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What Vagueness and Inconsistency Tell Us About Interpretation

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Two Kinds of Vagueness

When signing up for insurance benefits at my job, I was asked, "Do you have children, and if so are they young enough to be included on your policy?" I replied that I had two children, both of whom were over 21. The benefits officer responded, "That's too vague. In some circumstances children of covered employees are eligible for benefits up to their 26th birthday. I need their ages to determine whether they can be included on your policy." She was right; my remark was too vague. The information it provided was insufficiently specific to advance our common conversational purpose.

However, it was not vague, or at any rate not too vague, in the sense in which philosophical logicians and philosophers of language study vagueness. Vague predicates – like 'old', 'bald', 'rich', and 'red' – are those for which there are "borderline cases" separating things to which the predicate clearly applies from those to which it clearly does not. When o is a borderline case for a predicate P, there is, in some sense, "no saying" whether or not the proposition expressed by ⌈ He/she/it is P⌉ (said demonstrating o) is true. According to some theories of vagueness, the proposition is undefined for truth, or untruth, and so can't correctly be characterized either way. According to others, it is true or false -- even though it is impossible, in principle, to know which. On still other theories, it is only partially true (or true to some degree). For present purposes we needn't worry about which of these theories is correct, or which is most illuminating in discussions of the law. The present point is simpler. The problem with my remark to the benefits officer – the sense in which it was too vague – is not a matter of its susceptibility to borderline cases.

What I stated, on December 10, 2009, was that my two children were then both over 21 years old. That statement is true if and only if both were born on or before December 9th, 1988 (which they were). Granted, sticklers may wonder how to classify

individuals born on December 10th, 1988. Perhaps such individuals are borderline cases of *being over 21 years old on December 10, 2009.* Confronted with such cases, perhaps we should inquire on which side of the International Date Line they were born, or at what hour and minute in which time zone the birth occurred. Perhaps even these inquiries wouldn't settle the matter. If not, my remark may well have been vague in the special, technical sense of logical and philosophical theories of vagueness. However, the borderline cases crucial to so characterizing them are not what made my remark vague in the ordinary sense of that word.

Ordinary vagueness is a contextual matter. Whether or not a remark counts as vague in this sense depends on whether or not the information it provides is sufficiently specific to answer the question, or questions, directing one's inquiry. Since these questions may vary from one context of inquiry to the next, a remark that counts as vague in one context be may not be vague in another. Because of this, it is easy to construct examples of remarks that are vague in either the ordinary contextual sense or the technical philosophical sense without being vague in the other sense. If my benefits officer had been a sophisticated computer that measured time in nanoseconds, then my response -- "I have two children, but the number of nanoseconds from their birth to the instant at which you receive the electrical impulse encoding this answer is greater than or equal to n," (for some very large n determining a precise instant on December 9, 1988, in Los Angeles) -- would have been just as vague, in the ordinary contextual sense, as was my remark to the human benefits officer. This is so despite the fact that my specification of a length of time in nanoseconds is (we may imagine) perfectly precise in the technical sense of philosophical logic. Conversely, had I responded to my human benefits officer by saying that my children were still toddlers (in a context in which it is known that young children are always included on insurance plans), my remark would count as logically and philosophical vague, despite being fully precise in the ordinary sense of providing all the information required in the context.

So the two senses are distinct, and a context in which a remark is vague in one sense is not always a context in which it is vague in another. Nevertheless, there is an obvious connection between the two senses. If a predicate P is vague in the technical sense, then claims expressed by ⌜ Every/some/the/no F is P⌝ will be vague in the ordinary sense, *relative to some contexts of inquiry* requiring knowledge of the truth values of these claims at possible scenarios involving individuals that are borderline cases for P.

Vagueness and the Interpretation of Legal, and Nonlegal, Texts

A similar point applies to sentences occurring in legal texts. When a vague action predicate P occurs in such a text -- ⌜ It shall be a felony in the County of Los Angeles of the state of California to P in circumstance Q⌝ -- there will typically be possible actions in circumstances to which Q applies that are borderline cases for P. When considering such cases, no definite conclusions, (i) ⌜ The agent has Ped⌝ or ⌜ The agent has not Ped⌝, and hence (ii) that the agent has, or has not, committed a felony, will be determinable from a perfect understanding of the text together with a complete knowledge of the facts of the case. Since the information provided by the statute is insufficient for determining the agent's guilt or innocence, the statute counts as vague (in the ordinary contextual sense) in any judicial proceeding convened for this purpose.

Nevertheless, some decision must be reached in such cases, and not just any decision will do. In matters of great importance, flipping a coin won't suffice. Such cases call for principled decisions. But where are the principles to be found, how are they to be justified, and who is charged with finding them? In practice, the answer to the last of these questions is often clear. Those who administer and enforce the law – police, regulatory and administrative agencies, and the judiciary – are often charged with making such decisions on the basis of principles, which, though sometimes only tacit, should be

capable of articulation and justification, if challenged.[1] Arriving at these principles is often called "interpreting the law," especially when the legal actors are members of the judiciary. Although interpreting vague statutes is one kind of legal interpretation – which is not entirely unrelated to interpreting other kinds of vague texts and linguistic performances – its function in the law is special, and not merely a sub case of corresponding interpretations in other genres.

Vague predicates are more regularly used in ordinary discourse, as well as in works of both fiction and non-fiction, than they are in the law. In many of these non-legal cases, the purposes of the conversation, inquiry, or artistic endeavor don't require resolving whether or not the predicate applies to borderline cases. Let p be the vague proposition asserted or expressed by an agent (in conversation) or an author (of fiction or non-fiction) who uses such a predicate (without providing any indication of how potential borderline cases are to be treated). In reporting what the agent said or expressed, we (standardly) don't replace p with some precisified substitute p*. Imagine an agent who says, "The pulse of any young man is always quickened by the sight of a beautiful woman." We may be interested in knowing whether two individuals, John, a man who is borderline young, and Mary, a woman who is borderline beautiful, constitute a counterexample to the agent's remark. But if there is "no saying" about John's youth or Mary's beauty, then – since there is no need to come to a verdict about the agent's remark -- we would typically admit that there is "no saying" about whether or not they falsify it.

A similar case, which nevertheless takes us a step forward, involves interpreting a text in the history of philosophy. Imagine a philosopher, Brown, who enunciates the thesis ⌈ All A's, except those that are also B's, are C's⌉ , using vague predicates A and

[1] Sometimes it is open to a court to send a case back to the lawmaking authority for clafication, or precisification. However, this is not always possible, and even when it is, it is often impractical. Also, in certain types of cases a rule of leniency may apply, effectively requiring an action to be judged a clear case of the application of a (legally) vague term in order for a negative judgement to be sustained. However, (i) rules of leniency aren't always relevant, (ii) since it can be vague in particular cases whether they are, a court may be called upon to exercise its law-making authority at this meta-level, and (iii) even when a rule of leniency is clearly relevant, the court must judge what counts as *a clear case* of the relevant term, despite the fact that *being a clear case* may itself have borderline cases.

