

The Problem with Judges Acting Like Linguists | Otherwords

<https://www.youtube.com/watch?v=l7To2evwGKs>

Transcript: <https://dontveter.com/ec/judges.pdf>

In 1994, a 69-year-old man named Frank Muscarello sold eight pounds of marijuana to an undercover federal agent.

This might have earned him a short stint in prison, except for one detail. The officers found a handgun locked in the glove compartment of the pickup truck he had driven to the scene.

According to federal law, there's a stiff penalty for "any person who during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm."

And here's where linguistics comes in: What does the word carry mean? The prosecutor insisted that just having the gun in the car counted as carrying it.

While the defense argued that to carry something, you have to have it in your hand or on your person.

In cases like these, judges are supposed to default to the ordinary meaning of a word at the time.

That is the meaning that a normal speaker of English would assume based on the context. But that's not always an easy call.

Just the other day, my friend and I had a spirited conversation about what the word bit means when you say, "I'll be there a bit after five."

I thought that 5:20 was over the limit, which she found to be a bit pedantic.

In a courtroom, these semantic disagreements can have life or death consequences.

How a single word or punctuation mark is interpreted can mean the difference between freedom or life in prison.

And as someone who's gotten into a fair share of linguistic arguments online, I find that more than a bit scary.

I'm Dr. Erica Brozovsky, and this is "Other Words."

Before we answer what it means to carry a firearm, let's look at an even more loaded grammatical question.

The Oxford comma, also known as a serial comma, is sometimes found in between the last two items in a list and has been the cause of much spilled ink and ruined friendships.

Some people think that it's a superfluous piece of punctuation.

In the sentence "This morning I had bacon, eggs, and toast," the "and" already separates eggs and toast. Why would I need a comma there too?

But others point out that some sentences could be misinterpreted without it. If you say, "I took a road trip with my cousins, Ted and Anna."

Are Ted and Anna your cousins? Or did you go with Ted and Anna and your cousins? An Oxford comma can clear that up.

It may seem like a trivial thing for people to get worked up about, but in 2014, a group of truck drivers sued their employer, Oakhurst Dairy, for \$10 million over a missing Oxford comma.

According to Maine state law, companies are allowed to not pay overtime to some employees who handle perishable foods.

The thinking is that you don't want to incentivize workers to intentionally take their time when, say, raw meat or milk is at stake.

The exact wording of a statute exempted jobs related to the "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of perishable foods."

The plaintiffs argued that their department, distribution, was not the last item on the list, but rather part of a clause that modifies the word packing.

Otherwise, there should have been a comma here.

So the exemption, according to them, applies to packing-- whether for shipment or distribution-- but not the distribution itself.

The dairy's lawyers responded that not only is an Oxford comma unnecessary, but the Maine legislative drafting manual explicitly states that "when drafting Maine law or rules, don't use a comma between the penultimate and last item of a series."

But the plaintiffs had more grammatical ammo in their arsenal. They quoted the Chicago Manual of Style's admonition that every element of a parallel series must be a functional match of the others and serve the same grammatical function in the sentence.

Every element in the statute series is a gerund, an I-N-G word, canning, freezing, drying, except shipment and distribution.

That must mean that they are not members of the series, but rather parts of a clause that modifies packing.

"Wait a minute," says the defendant. If packing really is the last item on the list, why is there no conjunction before it?

Shouldn't it be marketing, storing, OR packing for shipment or distribution? "Ah," the plaintiffs respond. "Have you not heard of asyndeton?" It's a grammatical device sometimes used in legal texts where a conjunction within a series is omitted.

The case was eventually settled with no definitive ruling on the Oxford comma.

But you might notice that both sides seem to prioritize lexical arguments rather than ones of intent.

Obviously, if the point of a statute was to get food onto grocery store shelves as quickly as possible, that would probably include truck drivers, right?

Why not focus on the spirit of the law instead of quibbling over punctuation?

It might be thanks to a particular style of interpreting legal texts that has become very popular in the last 50 years: textualism.

According to textualism, a judge should never consider any information outside the literal wording of a statute.

Even if you happen to know exactly what the legislators had in mind when they wrote a bill, if they didn't express it clearly, it doesn't matter.

