Syntactic Cartography as a Forensic Linguistics Tool

A Retrospective Analysis of Prepositional Phrases in Two Appellate Court Cases

by

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ABSTRACT

This thesis argues for the utility of syntactic cartography in representing and analyzing the disputed language of legal statutes. It presents an analysis of two appellate court cases, Flores-Figueroa v. United States (2009) and In re Sanders (2008). Each case involves a difference of opinion with respect to the position and function of prepositions found in 18 U.S.C. § 1028A(a)(1) and 11 U.S.C. § 1328(f), respectively. Informing the tree structures are Merlo and Ferrer's (2006) six diagnostics for PP attachment: head dependence, optionality, iterativity, ordering, copular paraphrase, and deverbal nouns. In Flores-Figueroa, the analysis yields a conclusion that affirms the court's decision, as does the analysis in Sanders, although it only concurs in part. Implications of the study and the overall cartography approach are discussed, including how it could impact the drafting of jury instructions and future legislation. The paper also addresses the unique heritage of legal language, the ways in which it contrasts with civic, non-legal English, and how its characteristics give rise to ambiguity and vagueness, two suitable phenomena for linguistic analysis. Further, it discusses the potential for providing linguistic input on active cases to the Supreme Court and other judicial bodies.

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TABLE OF CONTENTS

LIST OF FIGURES

PREFACE

Justice Anthony Kennedy of the U.S. Supreme Court (2015) has observed that legal language features "a restraint, a discipline, a heritage, an elegance, a grammar, and a logic." All of these components forge together into a unique tool capable of creating and extinguishing rights and obligations (Ainsworth, 2008). Because of that power, the law depends on language to establish a balance between undue burdens on the public and undesired disorder in society (Gibbons, 2003). Legislators face the task of producing this linguistic feat, and judges, attorneys, and the collective legal profession are charged with upholding the final product. Given the oft-indeterminate nature of language, it is not surprising that debates over interpretation and application of the law arise. How forensic linguists can contribute to addressing such instances of discord is the focus of this thesis.

The present study presents syntactic analyses of the disputed statutory language in *Flores-Figueroa v. United States* (2009) and *In re Sanders* (2008). Each case involves a difference of opinion with respect to the position and function of prepositions and how they interact with neighboring words and phrases. Both to facilitate the discussion and to establish a basis for the conclusions drawn, syntactic cartography is advanced as a tool for forensic linguists. Utilizing tree structures familiar to syntacticians and to the linguistic community, I argue, is a viable means for offering expert analysis, be it in the role of expert witness, *amicus* brief author, or collaborator on an interdisciplinary study. Moreover, I assert that illustrating syntactic arguments by mapping the language in diagrams helps bridge the gap between the linguistic and legal disciplines, rendering the contributing analysis more accessible to individuals with disparate educational and professional backgrounds.

Others have similarly reviewed and evaluated court decisions retrospectively and from a linguistic perspective (Solan, 1993; Cunningham, Levi, Green & Kaplan, 1994; Hobbs, 2012; Kaplan, 2016). However, a detailed syntactic analysis of the language in debated court cases, particularly one leveraging tree structures to support its claims, appears to be absent in the literature. Filling this gap is thus a significant objective in the present study. A companion aim of this thesis is to build on the work of Cunningham et al. (1994), which, in addition to a review of decided cases, included two analyses of the pertinent language in Supreme Court cases yet to be decided at the time. However, my focus on prepositions, combined with the limitations of the 2017 Court docket, prevented this paper from replicating their approach. Any discussion herein of participating in an active case and contributing to a court decision is therefore restrained to hypothetical situations and to encouraging future studies as opportunities surface.

The crux of this thesis is the aforementioned syntactic analyses. Yet, as Justice Kennedy observes, grammar only constitutes a single element of legal language. Therefore, in order to arrive at a more informed analysis, this paper begins with a background on the language of the law. It is important to note that only certain parts of Chapter 1 directly connect with the content of the subsequent chapters (e.g. ambiguity and textualism), but they are offered to put this thesis in better context. The chapter opens with an overview of the heritage of legal language, including an account of its history and its progression through the centuries. The chapter traces a rough timeline showing the influence of Latin and French on legal English. It subsequently examines the contemporary nature of the language, from its many criticisms to its many justifications. The following sections focus on how critics have advocated for more plain language in

the law, how the lack of plainness yields the issues of ambiguity and vagueness, and how within the legal profession there is division on resolving matters of interpretation.

On the point of interpretation, textualism and purposivism are presented as the two leading schools of statutory interpretation; both groups emphasize the importance of context, but they disagree on what context to use. Generally speaking, textualists, as their name conveys, focus on the governing text, whereas purposivists look to outside sources, such as legislative history, to derive the meaning and purpose of a statute. Because this thesis is concerned with the linguistic influences that affect the interpretation of statutes, it happens to correspond with textualism. Yet, as the foregoing demonstrates, linguistic analyses need not only apply to the governing text.

Chapter 2 introduces the relationship between the law and forensic linguistics, a field dedicated to the study of legal language. The chapter proceeds with a brief overview of the types of studies conducted in this area, such as identifying the author of an evidential text. In the sections that follow, the paper features a summary of how linguists participate in the legal system, including everything from serving as an expert witness to helping facilitate jury instruction revisions toward more plain and accessible language. Chapter 2 concludes by evaluating the work of Solan (1993), Cunningham et al. (1994), and Kaplan, Green, Cunningham, and Levi (1995). In this section, the importance of statutory interpretation is addressed, as well as the need for more detailed syntactic analyses in forensic linguistics. It also points out the ideal nature of pursuing interdisciplinary studies with linguistics and members of the legal profession, given that such an approach yields higher credibility than does, for example, a single scholar submitting an unsolicited analysis to the court.

Chapter 3 narrows the scope of forensic linguistics to syntax, starting with a succinct treatment of the discipline and a note on the influence of Noam Chomsky. It moves forward by describing syntactic cartography and how tree structures have developed and transformed in recent decades. How the trees are formed and what they represent is additionally discussed. In syntax, the current Minimalist Program (Chomsky, 1995) is shifting away from utilizing tree diagrams to model and represent language, but I nonetheless argue for the viability of these multi-dimensional tree structures in the forensic linguistics context. Because the debates in *Flores-Figueroa v. United States* (2009) and *In re Sanders* (2008) hinge on prepositions, Chapter 3 addresses the topic. The bulk of the analysis relies on the attachment diagnostics developed by Merlo and Ferrer (2006). These guidelines help determine the position and function of prepositions and the phrases they head.

Chapter 4 comprises the original analyses of this thesis. The focus on prepositions and the limits of the Supreme Court docket for 2017, as mentioned, prevented the inclusion of active cases. To my knowledge, *Flores-Figueroa v. United States* (2009) and *In re Sanders* (2008) are the most recent cases of their kind. The *Flores-Figueroa* case falls in line with the cases examined by Solan (1993) and Cunningham et al. (1994) (all of which involve the scope of the word *knowingly – Flores-Figueroa* similarly questions whether a preposition falls within that scope), and the *Sanders* case is listed in Scalia and Garner's (2012) book on textualism and the canons of statutory interpretation (this case involves determining what verb a preposition modifies). Although both cases were appealed, a point of contrast between the two is that the Supreme Court heard *Flores-Figueroa* and the United States Court of Appeals, Sixth Circuit heard *Sanders*. The

original intent was to source cases that had reached the Supreme Court, as these are more prominent and more easily accessed by the public both before and after the actual oral arguments. In the end, however, the discussed constraints yielded the present data set.

The analyses in Chapter 4 build on those presented by the opposing sides of the argument, as well as the decisions written by the judges. With the aid of tree structures and the syntax literature, the evaluations go into greater depth than the court opinions, providing detailed illustrations of the statutory language along with discussion. In the spirit of Cunningham et al. (1994), the conclusions do not contend to have simplified the complexity of these cases, nor do they claim purchase on "the right answer" (p. 1561). Alternately, they aim to justify the contributive capacity of syntactic cartography, namely its ability to conceptualize legal language in new dimensions, resulting in a novel approach that neither attempts to circumvent or supplant the interpretive methods instantiated by the legal profession.

Chapter 5 offers a conclusion with thoughts on future directions for this kind of study. These include reaching beyond the topic of prepositions to explore other areas within syntax and, more broadly, encouraging the active legal participation of forensic linguists in cases that arise in the future, both locally and nationally.

CHAPTER 1

LEGAL LANGUAGE

Legal language can be divided into spoken and written traditions. Attorneys, judges, and members of the collective legal profession depend on both daily. However, discourse and literacy are merely two umbrellas to the multiple dialects and registers that exist within legal language (Gotti, 2012; Goźdź-Roszkowski, 2011; Williams, 2007). Legal writing shifts in style and tone from statutes to judicial opinions, legal speech differs greatly between police interviews and courtroom deliberation, and legal language as a whole differs from civic or non-legal language in distinct ways.

The first section gives a brief history of how English has evolved with respect to the law, including examples of Anglo-Saxon, Latin, and French influence. Subsequent sections discuss the contrasts between 'legalese' and 'plain English' and provide a summary of the plain language movement and its challenges. In addition, Chapter 1 examines a pair of complications that arise in legal writing, namely ambiguity and vagueness. Two predominant schools of legal interpretation are introduced, as well as a look at the ongoing debate between them.

Historical Foundations

The word *law* entered the English language through a series of linguistic derivations and borrowings, moving from Old Icelandic to Anglo-Saxon by way of Old Norse and Scandinavian (Mellinkoff, 1963). The Oxford English Dictionary (OED) provides that *law* in Old Icelandic – or *lǫg* – referred to 'something laid or fixed.' This meaning still

resonates today. Just as the word *law* evolved through language, legal language itself reflects a rich unfolding.

Pinpointing the precise origin of legal English is a moot endeavor. Nevertheless, a tenable timeline begins with the Celts, who arrived on the British Isles some 3,000 years ago (van Gelderen, 2014). The Romans invaded and ruled the Celts for a time, but left during the fifth century. Years later, around 450 AD, Germanic tribes (Angles, Saxons, etc.) reached the isles to help defend the Celts against their enemies. These mercenaries settled down in England and introduced their language: Anglo-Saxon, or Old English.

The Old English period lasted from approximately 450-1150 AD. Law-related language was present at the time, and examples of Anglo-Saxon legal vocabulary include *witness*, *will*, *bequeath*, *guilt*, *theft*, *steal*, *right*, *murder*, and *oath* (Tiersma, 1999, p. 12).

Latin also started influencing Old English late in the sixth century, when the population began converting to Christianity (van Gelderen, 2014). The Romans from earlier centuries spoke Latin, too, but without the same lasting effect as the Christians. Along with spoken Latin, Christian missionaries and clerics introduced literacy, which would greatly impact the language of the law (Tiersma, 2012).

What had been a purely oral and undocumented tradition now featured a written component. The introduction of literacy provided a means for organizing and consolidating the legal thinking that had been diversified by centuries of wide-ranging cultural interaction – Romans, under the rule of Julius Caesar, had conquered the Celts and occupied the British Isles (Tiersma, 2012); the Germanic tribes brought with them their inchoate flavors of law; Christians ushered in the governance of the Roman church; and Scandinavian Vikings introduced aspects of Danelaw in the eighth century (Tiersma,

1999). Then, in 1066, the Normans conquered England in the Battle of Hastings, and French was added to the mix (van Gelderen, 2014).

Legal documents originally appeared in Old English, but as a result of the Norman Conquest, Latin eventually became the written language of choice about 1100 AD (Mellinkoff, 1963; Tiersma, 1999). To the Normans, Latin was familiar and attempts to displace Old English were a symbol of their power. From another standpoint, Latin writing may have also achieved a level of clarity and precision that superseded the ambiguities in and fluid nature of Old English (Gu, 2006).

Companion to Latin writing, French became the language of the ruling class and the spoken language of the law, relegating English to the masses. The first group of professional lawyers emerged around 1200, and these individuals received their training, in French, at the Inns of Court (Tiersma, 1999). Principles of common law, upheld today in the U.S and several other countries, were first given voice in French (Tiersma, 2012). Gu (2006) asserts that French enabled increased sophistication of law-related communications both in terms of lucidity and logic. Such was the impression of the Normans that even after English made its return across classes, legal professionals continued to communicate in French (Gibbons, 2003).

English, Latin, and French all persisted as viable languages of the law in England for several centuries, and switching between them was not uncommon: French served as the preferred language of drafting statutes for a period, universities upheld the tradition of Latin, and English never fully died out. In 1731, however, English Parliament declared English the official language for legal proceedings (Tiersma, 1999). Subsequent to that decision the government approved the continued use of certain terms and phrases from

Latin and French. Preserving conceptual accuracy was one supporting reason, but it was also because finding an adequate translation in some cases proved nearly impossible.

Latin and French in modern legal English. Numerous Latin words and phrases abide in the current American legal system. Among these, several bear closely on the foregoing. One example is *certiorari*, which the OED lists as 'to be certified, informed, or shown.' In the legal system, *certiorari* is a type of writ, or order from a court. The U.S. Supreme Court, for example, grants a writ of *certiorari* to between 70 and 80 cases each year. With this writ, the Court certifies a case for review and requests more details to inform its decision.

Another important Latin phrase is *mens rea*, or, roughly, 'a criminal state of mind' (OED). Cases involving this principle require proof of a guilty mind to convict an individual of a particular crime (Solan, 1993). In other words, there must be evidence that the individual knew he or she was breaking the law (these cases also have what is called a *scienter* requirement, *scienter* being the Latin adverb 'knowingly'). More detail on *mens rea* in Chapter 4.

Other examples of Latin pertain to legal interpretation. Scalia and Garner (2012) outline more than 55 canons of interpretation which bear Latin names because of their venerability in the law. Such canons include: *generalia verba sunt generaliter intelligenda* ('general terms are to be given their general meaning'), *expressio unius est exclusion alterius* ('the expression of one thing implies the exclusion of others'), and *verba cum effectu sunt accipienda* ('if possible, every word and every provision is to be

given effect'). These canons apply to statutes – written law passed by a legislative body – and they inform and shape court decisions. More detail on one of the canons in Chapter 4.

The phrase *stare decisis*, 'to stand by decided matters,' is another instance of enduring Latin. Urofksy (2015) defines *stare decisis* as "the doctrine of abiding by and adhering to previously decided cases" (p. 10). This is the Latin representation of *precedence* (from French), which also signifies the notion of reaching judicial decisions in line with previous conclusions. *Precedence*, from the spoken tradition, and *stare decisis*, from the written, are foundational to common law as practiced in the United States (Gibbons, 2003).

In addition to precedence, legal terms borrowed from French include *attorney*, *court*, *claim*, *complaint*, *agreement*, *misdemeanor*, and *felony* (Tiersma, 2012, p. 21). Words like *complaint* are employed in both legal and non-legal contexts, and countless other examples exist because the history of legal English is not isolated from the history of English (Mellinkoff, 1963). Indeed, French influence, together with the Latinate, accounts for approximately half of the English language (van Gelderen, 2014).

French is not only a source of vocabulary, but also a language applied to accent legal writing. In a recent concurring opinion, Justice Ginsburg of the U.S. Supreme Court penned the phrase *faute de mieux*, or 'for lack of a better alternative.' Wrote the Justice, "When a state severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety" (*Whole Woman's Health v. Hellerstedt*, 2016, p. 2, emphasis added). Opting for French, or Latin, instead of English may further be viewed as a rhetorical strategy for elevating the authoritative ring of a text (Tiersma, 2012).

Moreover, English is the standing *lingua franca* in the United States and its courts, where judges routinely grant *certiorari* when attorneys file *appeals*. The language of the law will undoubtedly continue to evolve to reflect society, however conservative the pace. But one thing is certain of legal English in the 21st century: the influence of Latin and French is felt throughout.