B, where it is clear that he never considered borderline cases of A and B. Upon discovering an individual that is borderline for both to which C does not apply, we wonder whether it is a counterexample to the thesis. Typically, our answer will be that since what Brown asserted was vague, it is simply unclear, or indeterminate, whether or not we have a counterexample. This will remain so, even if we determine that taking both A and B not to apply to the individual makes it possible to extract a comprehensive philosophical system from Brown's total corpus that is superior to any extractable system incorporating a different decision about A and B. The proper verdict is that the preferred system -- while heavily indebted to Brown, and properly characterized as *Brownian* -- is a precisified reconstruction of the one he actually produced. In this case, the philosophical guidance we receive from our "interpretation" goes beyond our account of what Brown actually said, which is also part of our interpretation.

A real-life example of an interpretation of this sort involves a lacuna in the ideal language of Wittgenstein (1922) (which is held to underlie all thought). The Tractarian account recognizes logically proper names, predicates, and a single truth-functional operator of joint denial (of arbitrarily many arguments), plus variables used to express generality (without explicit quantifiers to bind them). This presents a problem of interpretation. On the one hand, the formal devices specified in the text are incapable of expressing what is standardly represented by certain relative scope possibilities of universal and existential quantifiers in the same sentence. Because of this, the expressive power of the Tractarian ideal language that emerges is severely limited. On the other hand, Wittgenstein, who claims that every proposition is expressible in that language, clearly intends it not to be so limited. The interpretive task is made more difficult by his discussion of what he calls "the general form of the proposition" – which is a schematic account of how every genuine proposition is constructible as a truth function of the totality of elementary propositions. Alas, the account is so abstract as to be compatible with both a narrow interpretation (which yields the restricted set of propositions

expressible in the scopeless quantified language) and a broader interpretation (which makes for a richer totality, while leaving room for the addition of scope-indicating devices not explicitly mentioned in the text).

The text is vague in the ordinary sense, and so indeterminate, between these two interpretations -- with some passages seeming to favor one, and some seeming to favor the other. Philosophically speaking, however, there is no contest. The broader interpretation is clearly best, in the sense of producing a superior philosophical system, which Wittgenstein would have favored had the issues been made explicit. However, they are not made explicit in the text, and there is no evidence that he clearly saw them. As with my earlier example involving the fictitious Brown, so in this example about Wittgenstein, the correct interpretation of the text (the *Tractatus*) identifies a powerful formal system -- properly characterized as "Wittgensteinian" -- while noting that it results from augmenting what Wittgenstein explicitly says in ways that his text is silent about. Here, what is called "interpreting" an important philosophical text includes both strict historical description, and the normative search for philosophical insight.[2]

The use of language to make requests, give orders, provide instructions, specify the scope of someone's authority, or, more generally, to guide action, brings us closer to the legal case. If (i) you are advised, instructed, or ordered ⌈ Do P in circumstance Q⌉ where both P and Q are vague predicates, (ii) it is important that you follow the advice, or comply with the instruction or order, and (iii) the action about which you need to make a decision (or the circumstance in which you are called upon to act) is a borderline case for P (or for Q), then you will search for guidance that goes beyond both the strict semantic content of the sentence uttered, and the content literally asserted, or stipulated, by the utterance to which you are responding. A natural first step in many such cases is to inquire into the intentions of the person giving the advice, or issuing the instructions or orders. By "intentions", I do not here mean the speaker's assertive or stipulative

[2] See the discussion in (i) chapter 6 of Robert Fogelin (1976), (ii) Peter Geach (1982) and Soames, (1983), and (iii) chapter 6 of Fogelin (1987).

intentions. These will already have been identified when you came to understand what was (literally) said, asserted, or stipulated. Rather, the intentions in question concern the reason, or larger purpose, that the agent said, asserted, or stipulated what he did.

Consider the homely example of a father who says "Never accept a ride from a stranger," to his teenage daughter, Susan, in the course of warning her about recent sexual assaults against girls who had accepted rides in cars from boys from out of town. Some days later, hurrying to her after-school job at the Mini Mart, for which she is late, Susan is stropped by a motorist asking directions to that establishment. The motorist – a sweet little old lady whom Susan has never spoken to, but has seen and nodded to several times around town – offers her a ride to work, in return for pointing the way. Susan accepts, thinking, "I know Dad told me not to ride with strangers, and I'm not really sure whether or not this lady is a stranger – *but I know he didn't mean people like her*."

In so doing, she interprets her father's remark correctly – which is *not* to say that accepting the ride strictly conformed to the injunction he laid down. Since, as we will assume, the motorist is a borderline case of *being a stranger (to Susan)*, there is no saying whether or not her behavior conformed to what her father (literally) told her to do. However, it did accord with his reason for instructing her as he did. This is what Susan grasped, and expressed in her thought about "what he meant." Recognizing the insufficiency of the information provided by the content of her father's remark, she looked to *his reason* for making the remark, and rightly acted in accord with it.

This model can be applied to the interpretation of some vague legal texts. Continuing the simple example, suppose that the town council responds to the outbreak of sexual assaults by adopting a statute "It shall be a misdemeanor in the Township of Plainsboro for children on their way to or from school to accept rides in automobiles from strangers." Suppose further that a policeman observing Susan accepting a ride stops her as she gets out of the car. After determining that she didn't know the driver, he wonders whether to arrest her for violating the new ordinance.

On the one hand, he may reason as Susan did about her father's injunction: although it is not clear whether or not the driver was a stranger to Susan, surely the town council didn't mean to prohibit this kind of innocent activity. To reason in this way is to interpret the vague statute to yield a result not determined by the content of the statute itself. If the policeman acts on this interpretation, and his fellow officers consistently follow suit in similar cases, the result will be a *de facto* change in the law as applied in this sort of case. A statute that previously had clearly applied to certain acts (making them criminal offenses), clearly not applied to other acts (leaving them unregulated), and yielded no determinate result for borderline cases, will have been sharpened, with the result that certain acts about which it had previously been silent, will now be excluded from its scope.

On the other hand, the officer may take the position that no matter how plausible the above interpretation may seem to him, it is not his job to second guess the town council; best to arrest Susan and let the court to do the interpreting. If the court reasons as I have imagined Susan and the officer reasoning, it will, in effect, create new law by changing the legal content of the statute -- even if claims merely to have interpreted the (already existing) law. Although this may sound puzzling, or contradictory, it isn't. When a law is vague – in both the technical sense of admitting borderline cases and the ordinary sense of not providing the information needed to reach a verdict in a particular case -- a court may be called upon to precisify, and make determinate, what had previously been legally indeterminate. Since this is will be a change in the law (if the decision is made by the court of last resort, or if other courts of the same level consistently reach similar verdicts in similar cases), it is undeniable that courts have a legitimate law-making function (in legal systems like our own).