In this philosophy, the law is the words on the page, nothing more, nothing less.

Textualism has turned judges into armchair linguists, asked to render the final verdict on what a word means or what a clause modifies.

And for a long time, they leaned heavily on what has traditionally been the ultimate word authority: the dictionary.

Since textualism's rise at the Supreme Court in the mid 1980s, the citing of dictionaries in rulings has increased over 400%.

And this brings us back to poor Frank Muscarello. The question of whether you can carry a gun in the locked glove compartment of car went all the way to the Supreme Court in 1998.

The justices consulted the Oxford English Dictionary and found that the very first definition of carry included "convey, originally by cart or wagon, hence in any vehicle."

In fact, carry and car are cognates. Case closed. They ruled against Muscarello and he eventually died in prison.

I don't know about you, but I don't think I'd use the word carry to refer to things in my car.

And a lot of people felt the same way because in the years since, the case has become an example of the dangers of relying on the dictionary to determine the ordinary meaning of a word.

For one thing, different editions can give you different definitions. And the order of the definitions is not always an indication of their cultural weight, an assumption that's been called the sense-ranking fallacy.

In fact, a closer reading of the OED reveals that the first definition of carry is not the primary one, but simply the earliest documented.

And that it's use to mean convey in a vehicle has largely been replaced by the word take, as in, "I'm going to take these groceries home in my car."

The shortcomings of dictionaries as a legal tool has led some judges to embrace a new technological authority.

Corpus linguistics is the analysis of large databases of text, or corpora, assembled from many different types of sources like books, articles, and transcripts.

Linguists have used them for decades to quantify how words are used by real speakers in everyday life.

But now thanks to the internet, any judge can perform a quick search to determine the most ordinary usage of a disputed word.

One of its biggest advocates is a lawyer named Stephen Mouritsen who, in 2010, conducted a search of the Corpus of Contemporary American English and the Corpus of Historical American English for the word carry, specifically when it appeared near words like gun, rifle, or firearm.

He found that when Americans talk about carrying a firearm, they almost always mean on one's person--not in a vehicle.

Although corpus linguistics has become very popular amongst certain judges and lawyers, others warn that it is still vulnerable to bias and error.

Just because a word is often used in a certain way, you can't assume that's the only way to interpret it, otherwise known as the frequency fallacy.

Corpora are also not perfect representations of common language use.

For instance, many that are scraped from the internet have a disproportionately large sample size of news articles, which could distort results.

If I searched a 2026 corpus for the word ice, I might conclude that its ordinary meaning is a federal law enforcement agency and not frozen water.

And how you frame the search could influence your results.

During the COVID pandemic, US District Judge Kathryn Mizelle struck down the mask mandate for air travel, ruling that the Centers for Disease Control had exceeded their rulemaking authority.

US law authorizes the CDC to make rules regarding sanitation to prevent the spread of disease.

But when Mizelle did a corpus search for the word sanitation, she also included the word sanitize.

Based on her search results, she decided that the ordinary meaning was to make something clean, not keep something clean.

Since the point of masking is to keep an area free of infection, the CDC could not compel their use.

Critics pointed out that sanitation and sanitize, though closely related, don't have the exact same meaning or usage, and suggested that she had included it to craft the results she wanted and give her ruling academic pedigree.

But it's not just how judges use corpus linguistics. Some legal scholars think they shouldn't be using it at all.

In 2015, the Utah Supreme Court actually admonished one of its own justices for the practice saying, that "linguistics is a scientific field of study that uses empirical research to draw findings," and that his corpus searches were tantamount to conducting "independent scientific research," which judges are prohibited from doing.

Just like with DNA, ballistics, or psychological evaluations, linguistic evidence should be collected by an expert and presented by a lawyer in court.

Then the judge or jury can decide whether they find it persuasive.

But then again, I'm a linguist, so I'm biased. Perhaps this debate is the result of the inherent tension of textualism.

Textualism seems to suggest there's a singular, perfect way to interpret a sentence. But language is not mathematics.

It's full of ambiguities and inconsistencies, and we are constantly using context and logic to infer what people are trying to say.

No matter how hard legal writers try to make their statements airtight, there always seems to be room for argument.