Linguistic Features

The language of the law, for all of its changes and developments over time, has sustained a single constant in its existence, namely criticism. Irish record hints that Celtic poets, perhaps the earliest bearers of legal language, received public censure for their use of obscurities (Tiersma, 1999). Centuries later, the author Charles Dickens offered his own criticisms in literary form, dedicating much of his oeuvre to satirizing the legal profession. In his novel *Bleak House* (1853), he describes the members of the High Court of Chancery as not only guilty of obscure speech but also

> mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretense of equity with serious faces, as players might. (p. 14)

Dickens leveraged his writing platform to express his sentiments and those of the lay public, but not all such evaluations are external. In fact, members of the legal profession often take issue with the language employed in their own vocation. In the case *In re Grydzuk* (2006), Judge J. Philip Klingerberger penned the following criticism of Congress:

> [W]hile a debate rages over whether William Shakespeare or someone else wrote the plays and sonnets attributed to the Bard of Avon, there will never be a similar

> debate over the authorship of the [Bankruptcy Abuse Prevention and Consumer Protection Act of 2005], because no one wants to be associated with that body of work. (p. 566-567)

Judge Klingerberger wrote this to identify 11 U.S.C. § 1328(f)(1) (analyzed in Chapter 4 of the present study) as one in "a long string of incredible [sic] poorly drafted statutory provisions" (*In re Grydzuk*, 2006, p. 567). Beyond the critical Celts, Victorian authors, and bankruptcy opinions, countless other examples persist from every imaginable angle of the law. Legal language may or may not merit the full sum of its criticism, but it is unequivocally different from everyday English and therefore subject to scrutiny. What, then, sets the language of the law apart? What constitutes "legalese"? The following is a brief overview of the linguistic features of legal language.

The legal lexicon. Jargon is one key distinguisher of legal language. Lawyers use specialized words, just like members of any other profession or speech community, as a way of achieving inclusion and exclusion all at once (Gibbons, 2003). Because of the conservative nature of legal language, much of the jargon is archaic words – e.g. *aforesaid*, *hereinafter*, *heretofore* – preserved for purposes of consistency, even as they change meaning or fade out of use in society. The persistence and tradition of these words, which mark the legal vocabulary as distinct, traces back to the Latin and French influences discussed in the previous section.

Along with archaic terms, the legal lexicon also features a number of words that speakers of English routinely deploy in non-legal settings. After all, as Mattila (2012) points out, "legal language is based on ordinary language" (p. 27). Examples include

witness, *right*, and *agreement*, and words like these carry relatively steady semantic value from context to context. Yet they may have crucial legal nuances, as well. One good example is the word *construction*.

Scalia and Garner (2012) note the polysemous nature of *construction*, a noun that corresponds to semantically contrasting verbs. On the one hand, *construction* can refer to the act of interpreting, while on the other it can indicate the act of building. The latter meaning has more traction outside of legal contexts. Legal professionals traditionally adhere to the former – one who construes the constitution performs a constitutional construction, or an interpretation thereof; but to construct the constitution is another task altogether (one for James Madison).

Polysemy, or the capacity for certain words to carry multiple meanings, is thus one more factor in the legalese-everyday English divide. Attorneys and judges utilize words that appear familiar and accessible to most, only they deploy them as terms of art with technical meanings. While this practice is not unique to the law, it is nonetheless of note, especially in combination with the grammatical aspects of legal language.

The legal grammar. In legal contexts, sentence structures vary from those of the vernacular and standard forms of English. "Complex" is perhaps the most common descriptor of legal grammar, but more detailed characteristics include the use of multiple negatives (e.g. "shall not"), frequent passive structures, and a sizable amount of nominalizations (Schane, 2006). Mellinkoff (1963) points out the issue of redundancy: attorneys frequently refer to "a last will and testament," which may have a "force and an effect" or may be declared "null and void" (p. 363). In terms of lexical density, legal texts

statistically feature more content words than function words (Gibbons, 2003). Successive embedded clauses also contribute to the complexity, along with the presence of conjoined phrases, impersonal constructions (in the "building" sense of the word), and the avoidance of pronouns (Tiersma, 1999).

"Unusual" is another adjective regularly ascribed to legal language and its sentence structures. Tiersma (1999) notes that common divergences from "ordinary" speech include adverbials preceding participles, nouns followed by modifying finite clauses, and a reordering of prepositional phrases and noun phrases. The example he provides of the latter is the phrase "*a proposal to effect with the Society an assurance,*" which follows a verb-prepositional phrase-noun phrase ordering (V-PP-NP), contrastive with the more common V-NP-PP ordering of "*a proposal to effect an assurance with the Society"* (Tiersma, 1999, p. 65, emphasis original).

Finally, there is the characteristic of verbosity: legal documents, communications, and proceedings are known, if nothing else, for their sheer length. Although length is not a direct point of grammar per se, such elements as embedded clauses and conjoined phrases all contribute to extended writing and lengthy periods of deliberation. At one point in England, a correlation between attorney wages and page count motivated verbosity (Tiersma, 1999). The practice of widened margins continues today, as seen, for instance, in the formatting of Supreme Court opinions, although members of the collective legal profession no longer receive a page-count commission. Instead, attorneys, judges, and the like make their living by striving for linguistic precision, the kind of exactness that routinely and incongruously requires wordiness. A later section in this chapter gives more attention to the topic of precision.

Take the grammatical features above, factor in a dense and archaic lexicon, and the result is a highly specialized register commonly viewed as difficult-to-understand and generally inaccessible. Efforts to reshape and improve the nature of legal language have included everything from public protests to legislative reform. Toward linguistic reconciliation in the law, one overarching campaign is the plain language movement.

The Plain Language Movement

Like legal language, the exact genesis of the plain language movement is unknown. Some credit British author Sir Ernest Gowers with opening the door in 1948 with his book *Plain Words*, which preceded *Complete Plain Words* in 1954 (Gibbons, 2003). Around that same time, Indiana University law professor Reed Dickerson taught plain writing to his students (Adler, 2012), and in 1963 another law professor, David Mellinkoff, published *The Language of the Law*, a tome that lambastes legalese. Others claim 1970 as the beginning. Between that year and 1973, New York-based Citibank proposed and adopted a policy for converting promissory notes into easily understood language (Williams, 2007). Citibank unwittingly started a trend that soon spread into other industries, such as real estate and insurance. From there, plain language took off as a consumer-driven movement (Schane, 2006).

Former U.S. President Jimmy Carter endorsed the movement in the late 1970s, as did President Bill Clinton in the 1990s with his Memorandum on Plain Language, "requiring all Executive Departments and Agencies to use plain language" (Williams, 2007, p. 175). More recently, President Barack Obama signed the Plain Writing Act of

2010, along with three executive orders – E.O. 13563, E.O. 12866, and E.O. 12988 – calling for plain language in the regulatory system.

Other notable plain language supporters in the United States today include Joseph Kimble, professor emeritus of the Western Michigan University Cooley Law School and author of *Lifting the Fog of Legalese* (2005); Bryan Garner, a leading lexicographer, founder of LawProse.org, and author of numerous publications on legal writing; and U.S. Supreme Court Associate Justice Clarence Thomas, known for his criticisms of inaccessible Court opinions, intense editing practices, and commitment to clarity and simplicity.

The concentration on plain language is not exclusive to the U.S., nor is it limited to the field of law. Canada, the United Kingdom, Australia, New Zealand, South Africa, France, Germany, Sweden, and Finland all have groups and organizations endeavoring to improve the accessibility of legal language. Outside of the law, fields with linguistic movements toward plainness include medicine, religion, finance, marketing, and the sciences. Adler (2012) observes that "plain language studies" may indeed become a formally recognized, international discipline.

The plain language movement seems self-explaining, but what exactly do its proponents advocate? The following features a definition of plain language and a brief discussion on the challenges associated with the movement.

Plain language. A working definition for plain language is "language and design that presents information to its intended readers in a way that allows them, with as little effort as the subject permits, to understand the writer's meaning and to use the document"

(Cutts, 1996, p. 3). In this light, the plain language movement is less about 'dumbing down' communications, as opponents would say, and more about efficiency. It further aims to remove linguistic barriers between citizens and institutions by helping people understand their rights and the agreements they enter.

In the legal context, suggestions for achieving this ideal essentially involve removing the characteristic elements of legalese: eliminate archaic expressions, reduce sentence lengths, strike unnecessary words, decrease passives, and so on (Williams, 2007). In theory, and arguably in practice, these strategies lead to clearer, more accessible language for both the public and the profession itself. Easier said than done applies well here.

For one, although their end product may not always match the original objective, legal writers already strive for clarity, precision, unambiguity, and inclusiveness (Bhatia, 2010). Superfluity, as stated by Judge Sutton of the United States Court of Appeals, Sixth Circuit, is "a result we must resist where possible" (*In re Sanders*, 2008, p. 400). Moreover, legislation like the Plain Writing Act of 2010 makes plain language the law. Yet, enforcing a standard is a challenge, one highlighted by the condition *where possible* in Judge Sutton's opinion and the caveat *as the subject permits* in Cutts' definition. Because legal language facilitates the practice of law, even the plainest words and phrases will unavoidably convey complex ideas. Gibbons (2003) describes these ideas as "how the legal system views the social and physical world" (p. 36). A perfectly written statute or contract may therefore be clear, precise, unambiguous, and inclusive, but not plain.

Proponents of the plain language movement must also address the point of language change. Linguistic evolution renders even the best of plain language measures temporary and dependent upon faithful revision and upkeep. A rewritten or rephrased document that meets today's standard of plainness may fail to do so a generation later, introducing a new barrier for the layperson (Stygall, 2010). In addition to time, plain language will vary across space, as speakers differ in their levels of literacy and social capital. Thus, even attempting to arrive at a standard that satisfies the here and now would lead to a nuanced result.

Legal language has almost always been at odds with plain or ordinary speech, though the two never become too distant from one another, despite a perpetually widening and narrowing gap (Tiersma, 1999). Plain language proponents, to whom Adler (2012) refers as 'plainers,' face a tall order in addressing the challenges inherent to their undertaking, but they have the potential to positively impact the way society operates, as everything from small print on credit card statements to jury instructions (see Chapter 2) falls within their scope.

Ambiguity and Vagueness

Plainness can help resolve issues of clarity and accessibility, but, as explained in the previous section, the complex nature of the law will often result in language that is neither clear nor accessible. Further still, legal language is subject to its share of indeterminacies, which typically manifest in the form of ambiguity or vagueness. Sometimes this effect is unintentional, other times it is deliberate. Consider, for a moment, the task of the legislator.

With wording that is too restrictive, a lawmaker may produce an infelicitous provision that burdens or otherwise limits the public; with language that is too general, the same writer may alternately authorize disorder in society (Gibbons, 2003). Balancing these extremes is not the only obstacle, though. Legislators must predict and preempt possible misinterpretations of their writing, as well as misapplications, and the final product must also align with precedent (Bhatia, 2010). Drafting a law with so many variables at play complicates the pursuit of linguistic precision. The outcome will often lack desired clarity, and in some instances it may even be strategically unclear.

English speakers generally describe a lack of clarity as "ambiguous" or "vague." Although colloquially synonymous, these two words differ in their technical senses and the distinction holds important ramifications for the legal context. I will examine each in turn.

Ambiguity. Solan (1993) states, "ambiguity results any time that our knowledge of language...fails to limit to one the possible interpretations of a sentence" (p. 64). It may rest in a single word – such as *construction* from earlier – or it might stem from the placement of a modifying phrase. In either scenario, one finds a set of fixed alternatives from which to choose (e.g. A or B). The important distinction here is that the speaker/listener or writer/reader narrows down the options to one rather than determining what those options *are*. Ambiguity assumes the existence of precision even in the presence of possibilities (Poscher, 2012).

Ambiguity is likewise found in instances where only one interpretation seems possible. Take, for example, the U.S. Supreme Court. The Justices have historically

convened, listened to a case, and agreed on the clarity of a certain statute, only to reach a 5-4 split decision in the end (Kaplan et al., 1995). Everyone agrees that a single interpretation exists but they disagree on what that meaning is because there are, among the Court members, at least two different ways to make sense of the text. Sometimes only one side will view a statute as ambiguous. In *Yates v. United States* (2015), Justice Elena Kagan wrote a dissenting opinion arguing for the clarity of the provision in question, claiming that its breadth did not equate to ambiguity, as her colleagues in the majority maintained. *Yates* also provides a good example of vagueness.

Vagueness. The substance of *Yates* entails the question of whether a fish classifies as a tangible object. Justice Kagan underlines the absurdity of the case by citing Dr. Seuss' One Fish, Two Fish, Red Fish, Blue Fish (1960) to affirm that a fish does, in fact, classify as a tangible object (*Yates v. United States*, 2015). More crucially, she identifies that the majority reached its decision by limiting the scope of the 'tangible object' definition, such that it excluded fish. Herein lies the concept of vagueness.

Vagueness, in contrast with ambiguity, operates on a scale or spectrum. What constitutes a tangible object? What does not? One can think of clear answers for both, but the borderline cases require real thought. Because a vague notion does not furnish any fixed alternatives to choose from, the only real option is subjective interpretation, or what Poscher (2012) calls "creative concept formation" (p. 133).

The Court discussed the ambiguity and vagueness in *Yates* as interchangeable concepts, but that is not uncommon (Slocum, 2015). Notwithstanding, a distinction between the two is quite useful since they can prompt contrasting methods of

interpretation. How to navigate these kinds of linguistic issues is a major point of contention in the law. In the absence of a single method for clarifying legal language, practitioners and scholars have developed and subscribed to various schools of interpretation, each with its own merits.

Schools of Interpretation

Roughly 80 percent of Supreme Court decisions are accompanied by at least one dissenting opinion (Urofsky, 2015). Not all of these disagreements involve matters of language and meaning, but for those that do, three schools of statutory interpretation are considered tenable: textualism, purposivism, and intentionalism (Slocum, 2015). The latter two have much in common and textualism closely compares to the doctrine of ordinary meaning, arguably a school in its own right. Because of these similarities, the more salient positions in the literature, namely textualism and purposivism, will receive attention here.

Judges who subscribe to textualism or purposivism commonly utilize some variation of "We begin with the words of the statute" in their written opinions. The differences quickly become apparent, though, in how members of the judiciary proceed and where they arrive.

Textualism. Many credit the late Justice Antonin Scalia for pioneering the textualism movement, beginning with his early days as an appellate judge and subsequently as a member of the Supreme Court. In *Reading Law: The Interpretation of*

Legal Texts, Scalia and Garner (2012) summarize the school by stating what it means to be a textualist:

> We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafter's extratextually derived purposes and the desirability of the fair reading's anticipated consequences. (p. xxvii)

Legislative purpose (associated largely with purposivism) and any anticipated consequences (conceptualized by consequentialism, or intentionalism) found in outside sources have no place in the textualist program, which dismisses textual departures as fruitless. However, that the textualist exclusively analyzes the words of a statute is not always the case. Indeed, individuals of this interpretive persuasion often consult dictionaries on points of grammar, style, and technical usage. In fact, since the 1980s, when Justice Scalia first sat on the bench, evidence of judges relying on dictionaries has grown substantially (Slocum, 2015). To arrive at 'the meaning born from inception' (generally in determining the constitutionality of a matter), textualists also refer to *The Federalist* and documents from the Constitutional Convention (Urofsky, 2015).