However, this function is limited. When the court says, in Susan's case, that it is merely interpreting the statute, it signals that it is not trying to implement its own vision of optimal public policy, but rather is deriving its decision from the legislative action of

the town council. In so doing, it must look beyond the content of the statute to the purposes of the council members in enacting the legislation. The interpretation is (arguably) correct because the decision to limit the scope of the statute to exclude cases like Susan's fully implements their legislative purpose.

Of course, not all cases are so simple. In many real-life cases in which a court is called upon to interpret a vague law the evidence available to it makes it difficult to rationally justify the identification of any legislative purpose as the dominate one. In still others, there may have been no single, consistent such purpose. In such cases, the court's creative, law-making role is substantially larger than it is in my simple example. Even when this is so, however, judicial deference to the legislature is often (properly) expressed by deriving its decision from the content and rationale of similar laws, or of the larger body of law of which the statute in question is a part.

Although complex real-life cases of the interpretation of vague laws raise issues that go beyond those illustrated by my simple example, some general conclusions apply to the continuum of such cases as a whole. First, judicial interpretation of vague laws is not always a matter of discovering hard-to-discern legal content that is already there, prior to interpretation; rather, sometimes it is an attempt to justify the introduction new legal content. Second, because of this, courts have a legitimate, though secondary, law-making role, which is limited by deference to primary legislative authorities. Third, exercising this authority sometimes requires judicial inquiry into the intentions, purposes, and the larger rationale guiding legislators in enacting the legally binding contents that they did.

The Value of Vagueness

The practical importance of these conclusions depends in part on how large a role vagueness plays in the law. Initially, the extent of vagueness may not seem clear. On the one hand, the ubiquity of vague terms in ordinary language may suggest a similar ubiquity in the law. On the other hand, legislators, lawyers, and drafters of wills,

contracts, and other legal instruments often go to considerable lengths to avoid certain obvious forms of vagueness. While a goal of entirely eliminating vagueness from the law would surely be quixotic, it might, therefore, seem desirable to keep it to an absolute minimum. However, as Timothy Endicott has persuasively argued, this is incorrect; vagueness is sometimes a valuable feature of the law, which we wouldn't want to do without.[3]

Although I agree with Endicott's central points, I think more can be said to dispel the impression of paradox to which his conclusion may give rise. If it is ordinary contextual vagueness that is at issue, then in order for the vagueness of a legal provision to be valuable there must be cases in which it is *desirable* that its content be insufficient, when combined with the facts of a particular case, to determine a correct outcome. Why, one wonders, should that be so? Adding that the provision is also vague in the technical sense of giving rise to borderline cases only increases the perplexity. How can the existence of borderline cases -- in which no amount of empirical investigation of the facts, plus no amount of textual exegesis, could ever yield knowledge of a correct result – ever be a valuable feature of law?

These questions can be sharpened by considering one of Endicott's examples.

> By statute, it is an offence to cause a child or young person to be 'neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health' (Children and Young Persons Act, 1933 s.1(1)). The statute defines 'child or young person' *precisely*, as referring to a person under the age of sixteen years. But when is it lawful to leave a child at home, without supervision? Or when is it lawful to leave a child with a babysitter? And how old does the babysitter have to be? The statute states no ages. The Act subjected all these questions to the vagueness of the terms 'neglected' and 'abandoned', and of the qualifying phrase, 'in a manner likely to cause him unnecessary suffering or injury'.
>
> The result is 'communicative under-determinacy' …: if you are a parent, you may well wish to know when it is lawful to leave your child unattended, or with a

[3] Endicott (2005), page ?? this volume.

> babysitter (and how old the babysitter must be). The law offers itself as a guide to your conduct, but if you do turn to it for guidance, you will find less information than you might expect in the situation. It is not that the law is unintelligible: you can see quite clearly that leaving a new-born baby alone all day would count as neglect (and if you told a 5-year-old to baby sit, it would still be neglect). Leaving a fifteen-year-old at home alone for a few hours (or leaving an infant with a competent seventeen-year-old) is not neglect. But there will be cases in between, for which the text of the statute gives no determinate guidance.

His discussion of this statute continues a bit later.

> Both the guidance and the process values of precision are evident in the law concerning child care. A parent deciding whether to hire a thirteen-year-old as a babysitter would be able to use a statute with an age limit to decide whether it is lawful to do so; under the Children and Young Persons Act, the parent needs to decide whether it would be 'neglect' (and may need to guess whether officials would count it as neglect). Officials considering prosecutions for neglect need to make similarly open-ended judgments that will lead to disputes and potentially to litigation – where a more precisely defined offence (e.g., an offence of leaving a child under ten alone or in the care of a child under fourteen) would settle matters.[4]

After citing these potential disadvantages of the vague statute, Endicott goes on to indicate its offsetting advantages. While endorsing much of what he says, I here offer a few further observations.

First, although some of the relevant terms in Endicott's example, most notably 'neglect', are indeed vague, their value in formulating the statute is due in part to factors other than their susceptibility to borderline cases. 'Neglect' is a highly general, multi-dimensional term, the extension of which is determined by a large and open-ended confluence of factors, including provision for the child's nutritional needs, physical safety, medical care, education, intellectual development, social development, and emotional health – each of which can be further broken down into myriad elements of various kinds. Judgments about whether particular patterns of behavior constitute neglect

[4] Page ??.

tend to be holistic, with lows in one dimension partially offset by highs in another. As a result, the variation in behavior across even clear (non-borderline) cases of neglect, and also across clear (non-borderline cases) cases of non-neglect is enormous. Abstracting away from borderline cases (by concentrating only on cases about which there is more than 90% agreement), one who undertook the task of more precisely delineating either of these two classes of clear cases using only more highly-focused language designating specific behavior – about the regularity and content of meals, frequency of trips to doctors, time with parents, age of baby-sitters, and the like – would, I suspect, find it stupefying at best, and practically impossible, at worst. If so, then the utility, for legislative purposes, of highly general, multi-dimensional terms like 'neglect' is due in part to factors other than their vagueness, and susceptibility to borderline cases. Although it is no accident that such terms are vague, the legal utility of such terms, as opposed to more specific substitutes, is only partly due to their vagueness, while being partly due to other semantic features possession of which contributes to their vagueness.

