, is to understand the reading process well enough to send the strongest interpretive clues possible to the greatest number of readers.

2. Even this "clear" error is no error if the context explains the deviation. For example, some "hours" are not 60 minutes long. The academic lecture "hour" is often 50 minutes or 75 minutes long. The psychiatric therapy hour varies from 40 to 55 minutes, but is rarely 60 minutes. Used in such contexts, the phrase "In an hour that has 60 minutes" can be taken (MUST be taken?) as a properly restrictive clause.

3. That new interpretive decision can be overturned by yet other factors relevant to the discourse but not explicitly mentioned by the discourse. If we recall that Dracula's face cannot be seen in a mirror, we find ourselves once again voting for John.

4. Tony T.'s accomplice had hired a separate lawyer, who had filed a guilty plea until Mr. T.'s motion to dismiss was resolved. Motion to dismiss being granted to Tony T., his accomplice changed the guilty plea to a motion to dismiss.