Texualists lean on the aforementioned sources for help with issues at the lexical level, but the majority of cases involving a linguistic dispute hinge on the meaning of a word in context or a particular syntactic structure (Katzmann, 2014). In these circumstances, the textualism program depends on a set of canons (e.g. those listed in the Latin and French section of this chapter). Some provide instruction on points of grammar, but a fair amount supply contextual or conceptual aid (Solan, 1999). A setback for these interpretive tools is that they can conflict with one another, forcing judges to decide which convention carries the greater weight. Yet, as Scalia and Garner (2012) note, "they

are not ‘rules’ of interpretation in any strict sense but presumptions about what an intelligently produced text conveys” (p. 51). Justice Kagan (2015) adds the description of “formalized intuitions.” The canons are thus properly regarded not as the final word but as a contributing voice in the ruling process.

Dictionaries, *The Federalist*, and the canons all play important roles in the textualist program, which aims to find the meaning most faithful to the original and governing text, the one approved by both chambers of Congress and the President (Katzmann, 2014). But in consulting these sources, textualists spur criticism from purposivists.

Purposivism. Purposivists inveigh against the textualism program not because of its use of extratextual sources but because it criticizes the puposivism school for the same practice. The two theories emphasize the importance of context, but they disagree on which context has primacy, the semantic value of a text (its meaning) or the conveyed policy (its purpose) (Manning, 2006). Proponents of the latter method therefore search for evidence of the legislator’s intent, whether in the text itself or in the legislative history (Fallon, 2014).

In *Milner v. Department of the Navy* (2011), Justice Kagan writes, “Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text” (p. 9). Legislative history furnishes the context in the purposivist camp. It is found in committee reports composed by statute drafters, as well as in the notes and records from various Congressional hearings. Such resources contain details and instructions pertinent to the purpose of a statute, including how to interpret it

and how to put it into action (Katzmann, 2014). They are viewed as contemporaneous materials that support legislation, similar to the relation between *The Federalist* and Constitutional matters. Legislative history might be conceptualized, in a way, as the unabridged version of a statute. But as purposivists will readily acknowledge, the law is the law and legistlative history simply provides a helping hand.

Some cases feature undisputable language and the task of interpretation begins and ends with the text, regardless of methodological persuasions. In these situations, purposivists assert that legislative history can confirm a decision. In more complex matters, the purposivism program ostensibly allows judges to apply the intentions of fixed statutory language to scenarios unanticipated at the time of drafting (Katzmann, 2014). Yet opponents of the method argue the same point as an advantage of the ordinary meaning doctrine, claiming, "meaning must surpass intent" (Slocum, 2015, p. 15). This illustrates just one of the many conflicts that the schools of interpretation share with one another.

Just as textualists and purposivists agree on the significance of context, both groups agree that neither of their methods is without flaw. After all, arriving at the semantic meaning of a text that satisfies every speaker within its intended purview is seemingly as impossible as deducing legislative purpose when countless minds and motivations contributed to the final draft. While both schools merit further treatment of their respective complexities, it suffices here to differentiate the textualist and purposivist programs by their general tenets, the one adhering to linguistic properties and the other to conceptual cues.

The nature of this paper happens to correspond more closely with textualism. It focuses on what Fallon (2014) terms, the "linguistic and cultural understandings that influence, and indeed determine, what a linguistically competent person would understand a statute to say" (p. 707). Nevertheless, as members of the legal profession lean on both schools from time to time, the present objective is to offer another resource to any and all involved in the interpretation of statutory language, including, as Chapter 2 will show, ordinary citizens in the role of juror.

Conclusion

Chapter 1 has provided a general timeline of the development of legal language, accompanied by a review of its unique and dynamic characteristics, possible areas for refinement and increased plainness, and the prevailing methods of interpretation. With this context as the backdrop, the following chapters proceed with an account of forensic linguistics (the intersection of linguistics and the law), syntax and tree structures, and linguistic analyses of a Supreme Court case and one from the United States Court of Appeals, Sixth Circuit.

CHAPTER 2

FORENSIC LINGUISTICS

The heritage of legal language has attracted the attention and interest of scholars and professionals from widespread disciplines for generations. Many have presented data, insights, and theoretical approaches to assist the legal system with its proceedings. The admission of forensic evidence in court, for instance, dates back to 1911 when fingerprints were first approved to help decide *People v. Jennings* (Koehler, 2013). Around that time, Justice Louis D. Brandeis, then a practicing attorney, wrote the first brief in which the majority of the text consisted of statistics from disciplines outside the law (University of Louisville Brandeis School of Law, n.d.). His writing in *Muller v. Oregon*, a 113-page document with more than 100 pages of non-legal data, serves as the template for what many call a 'Brandeis brief.' Over the last century, forensic evidence and interdisciplinary analysis has gained greater utility in the legal system, giving rise to such fields as forensic linguistics.

At its rudiments, forensic linguistics is the study of evidentiary language and of legal discourse. Johnson and Coulthard (2010, p. 7) divide the field into three subsections:

1. The study of the written language of the law
2. The study of interactions in the legal process
3. The work of linguists in the role of expert witness

Forensic linguistics further encompasses a notably wide range of concentrations, including methods and studies from applied linguistics (Eades, 2005); corpus linguistics (Finegan, 2010; Kredens & Coulthard, 2012); linguistic ideology (Ainsworth, 2008); phonetics (Olsson & Luchjenbroers, 2014, p. 83-136); pragmatics (Finegan, 2010; Danaher, 2015; Kaplan, 2016); semantics (Kaplan et al. 1995; Hobbs, 2012);

sociolinguistics (Eades, 2006; Kurzon, 2013); syntax (Kaplan, 1993; Klinge, 2000; Williams, 2007); Systemic Functional Linguistics (Nini & Grant, 2013); TESOL (Pavlenko, 2008); and translation and cross-linguistic interpretation (Berk-Seligson, 2012). Among other functions, these approaches contribute to identifying the authorship of an evidential text, highlighting potential judicial bias in court opinions, and understanding power dynamics in society.

This paper is concerned with the role of the linguist as expert witness, with jury instructions, and with statutory interpretation – and the intersections of the three. Chapter 2 proceeds by briefly addressing the expert witness role and bringing the topic of jury instructions into focus, connecting the latter with the importance of statutory interpretation. The chapter then considers the work of Cunningham et al. (1994) in assisting the Supreme Court with two cases, and it highlights a gap in the literature.

The Linguist as Expert Witness

In the *Jennings* case, the Court described an expert as someone possessing "peculiar knowledge or experience not common to the world, which renders their opinions...an aid to the court or jury in determining the questions at issue" (as cited in Koehler, 2013, p. 515). Linguists with professional and academic training fall under this description when the 'questions at issue' involve language. But beyond generally recognizing the status of a PhD or an individual with similarly advanced experience, there is not as yet an official credentialing system or baseline requirements for linguists to qualify as experts.

Stygall (2009), among others, has suggested possible solutions based on the policies and practices of other disciplines, but the burdens associated with instituting a formal organization (i.e. time, costs, etc.) seem to have prevented progress so far. In the anticipation of a formal system, linguists should strive to identify their own limits and decline their services when cases require expertise different from their own. For example, a highly regarded phonetician attempting an analysis of a complex semantics issue could lead to problems easily avoided by instead referring the case to a highly regarded semanticist. The objective is to optimally fulfill one's oath to tell 'the whole truth' and nothing else, which the phonetician in the hypothetical situation is less likely capable of than her colleague. Linguists must therefore recognize whether or not their own competence will honestly contribute to a case. Incompetence, "at least to the extent that the testifier knows—or should know—the testimony is incompetent," is unethical (Butters, 2009, p. 238-239).

Linguists may be called upon to contribute their knowledge as an expert witness in court. In addition, they may volunteer their skillset in certain ways, such as by writing an *amicus* brief or by submitting a scholarly article to the Court. Other forms of participation are likely permissible, but I will only discuss the dynamics of the aforementioned three.

Expert witness in court. Attorneys typically call linguists to serve as an expert witness. In some instances, though, the judge will request a linguist's assistance on behalf of the court. Each of these assignments is considerably different. When working with an attorney, a linguist bases her analysis on the information given to her, and that

information is shaped to provide the best case for the client – that is, with the end goal of winning (Finegan, 2009). The perceived imbalance of linguists working on one side or the other makes the apparent neutrality of a judge hiring an expert witness seem more appealing, although it bears its own challenges. Butters (2009) argues that even if neutrality or impartiality can be proven, such a practice contradicts the adversarial system. His reasoning is that if a linguist presents an analysis that influences the decision of the court, the produced bias may compromise the right to legal representation, even with an otherwise fair and accurate assessment of the language in question.

Finegan (2009) believes the best option is to have opposing experts equally capable of fulfilling their role in the process. In theory, this means that if attorneys on both sides enlist the aid of a linguist, the analysis provided by each will differ because they did not start with the same data. Linguists will not always have a say on the role they receive, but they should always be mindful of these nuances and how they can affect their ultimate analysis or opinion.

An additional point of mindfulness is the way in which linguists present their expertise to those present in the courtroom. Expert witnesses must offer their insights in terms relatable to the attorneys, the judge, and the jury, which adds another layer to the plain language equation: it now involves balancing legal language, plain language, and linguistic language. Koehler (2013) observes that forensic linguists, and experts in general, run the risk of presenting their testimony in a way that is ultimately counterproductive, notwithstanding good intentions. Specialized language, he asserts, can create greater ambiguity or even result in an unintentional misrepresentation of the evidence or an inadvertent misinterpretation of the statute, such that the jury gives more

weight to a particular detail because of its 'staging' in important-sounding technical terms.

On the one side, linguists must determine what their obligation as an expert requires in terms of unpacking and presenting the complexities involved in their analysis (Finegan, 2009). And they need to demonstrate their qualifications through their speaking and writing, that is, through the quality of their work. However, on the other side, their responsibility is to "explore and articulate the...intuitive but usually unconscious understanding" that speakers have of their language (Cunningham et al., 1994, p. 1565). Because they are attempting to show people what they already know, the conclusion of even a rigorous analysis may appear self-evident. Finding a balance that satisfies everyone can be supremely difficult.

***Amicus* briefs.** Another form of expert participation is the tradition of *amicus curiae*, or 'friends of the court,' which dates back to the Romans. In principle, the practice involves submitting an unsolicited report with scientific evidence or a philosophical argument that an individual or group believes will help the court reach a more informed decision (Umbricht, 2001). Linguists have the opportunity to draft an *amicus* brief if they so choose. The process necessitates keeping up with the court's case docket so as to provide any potentially helpful materials prior to the oral arguments (i.e. the official hearing of the case).

One caveat with *amicus* briefs is that their public perception has evolved over time: "what was once a gesture of friendship has become a deliberate act of advocacy" (Umbricht, 2001, p. 778). Because these briefs have garnered a reputation of underlying

bias or partiality, the classification alone of such documents can taint the objectivity and credibility of a linguist's work (Kaplan et al., 1995). That is not to say that linguists should avoid or abandon the practice – a strong analysis is a strong analysis, whether or not it bears the *amicus* title.

Scholarly articles. In 1994, Cunningham et al. (a law professor and three linguistics professors) submitted a galley of their paper "Plain Meaning and Hard Cases" to the Supreme Court. The paper, which the authors refer to as an essay, was later published in *The Yale Law Journal*. Part of the essay reviews *The Language of Judges* (1993) by Lawrence Solan, and part of it features an original analysis of cases then currently before the Supreme Court. The following year, Kaplan et al. (1995) – the same team of scholars – published an article in *Forensic Linguistics* revisiting their efforts. In *United States v. Granderson*, Justice Ginsburg wrote the majority opinion and she cited the essay in *The Yale Law Journal*; she did the same in her concurring opinion in *United States v. Staples*.

Kaplan et al. (1995) note that while they assisted the Court, sending pre-publication manuscripts can be problematic. The nature of a galley is that no one else has access to it yet, including both parties involved in the case. Thus, although the essay was unsolicited, it creates the same scenario of an expert witness retained by a judge. In both instances, the linguist or team of scholars is only providing information to the deciding individual or individuals, rather than to everyone involved, potentially swaying the thinking and decision making of the justice(s). It seems that simply sending the same information to everyone, pre- and post-publication might prevent such an outcome.

Whereas an *amicus* brief may not be held in the highest public esteem, a scholarly article seems better suited for achieving the purposes of an unsolicited report, particularly one produced through interdisciplinary collaboration. The Cunningham et al. (1994) and Kaplan et al. (1995) papers motivated the present study for this very reason. I will further examine the merits of their work later in this chapter. First, I address the topic of jury instructions.

Jury Instructions

The Sixth and Seventh Amendments to the United States Constitution enumerate the right to a trial by jury in criminal and civil cases, respectively. In the early history of the nation, the jury had considerable influence in court proceedings, including determining what constituted acceptable evidence, but since the end of the nineteenth century, judges have instructed the jury and jurors have been expected to conform (Solan, 2010). Even so, members of the jury still hold the power of making decisions that affect the livelihood of their fellow citizens. Because of that power, the accessibility of their instruction can either help legitimize or delegitimize the American legal system (Stygall, 2012).

Jury selections and the court process. Jurors are initially summoned as a matter of civic duty, and they are ultimately selected through a process of questioning called *voir dire*. The questioning takes place after the pleas in a trial, and once the jury is in place, jurors receive preliminary instructions with general details on their role and usually a brief background on the case. Attorneys then provide opening statements, present

evidence and question any witnesses, and finish with closing arguments (Stygall, 2012). Then, having listened to the proceedings, the jury receives instructions specific to the case (Marder, 2012). During the proceedings, a judge will sometimes provide additional clarification to the jury if a certain piece of evidence is inadmissible (Gibbons, 2003), or, they might, for example, remind jurors not to give the testimonies of police officers any special consideration because of their position of authority (Marder, 2012).

Instructions in some instances include nothing more than the statutory text or the language of a previous judicial decision (Tiersma, 1999). State and federal courts across the United States typically utilize pattern instructions drafted by committees of legal professionals, and judges have the option of rephrasing or adding to them if they deem it necessary (Marder, 2012). In effect, jury instructions are an "abbreviated legal education" focused on a single case (Dattu, 1998, p. 67).

Instructions: verbal and written. The issue of plain language appears again with this topic, as researchers from the fields of linguistics and psychology, among others, have found jury instructions to be largely incomprehensible to the lay public (Dumas, 2000). And beyond any challenges presented by the language itself, part of the trouble is that in some instances the jury has no written copy of its directions and, should a juror ask a question, the judge will simply re-read the instructions (Solan, 2010). Members of the judiciary choose to repeat instead of clarify largely because in clarifying, they are subject to influencing the decision, even as they aim for total objectivity. Repeating verbatim is thus the safe route for judges, as "paraphras[ing] the instructions in more modern terms might invite a reversal by a higher court because of some perceived change

in meaning" (Tiersma, 1999, p. 96). Further, a misrepresentation of the law can result in an entirely new trial (Marder, 2012).

Coulthard and Johnson (2010) point out the difficulty of making sense of instructions even when jurors have a printed copy in their possession. Again, the legal education in these scenarios is abbreviated. Further, while judges and attorneys have various resources for interpretation at their disposal (e.g. dictionaries, legislative history, etc.), jurors do not benefit from the same resources or the time to apply them. They are limited to the text provided to them and the constraints of reaching a timely decision (Solan, 2010).

Another crucial influence on jury instructions is the variable of courtroom discourse, that is, the linguistic context that frames the entire proceeding. The judge controls the hearing by determining who is permitted to speak and what is permitted to be spoken, and these directions serve to create a narrative that is unique to the courtroom and foreign to the layperson. Attorneys are typically cognizant of these rules of decorum, and for them, following the cues of the judge and their colleagues becomes second nature. However, for jurors who may only sit on the jury once in a lifetime, these inaccessible rules of discourse can have an exclusionary effect (Stygall, 2012). The members of the jury are left, after closing arguments, to determine how best to apply their instructions to the atypically presented narrative.