This point is closely related to Endicott's further observation that inclusion of vague terms in a statute typically has the effect of delegating authority to those who apply it to particular cases.[5] With laws concerning the welfare of children, the result is to give both courts and social service agencies considerable discretion in dealing with parents and other care-givers. The justification for doing so is, in part, to entrust the authority of deciding borderline cases to those best able to gather and evaluate all relevant facts. However, the full justification is more general, and does not rely simply on the vagueness of statutory language. Because 'neglect' is both highly general and multidimensional, judgments about clear and borderline cases alike tend to be holistic, and hence to rely on a broad range of facts about individual behaviors and relationships that only those closest to a case can be expected to have. Since some clear cases of neglect, or non-neglect, that are apparent to judges and social workers may bring together surprising clusters of facts

[5] See section 8 of Endicott (2005).

that are unanticipated by legislators working in a vacuum, there is ample reason for them to frame the relevant laws in highly general terms.

There is even guidance value for parents in using vague, general, and multidimensional terms like 'neglect'. Since proper judgments of neglect are irreducibly holistic, the use of the term in the law forces such judgments on those whose behavior it attempts to regulate. Although Endicott is right that there are costs associated with this approach – in failing to provide details such as the required age of babysitters – the fact that no precise and practically specifiable check list of such details can be expected to capture all and only the clear cases of neglect, or of non-neglect, suggests that one guided by such a list would miss much of what laws governing child neglect are designed to capture. Just as judges and social workers can be relied on to make determinately correct holistic judgments in applying the highly general, and nonspecific, content of the statute to a broad range of particular cases, so too can many parents in conforming their behavior to it. This too, is part of the rationale for using a vague, general, and multidimensional term like 'neglect'.

The final value I will mention is specific to directives that are vague in either the ordinary contextual sense, or the technical philosophical sense (or both). In some situations, directives that are vague in this way lead those whose behavior one wishes to influence to *oversubscribe* to the goals of the directive in an attempt to reduce the dangers of noncompliance (or increase the benefits of compliance).[6] Imagine, for example, a college administrator faced with a financial crisis requiring immediate across the board cuts in the budgets of college departments. Each, he believes, could make a 10% cut, if pressed, which is the minimum that might allow the college to survive. It would, we may imagine, be better to secure greater cuts, which he believes some departments could probably afford. However, he has to act quickly and doesn't possess enough detailed information to identify which departments fall into this category, or to set differential

[6] This point is related to the discussion in section 9 of Endicott (2005).

targets. He therefore limits himself two alternatives – (i) ordering all departments to cut at least 10%, on penalty of losing their graduate programs if they fail to comply, vs. (ii) ordering all departments to make the maximum reductions possible, indicating that those who aren't sufficiently forthcoming will lose their graduate programs.

The first potential directive is precise and specific, while the second is deliberately vague. Depending on the background circumstances, either one might prove to be the more effective. However, there are clearly some circumstances in which the vague alternative would be superior. In such cases, chairmen of the poorer departments, fearing the penalty for making cuts smaller than what the administrator will find minimally acceptable (which they may guess to be around 10%), will struggle to make slightly larger cuts in order to leave themselves a modest margin of error. While their counterparts in richer departments will reason in the same way, their extra resources may well lead them to make even larger cuts, amounting to affordable extra insurance against what would otherwise be a catastrophic loss. In this case, the vagueness of the standard leads relevant actors to over fulfill the requirements that would have been imposed on them by a more precise directive.

Vaguely formulated laws – for example, those criminalizing, or providing penalties for, various forms of neglect, negligence, abuse, and fiduciary irresponsibility – may display similar advantages over more precisely formulated alternatives. In such cases, the positive value of vagueness in the law typically leads to a corresponding delegation of authority to judges and administrators who are called on to interpret the law, and sometimes to a positive change in the behavior of those the law regulates.

Consequences for Textualism

This discussion of vagueness throws light on contemporary disputes about the doctrine of interpretation known as "textualism." Roughly put, the doctrine states that the content of a legal text – the law in the case of a statute – is what the lawmakers say, assert, or stipulate in adopting the text. Although this is, I think, the best rough and ready

formulation of the doctrine, it is not the most common one. Instead, textualism is typically identified as the doctrine that the content of a legal text (the law it enacts) is the meaning – sometimes "the ordinary meaning" – of the text. Elsewhere (in Soames 2009a), I have argued that this is confused. Contemporary philosophy of language and theoretical linguistics distinguish the meaning of a sentence from its semantic content relative to a context, both of which are distinguished from (the content of) what is said, asserted, or stipulated by an utterance of the sentence. Although in some cases the three types of content coincide, while in still others the final two do, there are a variety of cases in which the third differs from the other two.[7] In every legal case in which there is a such a difference, it is the third – asserted or stipulated – content that is required by any defensible form of textualism. Failure to recognize this – due to confusing the three types of content with one another -- has led to errors in the law itself, as well as to theoretical errors about the relation of the law to its authoritative sources.[8]

This observation is related to the vexed question of the place in legal interpretation accorded by textualists to legislative intent. Some leading textualists, most notably Antonin Scalia, maintain that since the job of the courts is to discover the content of statutes and other legal texts, which Scalia identifies with "their ordinary meanings," an inquiry into legislative history to discover the intent of the lawmakers in enacting such legislation does not advance the interpretative task. Worse, he worries, epistemological problems inherent in such inquiries are often so great as to leave jurists virtually free reign to read their own policy preferences into the texts they purport to interpret.[9] While one can appreciate these worries, as well as Scalia's desire to limit judicial law making, and to encourage deference to legislatures and other democratic rule-making bodies, his view about the relevance of legislative intent is seriously flawed.

[7] Chapter 7 of Soames (2010).

[8] See the discussion of *Smith v. the United States* on pp. 412-415 of Soames (2009a).

[9] Scalia (1998), pp. 16-18.

Most fundamentally, it fails to distinguish illocutionary intentions – to say, assert, or stipulate that P, in part by virtue of one's audience recognizing one's intention to do so – from broader perlocutionary intentions – to cause or bring about something as a result of one's having said, asserted or stipulated that P.[10] In my simple example discussed earlier, members of the Plainsboro Town Council intend to reduce the risk of sexual assault against the town's school children by enacting a law discouraging them from accepting rides from strangers. They enact the law by adopting a text with the illocutionary intention that their linguistic performance be recognized as asserting or stipulating that, henceforth, accepting such rides shall be a misdemeanor. Since it is this intention that gives the law its content, no theory of legal content, or of legal interpretation, can afford to dismiss it. Any defensible form of textualism must recognize the importance of the illocutionary intentions of lawmakers.

Any doctrine that aspires to be a theory of legal interpretation also cannot afford to dismiss the larger, perlocutionary, intentions of lawmakers, when the application of a vague statute to a borderline case is at issue. The decision of the Plainsboro court, that Susan acted lawfully in accepting a ride, illustrates the point. Since the content of the statute enacted, together with the facts of the case, failed to determine her guilt or innocence, the court based its decision on the public policy the town council intended the legislation to advance. The court's focus on legislative intent, far from being an excuse to substitute its policy for that of the council, reflected its deference to the council as the town's primary lawmaking body. Since the task before it was to make determinate something that had been indeterminate in the original statute, deciding the case on the basis of on the council's legislative intent rather than its own policy preferences was an act of deference, not usurpation.