Revising jury instructions. Arizona and California are two examples of states that have rewritten their jury instructions to meet plain language standards and to help jurors more fully fulfill their civic duties. The process, as one might imagine, is labor-

intensive. In California, for example, revisions required six years for civil law cases and another eight for criminal law cases (Marder, 2012). As discussed in Chapter 1, language change necessitates continual revision and upkeep in order to satisfy any plain language standards, so an honest revision process will be an ongoing one.

The other side of the coin is that jury instructions must be "legally watertight," i.e. faithful to the statutory language, in order to earn and maintain the approval of the legal profession (Gibbons, 2003, p. 174). Similar to a judge providing potentially non-objective insight to members of the jury, a poorly written set of instructions can just as easily lead to a reversal from an appellate court. Here, the important connection between jury instructions and statutory interpretation becomes more apparent: how an author drafts the instructions depends on an initial interpretation of the original governing text. So while the decision remains in the hands of the jury, the instructions – and, crucially, the writer or writing committee – influences that outcome with its perception of the law.

In addition to attempts to rectify jury instruction issues linguistically, Dattu (1998) proposed leveraging illustrations to create better connections between the law and the public. He identifies that the legal profession already observes this practice in cases where it is more effective to visually depict complex ideas and that it is not uncommon to find a diagram or picture in legal memoranda, judicial opinions, and other documents of the kind (Dattu, 1998). In the sections and chapter that follow, I will argue for directly and indirectly applying a variation of his proposal in the form of syntax trees.

Forensic Linguistics and Statutory Interpretation

In the forensic linguistics literature, the salient example of linguists engaging in statutory analysis is Cunningham et al. (1994). Their publication in *The Yale Law Journal*, introduced earlier in this chapter, provides a book review and a new analysis of legal language, and it also spurs a lively debate at a subsequent symposium. Starting with *The Language of Judges*, this section will present those proceedings chronologically for the dual purpose of examining the linguistic analyses and addressing the criticisms that emerge with this type of endeavor.

The Language of Judges (1993). Cunningham et al. (1994) dedicate a significant portion of their essay to reviewing *The Language of Judges* (1993) by Lawrence Solan, an attorney, law professor, and linguist. One of Solan's (1993) focuses is on the ruling of *United States v. Yermian* (1983) and *United States v. Yermian* (1984). Each case involves a dispute over the language in 18 U.S.C. § 1001, which underwent a change between 1938 and 1948. The original text positioned the phrase "in any matter within the jurisdiction of any department or agency of the United States" *after* the adverb "knowingly," and the revision features the same phrase *before* "knowingly."

In *Yermian*, the issue is whether Yermian is guilty for simply knowing he falsified his record or if it must also be proven that he knew he did so within the jurisdiction of a federal agency – he admitted to the former but claimed having no awareness of the latter. The U.S. Court of Appeals, Ninth Circuit viewed the statutory language as ambiguous, and on the grounds of inadequate jury instructions, it called for a rehearing of the case. The next year, *United States v. Yermian* (1984) reached the Supreme Court, which called

the language of 18 U.S.C. § 1001 plain (though the Court split 5-4 in its decision), noting it only requires proof of knowingly falsifying information. Yermian was found guilty.

What interested Solan (1993) were the linguistic factors of the case, namely whether or not the PP "in any matter..." falls within the scope of knowingly. The legislative history provides that the language in 18 U.S.C. § 1001 was intended to bear its same meaning when changed in 1948, which is to suggest that the position of the PP should have no consequence. However, Solan (1993) argues that preposing the PP reduces, if not eliminates, any ambiguity. But he essentially stops there, leaving the reader wanting.

Plain Meaning and Hard Cases (1994). In contrast with Solan (1993), Cunningham et al. (1994) decided to analyze cases prior to their official hearings in the Supreme Court. Part III of "Plain Meaning and Hard Case" provides an account for *United States v. Staples*, another case involving the scope of 'knowingly,' and Part IV, which I will review here, examines *United States v. Granderson*.

Cunningham et al. (1994) refer to *United States v. Granderson* as "the case of the missing referent" (p. 1577). The referent is missing from 18 U.S.C. § 3565(a), which outlines part of the punishment for the destruction of mail. Granderson pled guilty, and he received a five-year probation term instead of the maximum six months in prison. After violating probation, he received a new sentence of twenty months in prison.

The court based its decision on the section of 18 U.S.C. § 3565(a) that reads, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence" (as cited in Cunningham et al, 1995, p. 1578). The

issue is whether *original sentence* refers to the maximum six months in prison or the five-year probation term, one imposing a two-month minimum of jail time and the other a twenty-month minimum.

Several different appellate courts heard this case, and they all split on their interpretation of the statute. While the different judges and attorneys battled over the referent of *original sentence*, Cunningham et al. (1994) turned to the meaning of the word *sentence* itself as it appears in the legislative history. The team found an interesting distinction Congress passed in 1984 that put the words *probation* and *sentence* on synonymous ground. Prior to that act, probation meant probation and sentence meant prison. According to the history of 18 U.S.C. § 3565(a), it appears that the pre-1984 semantic values of *probation* and *sentence* were upheld in drafting (Cunningham et al., 1994). Thus, Granderson's prison sentence should have been no fewer than two months and not more than six – and certainly not the twenty he received.

Perhaps the most compelling argument made in the essay is that linguistic analysis can help point a legislative history consultation in the right direction. Locating the actual source of confusion in *United States v. Granderson* led to finding a useful explanation of the indeterminacy of the statutory language. This interaction goes to show, as Cunningham et al. (1995) observe, "that close attention to text is not necessarily at odds with the use of legislative history in statutory interpretation" (p. 1582).

Bringing linguistics into judicial decision-making (1995). As noted earlier in this chapter, Justice Ginsburg cited "Plain Meaning and Hard Cases" in the majority opinion of *United States v. Granderson* and in her concurring opinion in *United States v.*

Staples. In "Bringing linguistics into judicial decision-making," Kaplan et al. (1995), the same Cunningham team, viewed this result as hopeful for "those interested in seeing growth in the recognition of the relevance of linguistics to the law" (p. 96). Cunningham had hoped to produce something that was "more than academic" (Kaplan, 1995, p. 83); that is, something more than the after-the-fact analyses of Solan (1993). Cunningham and his colleagues achieved just that, and Justice Ginsburg confirmed it with her writing.

The Northwestern/Washington University Law and Linguistics Symposium (1995). The Cunningham et al. (1994) and Kaplan et al. (1995) papers precipitated the 1995 Northwestern/Washington University Law and Linguistics Symposium, attended by leading scholars of both disciplines. In the wake of that event, the *Washington University Law Quarterly* published a special issue featuring observations on the potential for more interdisciplinary work like "Plain Meaning and Hard Cases." Some either embraced or seemed open to the idea (Lawson, 1995; Popkin, 1995), while others were hesitant or intensely critical (Greenawalt, 1995; Poirier 1995).

What is interesting is that while forensic linguistics continued to grow in the years that followed – even at a rapid pace through the subsequent decade (Coulthard, 2005) – instances of linguists attempting to assist the Court in ways similar to Cunningham et al. (1995) appear to have faded out. Hobbs (2012) and Kaplan (2016), for example, take the approach of Solan (1993) and revisit influential Supreme Court cases, but their analyses are, again, completed after-the-fact. Although out of necessity this paper takes such an approach, encouraging more work like Cunningham et al. (1995) is a parallel objective.

Conclusion

Chapter 2 has introduced the field of forensic linguistics and narrowed down the focus of this paper to the role of linguists in contributing to matters of statutory interpretation. As discussed, the task of statutory interpretation often affects juries. This chapter has also shown that interdisciplinary scholarship in the form of co-authored papers appears to be a favorable approach for offering unsolicited expert insight. Further, it has highlighted instances of scholars evaluating syntactic issues in legal language, although a detailed syntactic analysis performed and presented to the courts appears absent in the literature. This paper aims to begin to address that gap, starting with an introduction on syntax in Chapter 3.

CHAPTER 3

SYNTAX

As a discipline, syntax, like other areas within linguistics, aims to articulate the intuitions that speakers have about language. Some intuitions involve the sounds and meaning of words, and syntax bridges the gap between them (Carnie, 2007). Put differently, syntax is the study of the ordering of words and phrases that allow speakers to extract meaning from sound, as well as from signs (i.e. sign language) and visual cues, such as the written word. With syntax, we give chronology to language – which words come first and which come last – and, depending on the language, we know to read left-to-right, right-to-left, top-to-bottom, and so on (Pinker, 2014). The principles that govern syntactic combinations and sequences have attracted efforts to describe and, more recently, explain them (van Gelderen, 2013; Patel, 2008). These are the overarching objectives of syntax.

Some syntactic principles hold true cross-linguistically, that is, they function across all languages, while others are language-specific. Still others apply broadly to language groups and families, though not universally. English, for example, is a subject-verb-object (SVO) language, one of many, Arabic is verb-subject-object (VSO), and Turkish is subject-object-verb (SOV). Spanish shares the SVO characteristic of English, as does Russian, generally speaking, yet Spanish and Russian syntax contrast with English in important ways, including the position of adjectives in Spanish (noun-adjective versus the adjective-noun in English) and the case system in Russian (English only features case in its pronouns). Adequately describing and explaining these and other characteristics depends on robust theories and comprehensive empirical approaches.

Modern syntactic theory emerged in the 1950s with the early work of Noam Chomsky, and since then, what is known as Generative Grammar has evolved organically from its roots (Tomalin, 2002). As the title suggests, Generative Grammar focuses on how people generate language. The current iteration of this approach is the Minimalist Program, also proposed by Chomsky (1995). Minimalism in syntax regards language as finite in its resources and infinite in its ability to produce (Baker, 2013). Assuming finiteness, or a certain amount of limitation, the program further views language as a system with principles of economy – 'less is more.' Minimalism is, in point, not a theory but a disciplined lens for observing and conceptualizing language.

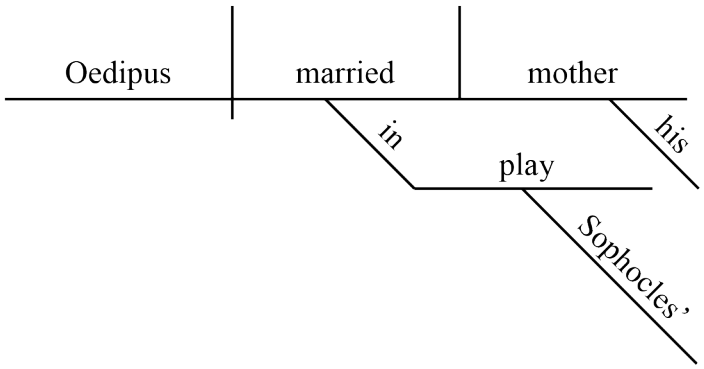
The Minimalist Program and it predecessors comprise a remarkable range of applications and findings that extend beyond the latitude of this study. Narrowing down the scope, Chapter 3 will first discuss the shift in Minimalism away from what has been the traditional approach of modeling linguistic data cartographically, and it will present an argument for the utility of syntax trees in commenting on statutory interpretation. A later section focuses on prepositional phrases and various methods for classifying them, all of which will factor greatly into the Chapter 4 analyses.

Trees

When dealing in abstraction, many disciplines find it useful to model, graph, or otherwise visually represent their ideas. Linguistics is no different. With respect to language, Alonzo Reed and Brainerd Kellogg reportedly innovated the concept of diagramming sentences during the 1870s, and their method appeared in American school

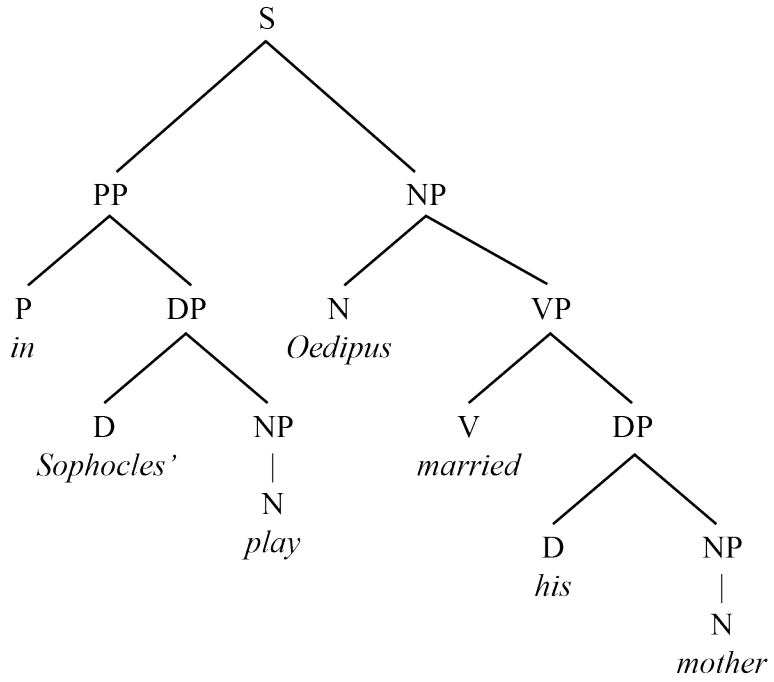
curricula for nearly 100 years (Pinker, 2014). The Reed-Kellogg notation looked something like this:

Figure 1 – "*In Sophocles' play, Oedipus married his mother"* (Pinker, 2014, p. 77).



The diagram outlines pretty clearly the SVO nature of English by placing *Oedipus married mother* in sequence. With a little instruction, the descending diagonal lines would make more sense, but at first blush, it is no wonder this notation went out of style. In the 1970s, roughly a decade after the Reed-Kellogg system disappeared from schools, linguists began employing X-bar theory, which utilizes tree structure to diagram the structure of phrases. Tree structure, which one may fairly view as a variation on Reed and Kellogg, is a mathematical tool developed with the purpose of uniformly representing sentence structure (Schweikert, 2005). Under X-bar theory, the sentence "*In Sophocles' play, Oedipus married his mother"* would take this shape:

Figure 2 – *"In Sophocles' play, Oedipus married his mother"* in X-bar notation

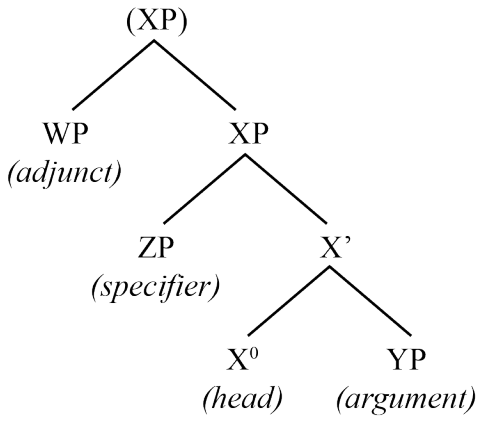


The difference between Figure 1 and Figure 2 is more than a simple ninety-degree rotation. With the Reed-Kellogg notation, the sentence is presented more linearly; X-bar theory presents the sentence vertically and, more crucially, as having a truer hierarchy. This distinction is important because of what Generative Grammar assumes about language, namely that it has a recursive nature that allows for limitless production – language is finite, but its productive potential is infinite.

A basic tree structure projection features three levels: a head, an argument, and a specifier. The head is an indispensable element (e.g. an adjective phrase must at least have an adjective); the head selects an argument (e.g. an adjective selects a noun to modify); and a specifier, although difficult to fully define, is a position for the grammatical subject of a clause and a destination point for phrases that move (e.g. wh-

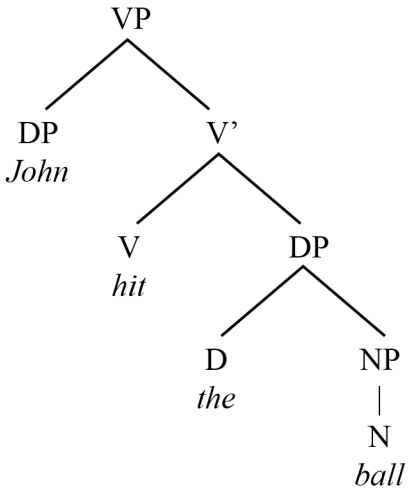
movement) (Schweikert, 2005). A structure may also optionally feature an adjunct. Figure 3 will help illustrate this last element and how it and the first three pieces come together:

Figure 3 – Basic tree structure projection (Nunes, 2013, p. 77).



X^0 combines, or merges, with YP to form the constituent X'. Then, X' merges with ZP to form the phrase XP. XP can also optionally merge with the adjunct WP, depicted on the top left (it can be argued that the projection starts from the top and moves downward, but I will not take a position here). The components X^0 and YP are referred to as 'sisters,' and they are 'daughters' of the 'mother' X'. Similarly, X' and ZP are sisters. The head X^0 will only have one argument (YP) and one specifier (ZP), but adjuncts (WP) have no fixed limit and can, in theory, iterate ad infinitum (Nunes, 2013). Moving toward a more concrete explanation of this concept, consider a similar tree structure with the inclusion of lexical items:

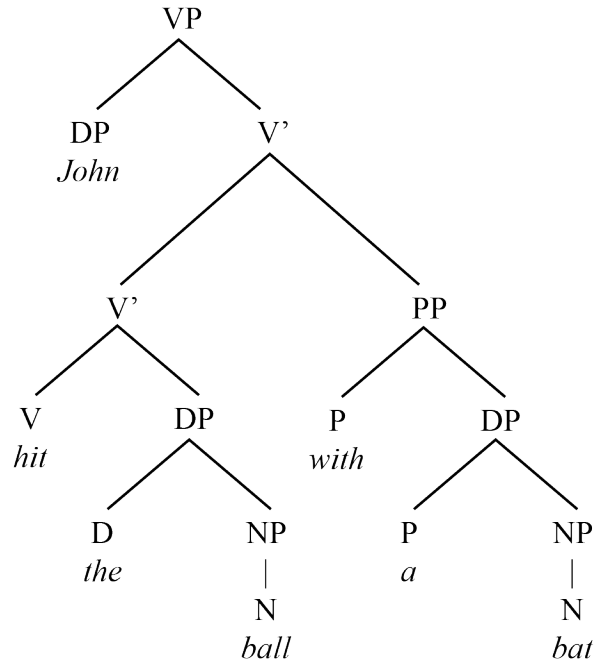
Figure 4– "*John hit the ball"*



The tree in the figure above is slightly different from the one in Figure 3. It shows how the constituents can build upon each other and hints at the potential for very large diagrams. But just the same as in Figure 3, *John hit the ball* is a structure with sisters, daughters, and mothers: *the* and *ball* are sisters, daughter of the DP, and as a constituent, they are the sister of *hit*, etc. This is important to note because it reflects how each word modifies or is modified – thinking of *the* and *ball* as syntactic siblings is merely a way to describe the relationship in which *the* modifies *ball*. The tree in Figure 4 represents the process of taking four words from the lexicon and putting them in a comprehendible order for others to hear or see.

If you take the sentence *John hit the ball* and add optional information to it, such as *with a bat*, the tree structure easily accommodates this adjunct. Figure 5 demonstrates the change:

Figure 5 – "*John hit the ball with the bat*"

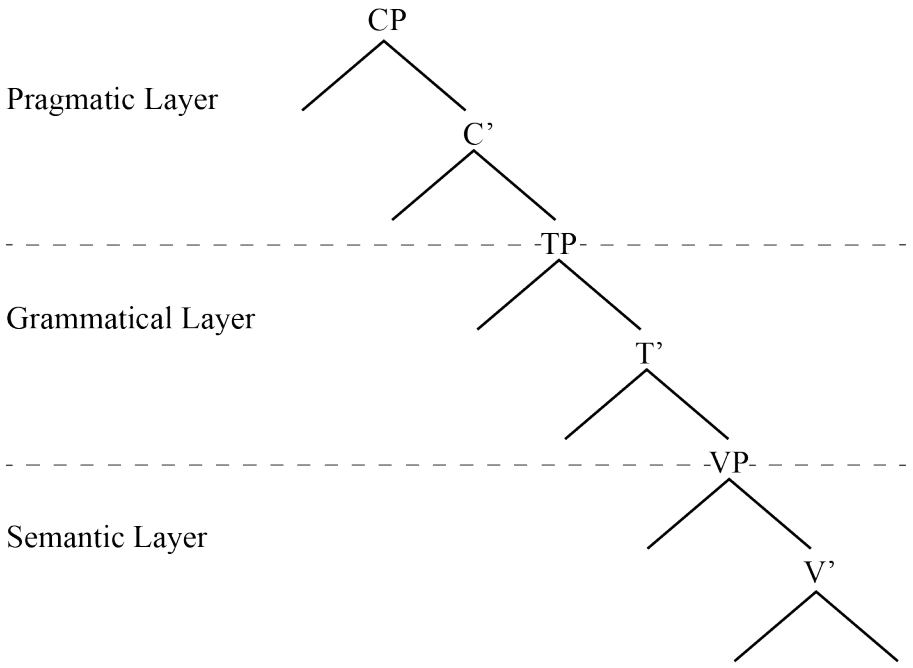


First, it is important to note the relationship between *hit* (V) and *the ball* (DP). The two are sisters, which means one (V) modifies – and depends on – the other (DP). Because *hit* is the head and *the ball* is the argument, the latter is obligatory. Without it, *John hit* does not quite make sense. It is additionally important to point out that *hit the ball* (V') and *with a bat* (PP) are sisters. In this case, the PP, an adjunct, modifies the entire V'. This is because *with a bat* is optional information. You can say *John hit the ball* without any grammatical problem. Adding *with a bat* specifies or clarifies the event, but it does not improve or diminish the grammaticality of the utterance. This difference between obligatory and optional information is simple, but Chapter 4 will show how consequential misrepresenting it can be, especially with regard to prepositional phrases like *with a bat*.

As mentioned, trees can reflect much larger and more complex matters of syntax. Figure 4 shows very simply what John hit, or the 'who did what to whom' information

that is crucial for communicating events. Figure 5 adds the 'how' or 'by what means' to the equation. Notice the VP at the top of each diagram. This signals that all of the information in the sentence, at least as depicted in Figures 4 and 5, is housed in the verb phrase. However, it is possible for the tree structure to extend above the VP to include a TP and a CP. Together these three elements form what is known as the basic spine of a clause. Figure 6 illustrates this and notes what occurs in each layer:

Figure 6 – The basic, three-layered spine of a clause

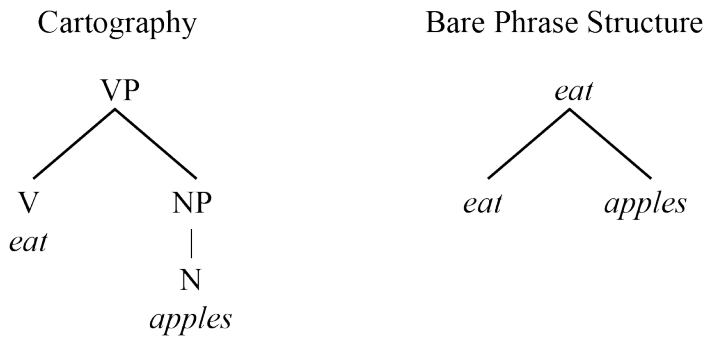


The top of the tree, or the CP layer, houses pragmatic material, including the mood of the clause and details information structure (e.g. topic – old information; and focus – new information). Below the CP is the TP, which stores information related to "tense, (epistemic) mood, aspect verbal agreement, and grammatical case" (van Gelderen, 2013, p. 66). The VP layer at the bottom details the argument and event structure, showing the transitivity of verbs based on their internal aspect, that is, their semantic value.

The basic spine is simply that, a spine or an outline, and it grants flexibility for modeling essentially any syntactic phenomenon. One might compare a syntax tree to an accordion for its ability to compress and expand. This allows for accurately reflecting the language in question or highlighting specific components of a clause. For instance, a sentence might map out across all three layers – the CP, TP, and VP – but if a linguist is only interested in the TP level, she has the option of expanding or zooming in on that portion and not giving the same attention to surrounding layers.

With respect to the flexibility of the tree structure, linguists hold opposing views of what information should be included in any diagram. One side favors the Cartographic approach and the other prefers the bare phrase structure method, both of which fall within the parameters of Generative Grammar. Cartography provides a highly detailed rendering of language, while bare phrase structure, as its name implies, provides the minimum amount of information needed. The Minimalist Program naturally gravitates to the latter. With the simple phrase *eat apples*, Figure 7 juxtaposes Cartography with bare phrase structure:

Figure 7 – Cartography vs. bare phrase structure (Jayaseelan, 2008, p. 91)



Note that the Cartography tree features the same labeling of its branches as in X-bar theory. The bare phrase structure leaves these out entirely, and the head of the phrase, in this case *eat*, is provided as the label for the entire projection. More recently, Chomsky and other linguists have started to move away from labels and trees altogether, adopting instead a linear set notation. In this approach, the same phrase in 6 would look like (1), or, more minimally, like (2), from Jayaleesan (2008, p. 94):

(1) {eat, {eat, apples}}
(2) {eat, apples}

Linguists have a number of options at their disposal when it comes to diagramming syntax, and they have to decide which of these representations to employ based on their benefits and drawbacks. For the present study, I will not use set notation because my objective is to take statutory language out of its linear presentation and to model it in a different light. Instead, I take a mixed approach featuring elements of Minimalism and Cartography to achieve the desired levels of dimension and detail. From a Minimalism perspective, the analyses provide an economic depiction of the language in question; on the Cartographic side, the analyses do not follow Cartography in the technical sense (see Cinque, 2006; and Rizzi, 2013), but they do cartographically represent the language in the general sense, that is, they function as maps. Minimalism allows for looking at the language at its most basic, and Cartography will simplify the level of abstraction needed to convey what each tree represents. The ultimate aim is to present an accessible, economic analysis.

Prepositions and Prepositional Phrases

In this paper, the bulk of my analysis will focus on prepositions and how they figure into the tree structures discussed in the previous section. Here, I will briefly describe the syntactic characteristics of prepositions and provide a sample of the relevant literature.

Prepositions belong to the functional and closed-class categories of words, as opposed to the lexical and open-class, and their basic grammatical role is to introduce nouns. Flexible in where they can position and versatile in how they function, they also express the relationship between words and phrases, and they can do so either obligatorily or freely (Fang, 1999). Because of their flexibility and versatility, prepositions exhibit "diverse grammatical behavior," which can be problematic at times (Croft, 2013, p. 14).

For instance, one closely studied topic in syntax is the resolution of ambiguities involving prepositions (Katsika, 2008). In studies on second-language (L2) acquisition of English, prepositions (and articles) are the grammatical components that generate the highest number of errors (Girju, 2008). Computational linguists have found the same to be true with parsing systems, namely that prepositional phrases present the greatest challenge for classification (Merlo & Ferrer, 2006; Fang, 1999). As will be shown in Chapter 4, prepositions can also be at the center of legal debates. In point, prepositions are tricky.

With respect to tree structure, a preposition is the head of its phrase, and it can combine with a prepositional object (e.g. a determiner phrase or a noun phrase). The prepositional phrase (PP) can attach to the structure of the clause in one of four ways: as

an argument to a noun phrase (NP) or a verb phrase (VP), or as an adjunct to an NP or a VP (Figure 5 in the previous section shows a PP attaching as an adjunct to the VP). There are various ways to determine how PPs attach. Merlo and Ferrer (2006, p. 345-347) provide a set of diagnostics:

I. *Head dependence* – the PP is an argument if the head depends on it semantically
II. *Optionality* – the PP is an adjunct if it does not affect grammaticality
III. *Iterativity* – arguments cannot be iterated, as the head selects only one argument
IV. *Ordering* – only the first in a series of PPs can be an argument, the rest are adjuncts
V. *Copular paraphrase* – adjuncts can be paraphrased by a copular relative clause
VI. *Deverbal noun* – PPs preceded by a deverbal noun typically function as arguments

Merlo and Ferrer (2006) remind the reader that the copular paraphrase and deverbal noun diagnostics only apply to PPs following an NP. Further, one can determine the position and function of a PP with one or more diagnostics, but not all of them need to apply like a checklist. Although Merlo and Ferrer developed these with a computational application in mind (i.e. corpus studies), the principles serve well to distinguish among PPs. The six diagnostics will therefore help inform the conclusions drawn in Chapter 4.

Conclusion

Chapter 3 has introduced syntax, the concept of tree structure, and the syntactic category of prepositions. These are the final sections of background that will be given to set the stage for my ultimate analyses.

To the present point, this thesis has provided a depiction of legal language, and it has attempted to illuminate the natural connection between linguistics and the law. It has

identified a gap in the literature and begun to argue for the utility of syntax in statutory interpretation. In Chapter 4, I will attempt to bring all of these pieces together.

CHAPTER 4

ANALYSIS OF CASES

In legal matters, conceptual vagueness tends to dominate as the source of debate and confusion, but that does not exclude entirely instances of linguistic ambiguity (Solan, 2010). Sometimes ambiguity appears forced in the courtroom, as the prosecution and the defense strive to develop distinct arguments over the same, ostensibly clear statutory language. One of the two cases analyzed in this paper fall into this category. Even though it can be argued that only one reading is possible for the given statutory language, an either/or must be resolved. The second case provides an example of genuine ambiguity.

Chapter 4 will proceed as follows: the first section is an analysis of *Flores-Figueroa v. United States* (2009), a case that centers on the scope of "knowingly." In searching for cases, I consulted the Corpus of US Supreme Court Opinions (2017) (CUSSCO), created at Brigham Young University. I selected *Flores-Figueroa* because, to my knowledge, it is the most recent one involving the word "knowingly" – a topic treated by Solan (1993) and Cunningham et al. (1994) – and that features an issue of syntax. Since 2009, The Supreme Court has heard several cases with regard to "knowingly" (*Rosemond v. United States*, 2014; *McFadden v. United States*, 2015; *Shaw v. United States*, 2016), but these hinge more on conceptual matters than linguistic ones. The same is true of cases on the docket and yet to be heard by the Supreme Court between the presented date of this paper – spring 2017 – and the closing of the 2016 court session – summer of 2017.

The second section is an analysis of *In re Sanders* (2008), which involves a canon of interpretation and hinges on the syntactic relationship of a verb and an adverbial. The

United States Court of Appeals, Sixth Circuit, heard this case. I also consulted the CUSSCO to find a similar, more recent case that had perhaps reached the Supreme Court. Numerous cases involved, for instance, the canons of prior-construction, constitutional avoidance, and waivers of sovereign immunity (*Lightfoot v. Cendant Mortgage Group*, 2017; *McFadden v United States*, 2015; *Federal Aviation Administration et al. v. Cooper*, 2012), but as Scalia and Garner (2012) note, these are more pertinent to procedure than to interpretation, although they certainly aid in the latter. Nonetheless, *In re Sanders* is a case where the debate over statutory language started in bankruptcy court and, through appeals, went through the district court and reached the Sixth Circuit.

A concluding section provides an overview of the two analyses in this chapter, along with some preliminary conclusions with regard to the overall objective of this thesis, which is to demonstrate the utility of syntactic cartography as a forensic linguistics tool.