A further lesson is evident from this case. Although textualism may well be a plausible theory of legal content, it can't serve as a comprehensive theory of legal

[10] See Austin (1962) for the distinction between illocutionary and perlocutionary acts.

interpretation – where "interpreting the law" is understood as what courts properly do in adjudicating cases, including those which count, for one reason or another, as "hard cases." As a theory of content, textualism tells us that the content of a legal document is what is said, asserted, or stipulated by the relevant legal authors, or enactors, of the document – which is fine, provided that judges, along with legislators, are included among the relevant legal actors, and that their recorded opinions, along with legislative texts, are included among the relevant legal documents. However, in order to view things in this way one must recognize that interpreting a vague law often involves not only figuring out what its (pre-existing) content is, but also revising that content by precisifying it.

Extending the Lesson to the Resolution of Inconsistencies

The same is true of situations in which the facts of a particular case bring two or more existing laws into conflict. In such cases, the combination of facts and law yield a contradiction – e.g. that the agent is, and is not, guilty of a crime, that a tariff of precisely \$X, and of precisely \$Y, is due (where X Y), or that a particular course of action both is, and is not, legally required. As with vagueness (when law plus facts yield no determinate result), so with conflict (when inconsistent results are determined) it is often proper for courts charged with resolving the case to look beyond the contents of existing laws to the legislative purposes they were designed to serve, in order to arrive at a justifiable change in the law.

As before, it is worth noting that this type of conflict resolution, so important in legal interpretation, has an analogue in the interpretation of non-legal texts. For a philosophical example, one need look no further than Donald Davidson's classic article, "Truth and Meaning," and related works.[11] There, Davidson holds (i) that a Tarski-style theory of truth – which generates a T-theorem, ⌈ 'S' is a true sentence of L iff P⌉ for each sentence S of L (where P is a metalanguage paraphrase of S) – may play the role of

[11] Davidson (1967), (1973).

an empirical theory of meaning for L, (ii) that it may do so because knowledge of that which it states (including knowledge of what the T-theorems state) provides all one needs to understand the sentences of L, and (iii) that the notion of truth employed in the theory is the "semantical concept of truth" that Tarski defines. The problem posed for interpretation is that (i) – (iii) are jointly incompatible with the fact that when Tarski's truth predicate is substituted (in accord with (iii)) for the ordinary truth predicate in the theorems guaranteed by (i), the propositions they express are knowable apriori, and contain no empirical information about the meanings of sentences of L (in violation of (ii)). In short the theses (i) – (iii) enunciated in "Truth and Meaning" and related works are jointly incompatible with the obvious facts about the Tarskian truth predicates they talk about.[12]

Since this inconsistency is now widely recognized, any interpretation that didn't mention it would be remiss. However, an interpretation that failed to resolve the inconsistency would be equally remiss. As just about everyone (including Davidson) eventually came to recognize, the best way to do this, while maintaining maximum fidelity to the most important features of Davidson's corpus, is to replace (iii) with the thesis that the notion of truth in Davidson's purported theory-of-truth-as-theory-of-meaning is our ordinary one.[13] This resolution of Davidson's inconsistency parallels our earlier precisification of Wittgenstein's vague text. In both cases, a proper interpretation of a philosophical text includes a historical description of what the text strictly and literally says, plus a normative improvement of that content designed to maximize the philosophical insight extractable from the text's leading ideas. The reason we are not satisfied with the former, but insist also on the latter, is that both the original text being interpreted and the later text interpreting it share a common aim – to increase our understanding of the philosophical subject matter at hand,

[12] See chapter 4 of Soames (1999).

[13] Chapter 12 of Soames (2003); Soames (2008); Davidson (1990); chapters 1, 2 of Davidson (2005).

As in philosophy, so (up to a point) in law.[14] Legislators, administrators, and members of the judiciary have a common interest that the laws they enact and enforce be coherent, and not lead to flatly inconsistent results when applied to particular cases. Since the body of laws in any modern jurisdiction is extraordinarily large, and mind-numbingly complex, the task of maintaining consistency is enormous and never-ending. Remember, the inconsistency we are most concerned with is not that of two laws flatly contradicting one another – so that *no possible pattern of covered behavior* could ever conform to both. Although such cases may occur, the most prevalent and worrisome problem arises from the incompatibility of two or more laws *with some possible behavior.* Since the range of humanly possible behaviors that could, if they occurred, determine inconsistent results by falling under different legal provisions is without foreseeable bounds, no legislative process – no matter how careful or deliberate – can assure that courts will not be called upon to resolve inconsistencies arising in particular cases. Since courts are designed precisely to mediate between the immense variety of possible behaviors, on the one hand, and the legally codified general principles designed to regulate them, on the other, this is just as it should be. Given the complex network of conceptual connections relating each law to other laws, and the multiplicity of nuanced adjustments to such networks capable of being generated by different possible actions and circumstances, no legislative body concerned with broad matters of policy could possibly perform the day-to-day task of making the fine-grained adjustments in effective legal content that is needed to rationalize and harmonize our body of laws. For this we need judicial interpretation.

Of course, not all judicial adjustments to effective legal content prompted by the occurrence of unforeseen particular circumstances are really changes in (the content of) the law. As in the earlier example involving the interpretation of vague law, adjustments

[14] Whereas in philosophy, we typically wish to learn as much as possible from the error or inconsistency in the text we are interpreting – which sometimes leads to a sweeping criticism, or elaborate reconstruction and defense, of its leading ideas – in the law the most pressing issue is often the resolution of the conflict for the case at hand, by means of what the court takes to be a minimal change, or reconstruction, of the existing body of relevant law.

aimed at removing inconsistencies can amount to changes in (the content of) the law – if made by the court of last resort, or if an adjustment in one case is followed by corresponding adjustments in similar cases, resulting in a consistent pattern of such interpretations. To put the point another way, both precisifying and inconsistency-resolving judicial interpretations are valuable elements of common law in extensive systems of modern positive law.