Identity Theft, *mens rea*, and a PP in Question

In Chapter 3, I overviewed the work of Solan (1993) and Cunningham et al. (1994), both of which feature analyses of cases involving the word "knowingly" (i.e. *United States v. Yermian*, 1983; *United States v. Staples*, 1994). While it may seem difficult to conceive of someone breaking the law unknowingly, or at least unintentionally, this type of case frequently reaches the Supreme Court. One will be analyzed in this section.

In cases with the word "knowingly," the statutory languages imposes what is called a *scienter* requirement (*scienter* is the Latin correlate of knowingly). The

requirement asks the judge to look for *mens rea*, or 'a criminal state of mind,' and it is in place to help determine innocence or guilt based on the provable knowledge or intent of the accused. In the absence of such a principle, "the state would be in a position to punish people for the consequences of actions in which they did not even intend to engage" (Solan, 1993, p. 68). The concept of *mens rea* is divisible into four sections, such that a criminal or guilty mind can be purposeful, knowing, reckless, or negligent (Ginther et al., 2014). These subtle but important nuances, along with their ramifications, naturally vary from case to case, but for the present study, simply distinguishing between knowing and not knowing will suffice.

Recall Solan's (1993) argument that the position of a PP affects the perceived ambiguity of the statute, namely to what extent the scope of "knowingly" reaches. The following analysis will similarly attempt to illustrate one instance of how "knowingly" interacts syntactically with PPs.

Flores-Figueroa v. United States (2009). In 2006, Ignacio Carlos Flores-Figueroa, a citizen of Mexico, gave his U.S. employer various forms of counterfeit identification, including a false Social Security card. The name he provided was his own, but the identifying numbers were those of a U.S. citizen. Arrested and charged for this action, he was later found guilty under 8 U.S.C. § 1325(a), 18 U.S.C. § 1546(a), and 18 U.S.C. § 1028A(a)(1) by the District Court, which the Eighth Circuit affirmed. Flores-Figueroa admitted to the former charges (entering the United States without inspection and misusing immigration documents) but challenged the latter (aggravated identity

theft), claiming it impossible for the Court to determine he knew the ID information in question belonged to someone else.

The focus in *Flores-Figueroa v. United States* is whether or not the Court must prove that he knowingly provided the identification of another person. Justice Breyer, writing for the majority, makes a useful distinction between a real ID and fake one: the information on (or taken from) a real ID corresponds with that of another person, and the information on a fake one does not. If the Court can prove Flores-Figueroa knew his ID bore real information, 18 U.S.C. § 1028A(a)(1) prescribes a two-year extension to his prison sentence. A Supreme Court reversal would alternately shorten his prison sentence by the same amount of time. Figure 8 provides the language found in 18 U.S.C. § 1028A(a)(1):

Figure 8 – 18 U.S.C. § 1028A(a)(1) (emphasis added)

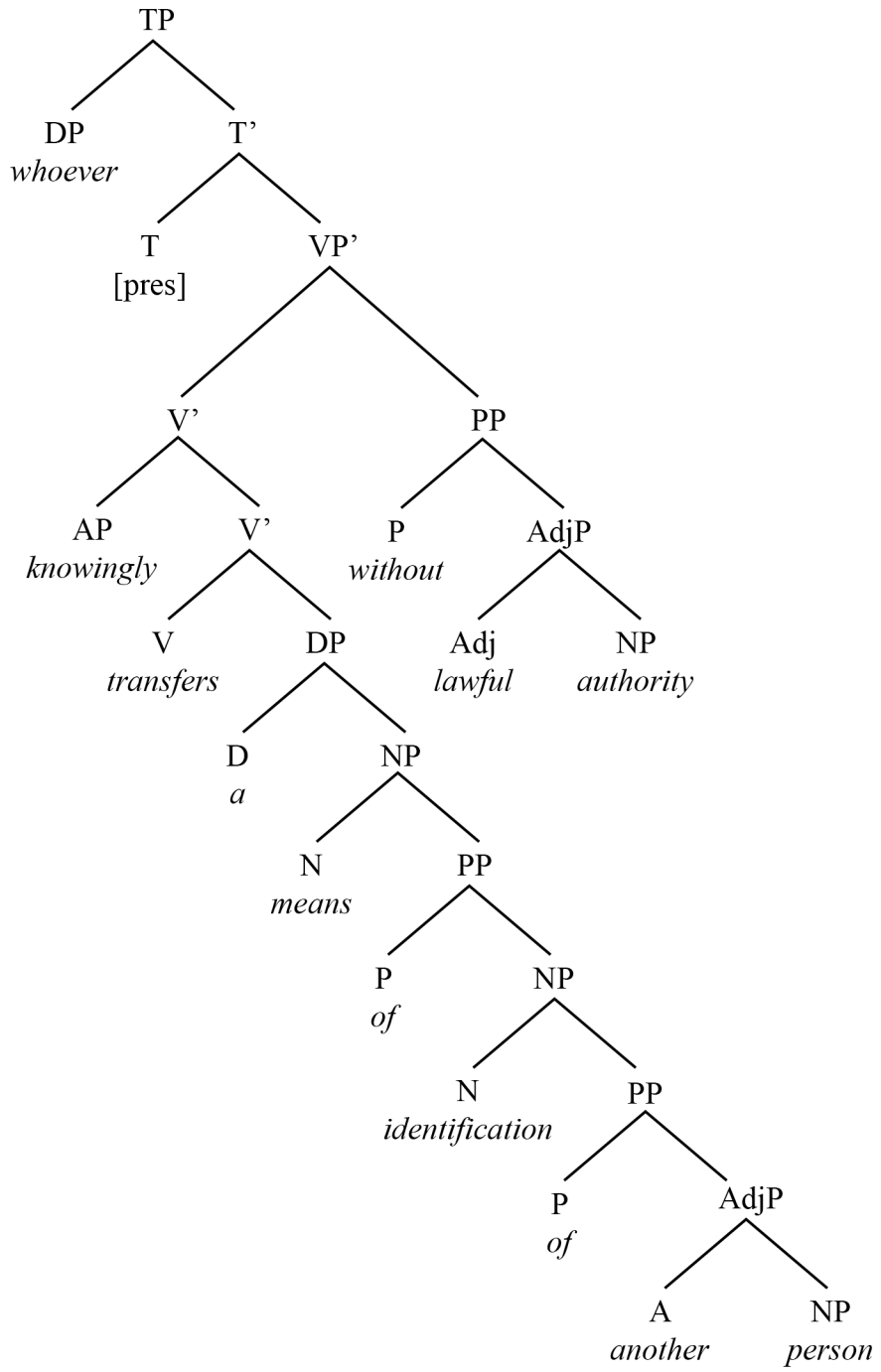
> (1) In general.—
> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, ***a means of identification of another person*** shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

Before reaching the Supreme Court, the judges in the District Court and the Eight Circuit concluded that "knowingly" modifies the subsequent language up until *a means of identification*, excluding the final three words *of another person*. Flores-Figueroa contended that it modifies both phrases, that is, the entire phrase, and that because the Court could not determine that he knew the ID numbers belonged to another person, he should be acquitted on that count. The Supreme Court agreed with Flores-Figueroa.

Supporting its decision, the Court notes that the very name of the crime, aggravated identity theft, implies that *knowingly* modifies *of another person* (*Flores-Figueroa*, 2009). In other words, a theft requires something to be taken from someone else, not simply that someone has created the desired item or result out of thin air.

The Court also consulted the legislative history, but it based its conclusion primarily on the language of the statute. Citing ordinary English and a natural reading of the text, the Court argues, "where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence" (*Flores-Figueroa*, 2009, p. 4). To investigate this point, the relevant language of 18 U.S.C. 18 U.S.C. § 1028A(a)(1) is mapped out on a syntax tree in Figure 9:

Figure 9 – Tree structure of 18 U.S.C. § 1028A(a)(1)



It is assumed here that the relevant language of 18 U.S.C. § 1028A(a)(1) reads:

"Whoever...knowingly transfers...without lawful authority, a means of identification of

another person...” With the sole inclusion of “transfers,” it is implied that the clause interchangeably repeats with the verbs “possesses” or “uses.” To arrive at the conclusions illustrated above, I applied the Merlo and Ferrer (2006) attachment diagnostics discussed in Chapter 3.

The PP *of identification* attaches to the N *means* as an argument because of head dependence. Listeners or readers know what kind of *means* is intended because of the clarifying PP that follows. Because each component relies on the other, they do not exhibit optionality. With head dependence and optionality under review, another diagnostic is the copular paraphrase, which instructs that only an adjunct can undergo paraphrasing with a copular relative clause. In this case, it would require *a means that was of identification* to pass a grammaticality test. It does not. The deverbal noun diagnostic does not apply here, and the ordering diagnostic (and the very closely related iterativity diagnostic) only supports the others already considered to this point, that is, it argues that in a series of PPs only the first can be an argument. Because this does not prevent it from being an argument and because of the results from the other diagnostics, the PP *of identification* attaches to the tree as an argument of *means*.

In like fashion, the PP *of another person* is displayed in Figure 9 as an argument to *identification*. This is done through the same line of consideration as in the previous paragraph. Yet another piece of supporting evidence for this conclusion is the fact that statistically, the preposition *of* attaches as an argument 99.8 times out of 100 (Merlo & Ferrer, 2006).

It is held that the PP *of another person* is an argument, but what does this mean for *Flores-Figueroa*? The tree affirms the ruling of the Supreme Court, namely that *of*

another person falls in the scope of knowingly. This comes by way of constituent command, or c-command. On the tree structure, the adverb phrase (AP) *knowingly* forms a constituent with its sister V', and that relationship signifies that it modifies everything from there down. Conversely, everything positioned higher in the tree (*whoever* and *without lawful authority*) is not within the scope of *knowingly*. Therefore, the tree not only affirms the ruling of the Supreme Court, but it also refutes the counterargument of the District Court and the Eighth Circuit.

If, for the sake of hypotheticals, the *of* in *of another person* fell into the rare .2% that does not attach as an argument, it would not necessarily fall under the scope of *knowingly* because it could, in theory, appear elsewhere (higher) in the tree. This is plausible given the free-attaching nature of adjuncts. Problems quickly arise, though, as the phrase would have to attach either in succession with *without lawful authority* or perhaps somehow to *whoever* (it could also potentially fall in line with the phrase *during and in relation to any felony violation enumerated in subsection (c)*, although I did not include that portion in Figure 9). If this were the case, *knowingly* would have no force on *of another person*, per the District Court and Eighth Circuit, and the PP, relocated in the published statute, would render the clause entirely incoherent. Figure 10 and Figure 11 illustrate this issue.

Figure 10 – First positional alternation for *of another person*

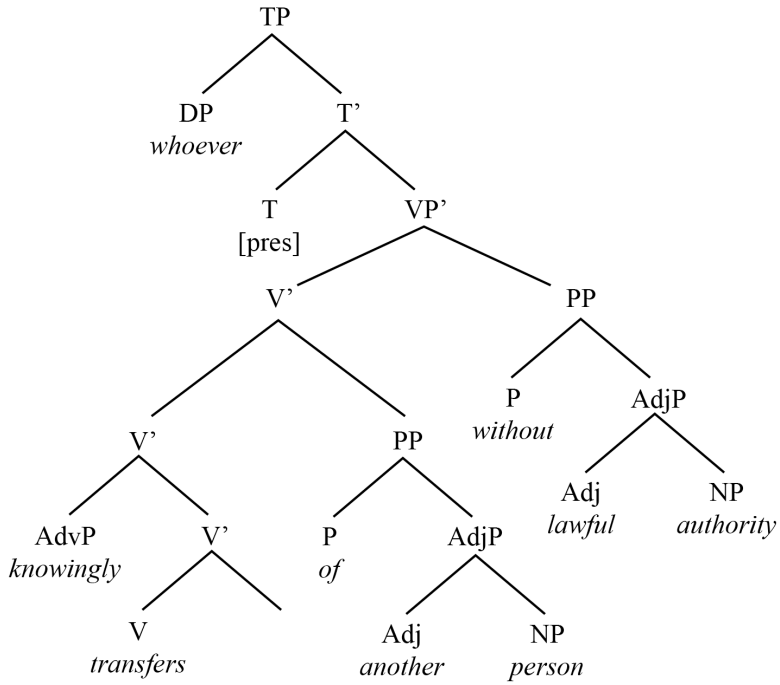
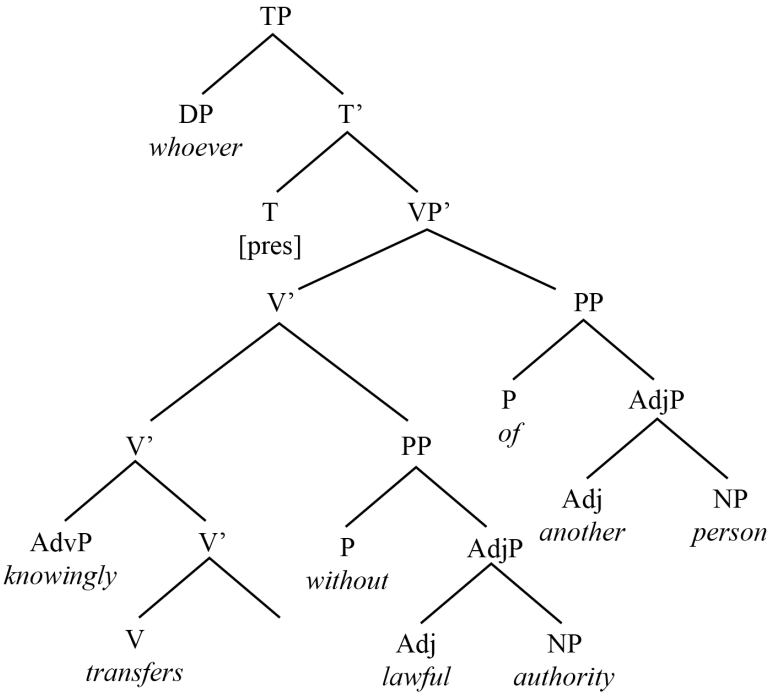


Figure 11 – Second positional alternation for *of another person*



Reading the language directly off of the tree would result in an 18 U.S.C. § 1028A(a)(1) that either says "Whoever...knowingly transfers...without lawful authority, of another person, a means of identification..." (in Figure 10) or "Whoever...knowingly transfers...of another person, without lawful authority, a means of identification..." (in Figure 11). These options, again, appear entirely incoherent.

In the three trees in this section, the word *knowingly* is positioned just above *transfers*. The epistemic nature of the verb calls for a higher placement in the tree, likely just above the highest PP adjunct. This would not change the matter of c-command for *knowingly*, as the rest of the clause would still fall in its scope. The reason for placing it lower in the clause is to better capture the sequence of the phrasing in 18 U.S.C. § 1028A(a)(1). Interestingly, placing *knowingly* higher in the tree, above both of the PP adjuncts, would still mean that it modifies *of another person*, but, as has been shown, the language would not make any sense. All said, what the trees in this section have show is that it is an unconvincing position to assert that the scope of *knowingly* reaches only as far as identification.

Bankruptcy Filing, a Syntactic Canon, and a Contested Adverbial

Chapter 1 featured a discussion on textualism, along with a few examples of the canons of interpretation. Scalia and Garner (2012) list dozens more of these, including a syntactic guideline known as the nearest-reasonable-referent canon, which reads: "When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent" (p. 152). This is in contrast with the series-qualifier canon (given in the section before the

nearest-reasonable-referent canon in Scalia and Garner), which provides that when there is a parallel series of nouns or verbs, the modifier, pre- or postpositive, applies to the collective series (Scalia & Garner, 2012). It should be noted once more that these canons serve not as strict rules but as formal suggestions on how to proceed with statutory language.

Scalia and Garner (2012) provide *In re Sanders* (2008) as an example of a case involving the nearest-reasonable-referent canon. For the purposes of this section, I will present a summary of the case and its arguments as found in the Sixth Circuit court opinion. I will subsequently provide a tree-based analysis in the fashion of the previous section.

***In re Sanders* (2008).** Jason Sanders filed for Chapter 7 bankruptcy on July 29, 2002, and he received a discharge, or relief, of his debts the following February (Chapter 7 of the Bankruptcy Code features instructions for liquidating assets with the purpose of repaying owed sums). Fewer than four years after the February discharge, Sanders filed for Chapter 13 bankruptcy (Chapter 13 differs from 7 in that it entails establishing a new payment plan for indebted individuals who have a reliable source of income), but the court denied his request for a second discharge because of its reading of the language in 11 U.S.C. § 1328(f):

Figure 12 – 11 U.S.C § 1328(f) (emphasis added)

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a **discharge**—

(1) in a case **filed** under chapter 7, 11, or 12 of this title **during** the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

The bankruptcy court argued that according to the statute, Sanders was ineligible for a discharge because four years had not passed since his previous discharge. In other words, the court determined that the word "during" modifies the phrase "received a discharge." The district court, however, asserted that "during" modifies the verb "filed." Under that reading, Sanders qualifies for a discharge under his second petition, given that four years had transpired since he last filed. The Chapter 13 trustee appealed the case, which was then heard by the United States Court of Appeals, Sixth Circuit in December of 2008 (interestingly, Sanders' file date for Chapter 13 came only a month before the four-year mark of his Chapter 7 discharge – and the Sixth Circuit reached its decision almost two years after that).

Judge Sutton, writing for the Sixth Circuit, cites the last antecedent guideline, and he concludes that the language is plain and requires no adjustment in punctuation. He also notes that if the "during the 4-year period" phrase truly modified "received a discharge," congress would have positioned it earlier in the statute. Another important observation is the fact that reading the statute by the bankruptcy court's interpretation would render the verb "filed" superfluous (*In re Sanders*, 2008). The discharge-to-filing reading further generates illogical outcomes, such as the fact that, in theory, it encourages

a chapter 20 bankruptcy, which the Bankruptcy Code is in place to prevent (*In re Sanders*, 2008).

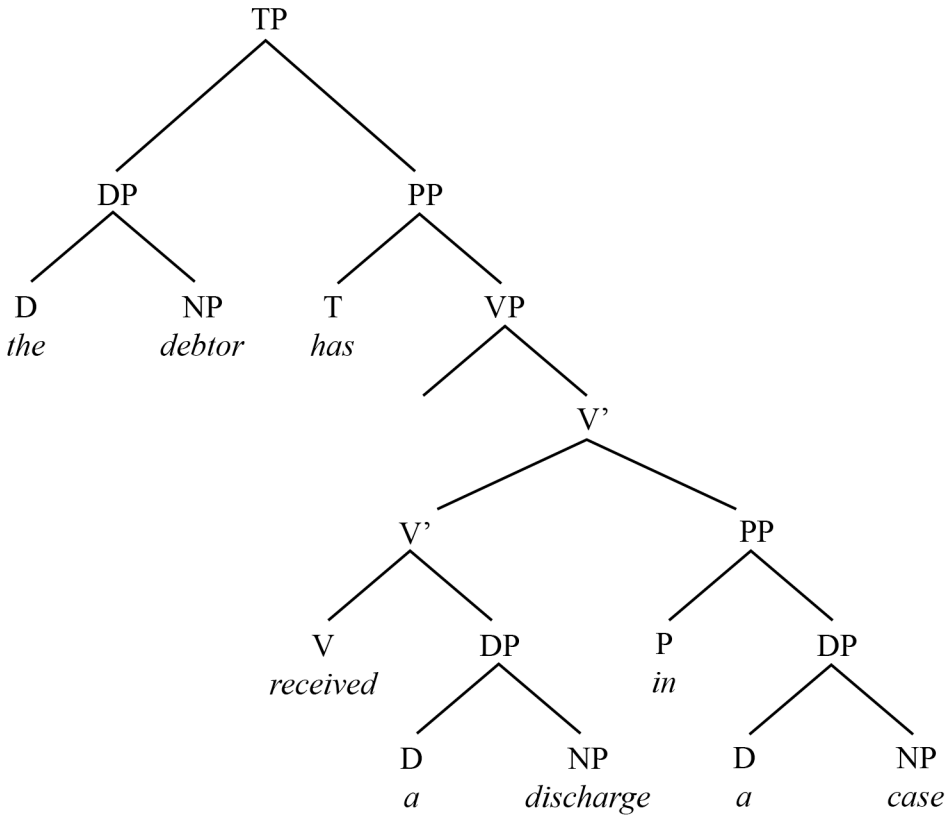
As a preliminary consideration in the analysis, it bears noting that two lexical verbs are present in the relevant language, namely *received* and *filed*, which indicates the presence of a subordinate clause (van Gelderen, 2013). With respect to 11 U.S.C § 1328(f), this means that *has received* and *filed* are in separate clauses, such that the division of the bolded and underlined language in Figure 12 leaves *the debtor has received a discharge in a case* on one side and *filed under chapter 7, 11, or 12 of this title* and *during the 4-year period* on the other. Already, this begins to weaken the argument of the Chapter 13 trustee and the decision of the bankruptcy court. If the canon holds, it seems very unlikely that the phrase *during the 4-year period* would find its nearest reasonable referent in a separate clause. But there is more to be considered.

The contention in *In re Sanders* is over the preposition *during*, but the language in 11 U.S.C § 1328(f) is replete with PPs. Sorting out the position and role of each, at least those in the bolded and underlined portions, will further aid in reaching a conclusion on the *during* phrase. On this point, I return to the Merlo and Ferrer (2006) diagnostics.

First, the PP *in a case* seems to only have one option given the subordination of the subsequent clause. In other words, it is likely that *in a case* attaches to *the debtor received a discharge*. Even so, how it attaches is worth knowing. On the presumption that *in a case* is the only PP in the clause, the iterativity and ordering diagnostics have no claim. The PP is not grammatically dependent on the head *discharge*, which demonstrates its optionality. From one angle, *in a case* does follow a deverbal noun, suggesting that it may function as an argument. However, under the copular paraphrase diagnostic, it is an

adjunct because of the grammaticality of *a discharge that was in a case*. Arguments, according to Merlo and Ferrer (2006), "cannot be paraphrased by a copular relative clause" (p. 347). I conclude that *in a case* is an adjunct, and therefore the PP attaches as the sister to V', as shown in Figure 13:

Figure 13 – "*the debtor has received a discharge in a case*"



The tree above shows how the PP *in a case* modifies the V *received.* It is important to note that this PP and the others that follow will modify the V and not the NP. This is an area in the *In re Sanders* discussion that is misleading from both sides of the argument. Each part attempts to determine whether *during* modifies *discharge* or *filed*, when, again, as the tree structure above shows, the PP adjunct really modifies the V and not the NP.

Conceptually, it works to talk about discharges and filings, but because of the way the statute is written, the verbs at play, in terms of what adjuncts modify, are not the ones really addressed by either party. I will return to this point in the conclusion. First, I will look at the PPs of the subordinate clause.

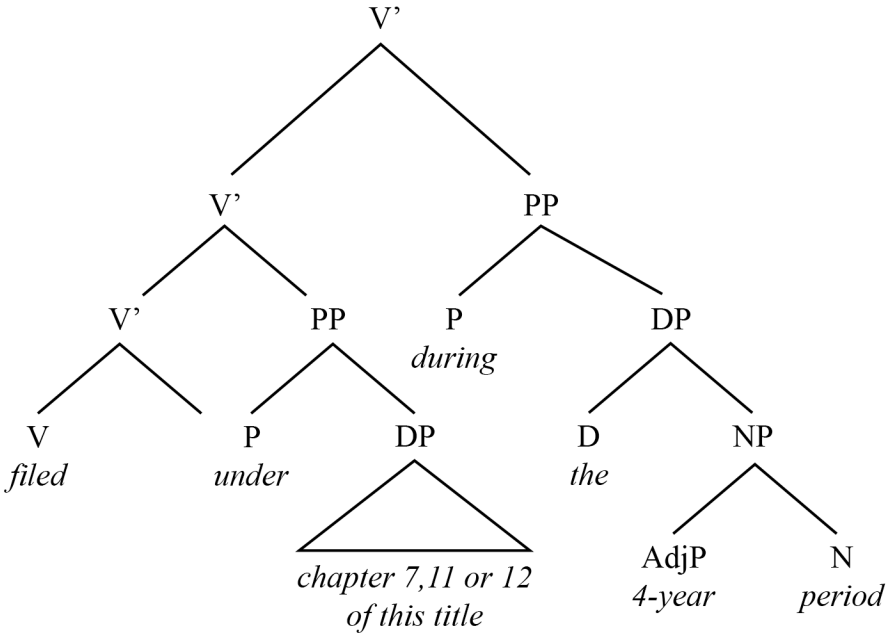
After *filed*, there are three PPs: *under chapter 7, 11, or 12*; *of this title*; and *during the 4-year period* – there are, of course, more, but for the purpose of this study, I am limiting the analysis to the most pertinent factors. To begin, the *of this title* phrase attaches to the DP *chapter 7, 11, or 12*, and I make this claim based on the statistic presented with the previous case, namely that 99.8% of PPs beginning with *of* attach as arguments. This works because *of this title* is not first in the series (and therefore not an argument to *filed*), and it says nothing about how or when the case was filed, whereas the PPs beginning with *under* and *during* do. Under this assumption, the field is narrowed to two PPs: *under chapter 7, 11, or 12 of this title* and *during the 4-year period*. The next step is to determine the attachment of *under* and *during*.

The ordering diagnostic from Merlo and Ferrer dictates that in a series of PPs, only the first one can function as an argument, leaving the others without any option as to their adjunct-hood. Thus, only the *under* phrase has the option of attaching to *filed* as an argument, but this does not necessarily require it to be one. The *during* phrase, alternately, must be an adjunct.

With respect to the attachment of the *under* phrase, the copular paraphrase and deverbal noun diagnostics do not apply. Measuring against the optionality diagnostics, the *under* phrase does not feel directly obligatory to the grammatically of the clause, though for the phrase to end with the word *filed* feels lacking in some way. The nature of

this verb seems to want either an argument or an adjunct to say what was filed or how something was filed. Based on the context of the statute, though, this information is crucial to its meaning. Still, it seems most accurate in this instance to classify the *under* as an adjunct, as well as the *during* PP. This conclusion will make more sense shortly, but for now, Figure 14 provides an initial visual of these placements:

Figure 14 – "*filed under Chapter 7, 11, or 12 of this title during the 4-year period*"



Note that because my aim is an economic analysis, I have grouped *chapter 7, 11, or 12 of this title* in a DP "hanger" – hangers are cartographic shorthand that help abbreviate less-vital portions of an analysis. The *during* PP is the sister of V', which, to a degree, places it a little closer to *received* in the hierarchy of the main clause. Notwithstanding, assuming that it attaches in the subordinate clause, the nearest reasonable referent is *filed*. This conclusion agrees with the Sixth Circuit.

Yet, when taking into account the relevant language of 11 U.S.C § 1328(f) as a whole, a pair of options emerge with respect to possible tree structures. Consider the following diagrams:

Figure 15 – First representation of 11 U.S.C § 1328(f)

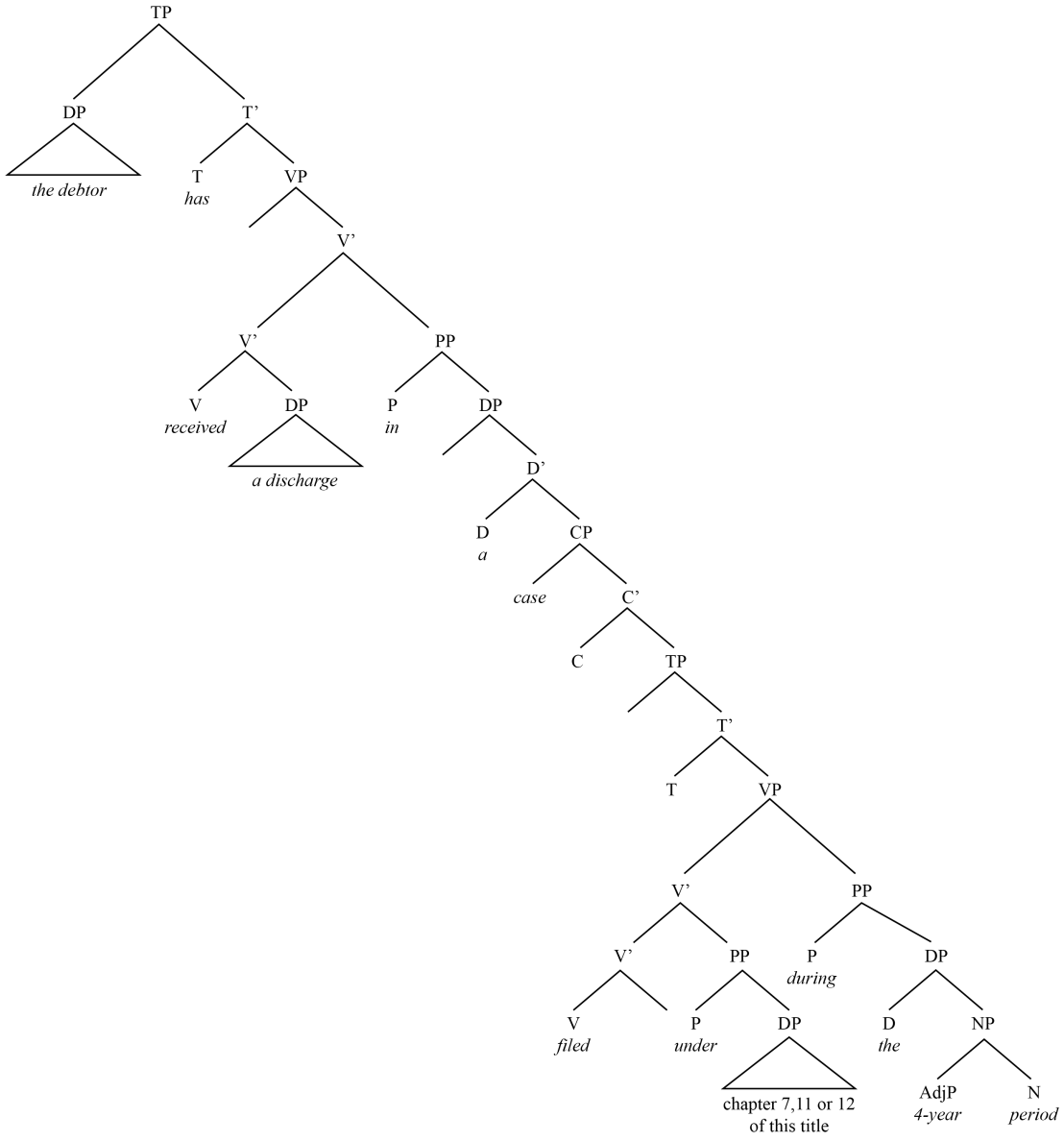


Figure 16 – Second representation of 11 U.S.C § 1328(f)