A different, though related, sort of case in which judicial interpretation resolves an inconsistency involves those in which the inconsistency brought out by the particular facts of the case is not between the contents of different statutes, but between what the law literally says and the transparent purposes for which it was introduced. In these cases, the law as it exists, plus the facts of the case, generate unforeseen results the wrongness of which seem evident. Consider, for example, a variation of Susan's case in which the obviously undangerous motorist clearly is a stranger, whom Susan has never seen before. In such a case, it is not far fetched to suppose that the same verdict of "not guilty" should be rendered as was rendered in the earlier version that turned on the vagueness of the term 'stranger' in the ordinance. In this new version, however, the court is not precisifying content that the town council originally left vague. Instead, it reaches a result that flatly contradicts the one dictated by the facts together with the law as actually passed. Here, a set of particular facts about an agent generates an unexpected conflict not between two or more laws, but between the content of a single law and the purpose it was meant to serve.[15]

Real-life examples of this are not as hard to come by as one might imagine. Arguably, some come from the highest profile arena of judicial interpretation – constitutional law. For example, the provision in the First Amendment to the Constitution of the United States specifying that "Congress shall make no law … abridging the freedom of speech, or of the press …" is an example. Despite its breath-taking sweep,

[15] Brief discussions of both kinds of conflict are found in Soames (2009a).

there are plenty of laws restricting defamatory and libelous speech, commercial speech, publication of state secrets injurious to national security, incitements of violence (including the use of "fighting words"), and false and dangerous speech (falsely shouting "Fire!" in a crowded theater). There are now even certain legal restrictions on political speech, in the form of campaign contribution restrictions, and restrictions on the content of messages aired during political campaigns by certain groups. Although the validity of some of these exceptions is dubious, and the scope of any of them could be challenged, there is, I think, no serious argument supporting the conclusion that what the First Amendment requires is precisely what its words seem, explicitly, to state – namely, that there shall be no law restricting the freedom of speech or of the press in any way.

Might it be argued that we arrive at the correct content by focusing not on what the words of the First Amendment mean in English, independent of their use in any particular context of utterance, but rather on what the framers and ratifiers took themselves to be using it to assert in their context? The idea here is that they meant something quite specific by their use of the quantified phrase "no law" (together with the qualifying clause 'abridging the freedom of speech, or of the press'). Perhaps, the apparent exceptions to the amendment fall outside the contextually presupposed *domain of quantification* determined by the content they asserted. Whenever one uses a quantified phrase ⌈ all/some/no/many/most Fs⌉ in a sentence to say or stipulate something, the content of one's assertion or stipulation depends on the class of things one intends to talk about. The presence of the predicate F explicitly restricts the class to be one each member of which has the property it expresses. However, it is common for further restrictions to be implicitly incorporated into asserted, or stipulated, content by virtue of assertive or stipulative intentions that the speaker presupposes to be recognized by his audience in the context.

For example, if I say to the incoming class of first-year graduate students in my department, "No student who doesn't pass Philosophy 500 and Philosophy 510 with a

grade of B+ or better will receive a PhD," I am not talking about all students everywhere. Rather, the content of my assertion includes a restriction to students *in the Ph.D. program in philosophy at USC*. This extra restricting content is provided not by the words I utter, but by an intention I correctly believe to be recognized by my audience – namely, to use those words to assert what is more explicitly expressed by "No student *in this program* (said referring the Ph.D. program in philosophy at USC) who doesn't pass Philosophy 500 and Philosophy 510 with a B+ or better will receive a PhD," or, "No student *in the Ph.D. program in philosophy at USC* who doesn't pass Philosophy 500 and Philosophy 510 with a grade of B+ or better will receive a Ph.D."

To apply this idea to the First Amendment is to suppose that its framers and ratifiers had some implicit content in mind limiting the type of laws restricting freedom of speech, or of the press, that were to be prohibited. Although it is very plausible to believe that this is so, there is very little reason to suppose that these mutually understood limitations coincided with those that are now (let us suppose correctly) regarded to be exceptions. Such a supposition would, to put the point most starkly, amount to the idea that what the framers and ratifiers understood themselves to be saying was, more or less, what is explicitly asserted by uses of "Congress shall pass no law abridging the freedom of speech, or of the press, *except for those governing commercial speech, defamatory and libelous speech, publication of state secrets injurious to national security, incitements of violence (including those involving fighting words), or false and dangerous speech (such as falsely shouting 'Fire!' in a crowded theater).*" To put the view this baldly is, perhaps, to unfairly suggest its absurdity. But absurd or not, it is clearly incorrect.[16]

Its chief problem is that it requires a grossly unrealistic level of detail and transparency -- not so much in *the verdicts that the framers and ratifiers would have desired had they foreseen the different potential challenges to a blanket ban on laws*

[16] There are some complications worth noting. As Andrei Marmor pointed out to me, it could be argued that the terms 'freedom', 'speech', and 'the press' are vague, and may themselves have been used with partly precisified contents by framers and ratifiers of the Amendment. Although correct, this observation complicates but doesn't substantially alter the lessons drawn here.

regulating speech and the press (which bear primarily on the larger public purposes they wished the amendment to serve) -- but most crucially on *what they, in fact, recognized themselves to be strictly and literally saying, in adopting the amendment*. Surely, it is a fantasy to suppose that they had all this in mind in the sense that I have the graduate program in philosophy at USC in mind, when I say to the incoming class "No student who ….." Remember, our interpretive problem is to reconcile the apparent content of the legal provision adopted – in this case, one aspect of the First Amendment – with all the seemingly incorrect verdicts capable of being generated by strictly and literally applying that content to the totality of *different possible cases* that might arise in the future. If, as seems natural, there is no foreseeable end to the variety of such possible cases, then an interpretive strategy which, in effect, requires them to have been foreseen, and present in the minds of those who framed and ratified the amendment, is a non-starter.

As if this weren't bad enough, the same strategy would have to be repeated for each of the clauses of the First Amendment, the full text of which is:

> Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (my emphasis)

When applied to the freedom of speech provision, the strategy would have us identify the assertive content of the relevant portion of the amendment, as used by the framers and the ratifiers, with the enrichment of the semantic content of that portion that results from adding extra content (present in their minds) to the content expressed by the compound quantified phrase consisting of 'no law' plus the relevant accompanying clause 'abridging the freedom of speech and of the press'. Repeating the analysis for the clauses covering religion, assembly, and the redress of grievances, multiplies the implausible complexity and specificity of the story we have already told several times over. Surely we can do better.

The way to understand the First Amendment, and its subsequent interpretation, is, I suggest, to see it is a vastly more important and complicated version of what we saw when we applied the imaginary ordinance, "It shall be a misdemeanor in the Township of Plainsboro for children on their way to or from school to accept rides in automobiles from strangers" to the case in which Susan accepted a ride from an obviously sweet, distinctly undangerous, little old lady, whom she didn't know. Since, in that case, a literal application of the law would have lead to a finding that did not serve the purpose the law was designed to advance, the court ruled in a way that narrowed the legal content of the ordinance (assuming the decision to be precedent-setting).