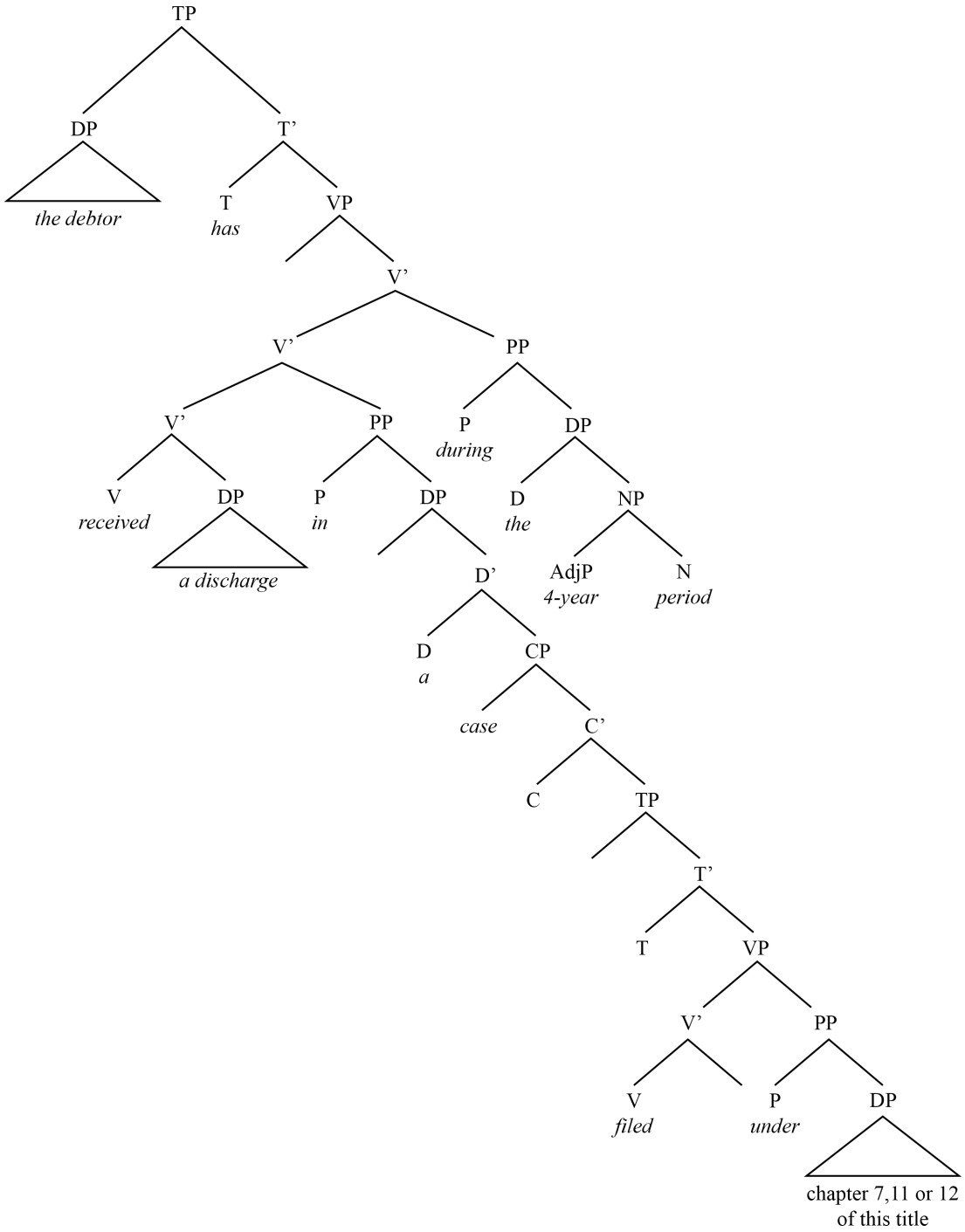
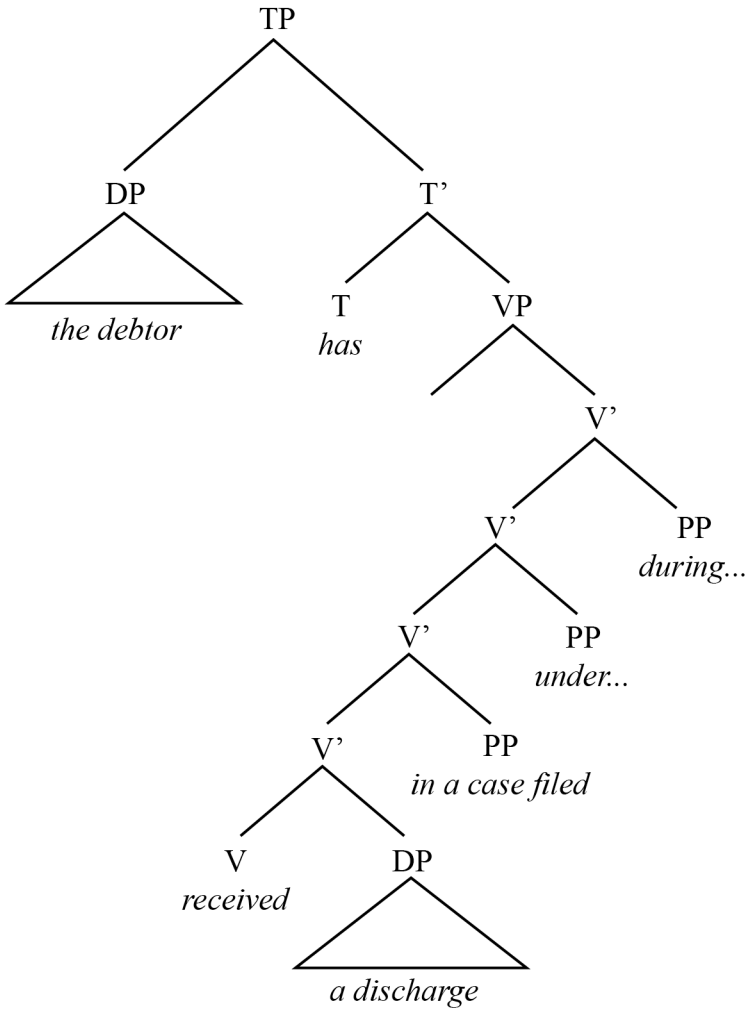


Figure 17 – Third representation of 11 U.S.C § 1328(f)



The structures in Figure 15, Figure 16, and Figure 17 illustrate three possible interpretations of the statute. Because of the nature of the verb *filed*, as previously discussed, it seems more likely that the *under* PP attach with the *filed* VP, even though it is still an adjunct. I therefore argue that Figures 15 and 16 are the only likely options. In the first one, the *during* phrase modifies *filed*, but in the second one, the PP modifies *received*. Both outcomes are possible. From a syntactic perspective, the statute is

ambiguous and the Sixth Circuit and the bankruptcy court each have valid arguments. So what can be concluded from the analysis?

The analysis leads to three main conclusions. First, it shows that the language of 11 U.S.C § 1328(f) is not plain or clear. The Sixth Circuit contrastively believed that it was. Judge Sutton pointed out that the interpretation in Figure 16 (that of the bankruptcy court) leads to an illogical, purpose-defeating outcome. It seems that claiming plainness because of the implications of alternative readings is not an accurate or helpful way to classify plain language. Plain, unambiguous language classifies as such when it "limit[s] to one the possible interpretations of a sentence" (Solan, 1993, p. 64).

Second, although identifying the ambiguity of the statute does not yield a conclusive interpretation, it is not entirely without value because this syntactic approach supports the importance of the canons of interpretation. Given the indeterminacy of the language itself, the direction to look for the nearest reasonable referent in *In re Sanders* helps resolve the ambiguity. Without the canon, it appears that neither side of the argument would really have a claim on what the appropriate outcome should be. Thus, just as Cunningham et al. (1995) found, a close analysis of the statutory language can help point a judge in the right direction with regard to consulting legislative history or to considering how the available interpretations contrast from a conceptual standpoint.

Third, as mentioned, this analysis provided an important clarification on the argument between the various courts and the parties involved. Everyone talked about whether *during* modified *discharge* or *filed*. As the trees depict, *during* gives temporal information only to the V. In other words, *during* must refer to when the client *received a discharge* or to when he *filed* for bankruptcy. Again, from a conceptual standpoint, this

distinction does not change very much in terms of the outcome of the case, but it does show an area where tree structures can help illustrate the small details that could prove hugely influential.

Conclusion

Chapter 4 has provided an analysis of *Flores-Figueroa v. United States* (2009) and *In re Sanders* (2008). The first analysis offers a conclusive argument on the language in question, and it agrees with the overall ruling of the Supreme Court. It shows what the alternative readings and interpretations would require from a syntactic perspective, and it argues for why these are unconvincing. The second analysis does not offer a conclusive argument, but it does point out the value of recognizing ambiguity where it exists. Ambiguity, I have argued, can serve well as a point of departure when considering other resources and forms of analysis, namely legislative history or conceptual logic.

The aim for economy in each analysis resulted in tree structures that are rather simplistic. One might notice empty spaces in the diagrams, for example. There is evidence in the syntax literature for the movement of parts and pieces throughout the tree. Work by Sportiche (1988) and Koopman and Sportiche (1991), for instance, gives evidence that the subject (an NP or DP) of a sentence begins in the specifier of the VP and later moves up to the specifier of the TP (collectively known as the VP-Internal Subject Hypothesis, or VPISH).

Another important point on the illustrations in this thesis is the tree structures in Figure 15 and 16. Because of the presence of a reduced relative clause, I drafted a section of the trees based loosely on the work of Kayne (1994) on relative clauses. This helps

take into account that the statute, in essence, reads *in a case which was filed under*, only the "which was" has been reduced. Otherwise the word *case* would be under the DP as *a case* instead of where I placed it in the specifier of CP. A rendering more faithful to Kayne (1994) would illustrate the movement taking place, similar to that occurring with the VPISH considerations.

Notwithstanding these technicalities, the tree structures represent the information relevant to the cases at hand. They help illustrate arguments and conclusions in ways that the linear presentation of the language alone cannot. In point, they show the ability that syntactic cartography, in the non-technical sense of the term, has to conceptualize legal language in new dimensions in a way that neither attempts to circumvent or supplant the interpretive methods instantiated by the legal profession.

CHAPTER 5

CONCLUSION

This thesis has presented a retrospective analysis of PPs in two appellate court cases. It has also argued for the utility of syntax trees in representing and analyzing statutory language. With respect to *Flores-Figueroa v. United States* (2009), the analysis agreed with the Supreme Court's ruling, and with respect to *In re Sanders* (2008), the analysis also agreed with the Sixth Circuit's ruling, at least in part. The contrast in the latter being that this thesis has discovered ambiguity in the statute, whereas the court declared the language plain. Between the two analyses, this paper has shown how tree structures can help reach a conclusion and how they can help identify the need for interpretive resources beyond the language in the statute.

The ideal application of the concepts and arguments in this thesis would be to submit them in advance of the cases being heard. Given the dates of each, 2008 and 2009, this was not possible here. It is admittedly less compelling and less contributive to advance these comments retrospectively, but at the same time, it has shown how one might employ such an approach with active cases. Given the nature of this paper (i.e. a thesis) collaboration in the style of Cunningham et al. (1994) was also impossible. Notwithstanding, I have argued that the best way to submit this kind of analysis, again in future cases, is through a scholarly article in a law review or another journal publication (rather than as an *amicus* brief). In the future, I hope to collaborate with others from both disciplines – linguistics and the law – to do just that.

Beyond the direct application of these analyses to the interpretation of statutes, their value extends into a couple of related areas, which may serve well as future

directions. The first area, I contend, is at the very point of drafting. Pinker (2014) suggests that tree structures can aid in the writing process because they give the writer a better understanding of the task he or she is imposing on the reader by choosing one phrasing over another. If the drafters of 11 U.S.C § 1328(f) knew, for instance, the inherent ambiguity of the statute, perhaps they could have adjusted the language from the outset to preempt cases like *In re Sanders*. While it may seem like a cumbersome task to draw tree after tree at the legislative desk, it may help resolve unnecessary debates and outcomes in the future. Such an application may also seem rather quixotic, but the very fact that laws create and extinguish rights and obligations seems to merit the investment (Ainsworth, 2008).

The second area where these analyses may apply is to jury instructions. As Chapter 1 discussed, the way that an author drafts instructions to the jury depends on an initial interpretation of the original governing text. Perhaps these illustrations might also be used in court. They could be used to determine what the instructions say or, in line with Dattu's (1998) proposal, they may even be presented as part of the instructions. Looking to the tree structures could help determine "what a linguistically competent person would understand a statute to say," particularly one without any legal training (i.e. a juror) (Fallon, 2014, p. 707). With regard to this application, collaboration with psycholinguistic experts could hold a lot of promise.

As to the quality of the analysis, it would be reasonable for future studies to include more detail in the tree structures. Chapter 4 pointed out a few of the areas that were essentially overlooked in the analysis but that could potentially reveal more layers to the issues at hand. The reasoning henceforth has been to provide an economic analysis,

but, as Chapter 2 discussed, there must also be a balance in providing a thorough evaluation that brings the parties involved closer to the whole truth. Even so, similar work at a later date should explore more of the possibilities that deeper syntactic analysis could facilitate, as this thesis has only begun to address the gap that exists in the literature.

Further, there is the prospect for a broad range of studies that focus on other parts of speech than prepositions. Future cases will invariably present opportunities to look at statutory language from my syntactic angles, and I believe tree structures can demonstrate similar efficiency in diagramming those issues. Collaboration with semanticists would also likely prove fruitful in the search for meaning in statutory language. In addition, linguists with interests outside of syntax should consider developing and applying analogous visual tools in the courtroom, whether for the task of statutory interpretation or some other form of participation in the legal system.

In any of these approaches, linguists must take into consideration the various dynamics of being an expert witness or a contributing scholar. Chapter 2, for example, discussed the issues of deciding how much detail to provide in an analysis and what may constitute a breach of ethics. Chapter 4 addressed the former matter by showing that there were a few things left out of the tree structures in order to arrive at the most accessible product. There is also the matter of staying within one's bounds and not assuming that on matters of language a judge should show total deference to the expertise of a linguist. As Cunningham et al. (1994) were careful to point out, they did not claim to have found the right answer on the cases they analyzed. Even by doing so, they received a fair amount of harsh criticism at the 1995 Northwestern/Washington University Law and Linguistics

Symposium. Building a relationship of mutual respect between the disciplines involved in forensic linguistics is critical.

Chapter 1 provided another overview that linguists should account for in their work, and that is the nature of legal language and how it distinctly contrasts with civic or non-legal language. Because of the nature of legalese, much of which is arguably contrived to meet its ends, many of the linguistic principles and conventions that hold elsewhere will not relate to the language of the law. Nevertheless, the field of linguistics, and particularly that of forensic linguistics, has the choice opportunity to help build bridges that benefit everyone involved with and living under the law.

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APPENDIX A

COURT CASES

Federal Aviation Administration et al. v. Cooper, 566 U.S. (2012)
Flores-Figueroa v. United States, 556 U.S. (2009)
In re Bateman, 515 F.3d 272 (4th Cir. 2008)
In re Grydzuk, 353 B.R. 564 (Bankr. N.D. Ind. 2006)
In re Sanders, 551 F.3d 397 (6th Cir. 2008)
Lightfoot et al. v. Cendant Mortgage Corp., dba PHH Mortgage, et al., 580 U.S. (2017)
McFadden v. United States, 576 U.S. (2015)
Milner v. Department of the Navy, 562 U.S. (2011)
Muller v. Oregon, 208 U.S. 412 (1908)
People v. Jennings (1911)
Rosemond v. United States, 572 U.S. (2014)
Shaw v. United States, 580 U.S. (2016)
United States v. Granderson, 511 U.S. 39 (1994)
United States v. Staples, 511 U.S. 600 (1994)
United States v. Yermian 708 F.2d 365 (9th Cir. 1983)
United States v. Yermian 468 U.S. 63 (1984)
Whole Woman's Health v. Hellerstedt, 579 U.S. (2016)
Yates v. United States, 574 U.S (2015)83