Why, one might ask, did the town council formulate the law as it did? One plausible scenario is this. Being well aware that their purpose was to diminish the danger that school children would be victims of sexual assault, they considered various formulations explicitly referencing the danger – e.g. "It shall be a misdemeanor in the Township of Plainsboro for children on their way to or from school to accept rides in automobiles from *dangerous* strangers." Such formulations were rejected on the sensible grounds (i) that asking the children at whom the law was directed to make judgments about who was dangerous and who was not might easily turn out to be counterproductive, and (ii) that including such a vague and contentious term in the statute would make for uncertainty in enforcement and difficulty in prosecution. Better, the council members reasoned, to leave the language unadorned, and let the court be guided by their evident intention -- to reduce unnecessary risk to the town's school children -- to sort out cases in which the ordinance should apply from those in which it shouldn't.

The effect of this policy is to put anyone accepting a ride from a stranger on notice that he or she will be subject to a judgment that could lead to criminal penalties. The counsel members were well aware that innocent exceptions to the ordinance would come to be recognized, and, eventually, lead to a narrowing of its content by carving out special classes of cases. However, they were also aware that the ultimate scope and

precise identity of those exceptions was unforeseeable, and that whatever carve-outs came to recognized would be piecemeal. They foresaw that the boundaries between such cases and those in which one's behavior in accepting a ride might leave one vulnerable to legal penalty would thus remain vague, ragged, and usefully unpredictable. In short, they intended passage of the ordinance to lead to a strong, but rebuttable, presumption against the behavior to be discouraged. The fact that the presumption is sweepingly expressed, open-ended, and pervasive provides motivation to avoid behavior that might fall into that category. The fact that the presumption is rebuttable in court reduces the disadvantages of the (overly) universal description of the behavior in the ordinance itself. All in all, the counsel concluded, a good bargain.

A similar – though admittedly hypothetical – story can be told about a line of reasoning open to the framers and ratifiers of the First Amendment. What was wanted, we may imagine, was a strong, but rebuttable, legal presumption against the passage of laws by Congress regulating the freedom of speech, or of the press.[17] The sweeping, open-ended content of the amendment was, we may suppose, reasonably intended to put present and future members of Congress on notice that any law restricting freedom of speech, or of the press, risked being judged unconstitutional (and so invalid).[18] We may further suppose that it was anticipated, at least by some, that, over time, reasonable exceptions to the prohibition would come to be recognized, with a consequent narrowing of the legal content of the amendment's guarantee. This is not to say that the precise scope and contents of these exceptions could be foreseen. What could be foreseen was that the process by which the exceptions would come to be recognized would be piecemeal, and that the boundaries between them and the laws to which the prohibition would apply would remain vague, open-ended, and usefully unpredictable. In short, the First Amendment provision on freedom of speech, and of the press, would amount to a

[17] In the interests of simplicity, I here put aside the other freedoms covered by the amendment.

[18] Who might make that judgment, and what its consequences would be, are, of course, historically complicated matters, since when the First Amendment was ratified judicial review did not yet exist. For purposes of rational reconstruction, I put this complication aside.

strong, but rebuttable, legal presumption discouraging the sort of legislation the framers and the ratifiers wished to limit.[19] Not perfect perhaps, but, again, not a bad bargain.

Although this discussion of the content, and interpretation, of the First Amendment barely scratches the surface, the analytical framework employed can be applied to many instances of constitutional interpretation. Often, constitutional provisions are stated in language the broad purpose of which is quite plain, even though the semantic or assertive content of that language is, by design, overly general. The intent is to articulate a reasonably clear, enduring normative goal the advancement of which, over time, will involve concrete implementations that cannot be foreseen. The overly general content of the constitutional provision keeps the normative goal clearly in mind, while signaling to relevant actors that although care must be taken to adhere to the goal, the actions counted as doing so may not always be those that strictly conform to the literal content of the provision, as originally adopted, but rather are, to a certain extent, up for negotiation. The foundational feature of the law that is exploited in this complex process, and accorded its greatest scope, is the role of interpretation in resolving conflicts that arise when the purposes that a law, ordinance, or constitutional provision are designed to serve clash with literal applications of its existing content in new cases.[20]

Having come this far, we can now extend the lessons about textualism drawn from the interpretation of vague texts to cover cases in which interpretation is required to eliminate inconsistencies – either between two or more different laws (together with the facts of a given case), or between the literal application of the law in a particular case and the purpose the law was designed to serve. The precisification of vague legal texts and the resolution of legal inconsistencies make up a large proportion of the "hard cases" about which theories of legal interpretation are offered as guides to proper conclusions. Since

[19] Here, and throughout, I use the term 'legal presumption' or simply 'presumption' in their ordinary senses, which are looser than their technical understanding in the law as designating a rule shifting the burden of legal proof. In the sense in which I use the term, a legal presumption is a policy to be followed by relevant legal actors (which need not concern the burden of legal proof).

[20] Though this foundational feature of the law is often exploited in constitutional interpretation, it is not the only feature operative in such cases. For example, the resolution of vagueness is also important.

what courts are called upon to do in such cases is to change, rather than ascertain, existing content, it is a category mistake to think that textualism -- which is, in effect, a theory what the existing content of law is -- can play this role.

A Note about Legal Positivism

There is a corresponding lesson about legal positivism. In some cases, the court properly makes substantive evaluative judgments in coming to a decision that determines what the law is. Since legal positivism says that one can determine what the law is without making any such judgments, there may seem to be a conflict here. Of course, there isn't. Legal positivism would be patently absurd, if it held that evaluative judgments and evaluative reasoning don't guide those who make the laws. Since judges sometimes do this, any proper understanding of positivism will make room for the idea that the task confronting them in interpreting the law sometimes goes beyond the descriptive task of ascertaining the content of existing law by tracing its authoritative sources. When judges fill in gaps in a vague law, revise existing laws by removing previously unnoticed or unimportant inconsistencies, or override the content of an existing law because its literal application in a particular case clearly conflicts with the fundamental purpose the legislation was designed to serve, the judicial action has a law-making role the proper exercise of which may, in some cases, involve limited normative, or evaluative, reasoning on the part of the judges.

Purpose and Normativity

The point here -- that much judicial interpretation is law making, and hence normative – should not lead one to jump to the conclusion that all such interpretation has this character. It is, of course, true that a great deal of adjudication, consisting in the routine application of pre-existing legal content to normal, run-of-the-mill cases, involves little, if any, real interpretation. However, there are also cases in which substantive, non-normative interpretation is required to identify pre-existing legal content which, together with the facts of the case, fully determine the legally correct result. In these cases the

legal content in question – which is that asserted or stipulated by lawmakers in adopting a text -- outstrips the semantic content of the text used for that purpose. These cases divide into (at least) three subtypes: (i) those in which the assertive or stipulative intentions of lawmakers fill a gap in the semantic content of a text that is nonspecific on a crucial point,[21] (ii) those in which lawmakers partially precisify the content of a vague term by explicitly applying it (or its negation) to an item that would normally be regarded as a borderline case,[22] and (iii) those in which lawmakers innocently misdescribe, or misstate, the content of their own (primary) assertion, due to readily explainable ignorance of the extension of one or more of the terms they employ.[23] In these cases, the interpretive task of sleuthing out what the lawmakers actually said or asserted, and, in so doing, determining the legal content to be applied to the facts of the case, require nuanced and sophisticated judgments that are primarily descriptive rather than normative in character.

A further deflationary point can be made about many cases in which interpretation is required to resolve an inconsistency between the purposes of a piece of legislation and its literal application in unforeseen circumstances. If, as seems reasonable, identifying the purposes of the legislation is primarily a descriptive task, so too should be the determination of whether the literal application of its content to the facts of a new case would accord, or conflict, with those purposes (or perhaps be orthogonal to them). After all, one doesn't have to share someone's purpose to know that he has it, or to know what conflicts with, or advances, it. Where, then, is the normativity?

In cases of conflict – or of orthogonal, non-advancement that would impose other costs – a judgment must be made about the costs and benefits of carving out an exception. Do these potential benefits outweigh the potential diminution of the legislation's purposes that may come from narrowing their scope? In many cases this will involve judgments not just about the size of the hit to the values the legislation was designed to promote, but

[21] See the discussions of *Smith v. the United States* in Neale (2007), and Soames (2009a). For more on the supplementation of semantically incomplete or nonspecific content see chapter 7 of Soames (2010).

[22] Pp. 418-419 of Soames (2009a).

[23] See the discussion of *Nix v. Hedden*, pp. 407-410 of Soames (2009a).

also about the identity, extent, and relative importance of other values brought into play by the potential exception. This is the locus of normativity in cases of interpretation in which the purposes of a legal provision conflict with the literal application of its content in novel circumstances. Similar points apply to the adjudication of cases in which the contents of two or more legal provisions (neither of which has inherent priority over the other) are jointly inconsistent with the facts of the case. In such situations, the court has no choice but to limit the scope of at least one of the relevant provisions. Typically this will involve not only identifying the purposes served by each, and assessing the likely effects of different possible restrictions, but also of assessing the relative importance of the different values served by different resolutions, and weighing the costs and benefits of each against those of the others. There is no denying the normative elements of this enterprise. However, the scope legitimately afforded these elements is far from unlimited, but rather is tightly constrained by the web of pre-existing legal contents, and accompanying legislative purposes, that interpreters are called upon to rationalize.

Much of what I have said rests on the assumption that interpreters are often able to discern the purposes of a piece of legislation, or other legal provision, and that doing so is primarily a descriptive matter that needn't involve subscribing to those purposes themselves. This combination of views is, I think, more controversial than it should be. One source of avoidable contention is unclarity about what different authors mean, when speaking about interpretation, by the "purposes" of a law, or other legal provision. What I mean here is *not* the causally efficacious factors that motivated the required number of lawmakers to enact the law or provision. In addition to being private, and often difficult to discern, these may be as individual and various as the actors themselves. An individual lawmaker may be motivated by personal or political self-interest, a desire to advance the economic interests of friends or former associates, devotion to the political fortunes of a particular faction or party, or identification with a privately held, or publically expressed, ideology. Any attempt to aggregate these, and identify the dominant

motivators of the relevant group or majority, will, typically, face severe epistemic obstacles. Whether or not these obstacles can ever be overcome in interesting cases, the attempt to do so in the service of interpretation of the sort at issue here is a fool's errand. The purposes of a law or other legal provision, sought in the adjudication of hard cases, are not the causally efficacious motivators that produced the law or provision, but the chief reasons publically offered to justify and explain it's adoption.

In our simple fictional case involving the Plainsboro Town Council, the purpose of the ordinance against accepting rides from strangers was to reduce the risk of sexual assault on children going to, or returning from, school. This, we may imagine, is what the local newspaper agitated for, and how the council members explained and defended their action. Whatever private personal or political motives they may have harbored are irrelevant. The same is true of complicated real-life cases, like the health care bills that passed the United States Senate and House of Representatives in 2009. Among the motivators of individual lawmakers were, political payoffs in the form of special benefits for their states or districts, political contributions from groups favoring, and companies profiting from, the legislation, fear of retaliation from the administration and its allies, a desire to advance the fortunes of their party and the agenda of their new president, as well as an ideological commitment to expanding government control over the economy and ushering in a more socialistic system of medicine and political economy. However, none of these were among the purposes of the legislation, in the sense relevant here. Rather its chief purposes were, (i) expansion of health insurance among the previously uninsured, (ii) reduction of the total amount spent on health care without jeopardizing quality, (iii) reduction of its cost to most citizens, including the poor who would be more heavily subsidized, (iv) equalizing access to health care and insurance, and (v) making both more reliably available by severing their connection to employment.

Since these were central elements of the public rationale offered for the bills, the bills' central purposes are easily discernable, and recognizing them neither presupposes

endorsing them nor taking them to outweigh other aspects of the legislation. In short, knowledge of legislative purposes is (here) unproblematic and non-normative. Normative issues can be expected to arise when details of implementation collide with presently unappreciated facts in ways that bring either the chief purposes of the bills, or the myriad more specific, subsidiary purposes behind particular sections or clauses, into conflict with the contents of the bills' staggering number of provisions. At that point many normative decisions will be required in implementation and administration, as well as in likely judicial challenges. Although the enormous complexity of the issues may be excessive, the normativity involved conforms to the limitations recognized by our model of interpretation, and is not, in itself, objectionable.

No doubt, some will worry that the limited normativity, and appeal to legislative or constitutional purpose, here recognized to be legitimate will provide the sort of excuse all too frequently used to cover what really are unjustifiable judicial rewritings of our laws and Constitution. Though I very much sympathize with the worry, I do not sympathize with views that falsify what legitimate legal interpretation is, out of confused anxiety to protect us from abuses of a legal system based on the correct account. Any system can be gamed, and it is no argument against the limited, but legitimate, normativity of some interpretation that the uncomprehending, or unscrupulous, may abuse it.

By way of protecting against such abuse, it may help to say a little more about recognizing the purpose of legislation. In addition to identifying such purpose with the legislation's public rationale, it is also necessary to specify the level of abstraction required. Since the purpose of the Plainsboro ordinance was to reduce the danger of sexual assaults against the town's children, the ordinance may also be said to be aimed at reducing the danger of harm to its residents. However, only the more specific of these two designations of purpose – rather than the more general designation, which provides a merely partial specification the aim of the legislation -- is relevant to interpreting hard

cases. For example, even if the Mini Mart, where Susan worked, were in a dangerous part of town, and so a likely target for armed robbery, no one could reasonably argue that she should be held guilty for accepting a ride to work -- even though the motorist was both undangerous and merely a borderline case of being a stranger -- on the grounds that precisifying the vague legal content of the ordinance in this way would further its purpose of reducing the danger of harm to residents. On the contrary, since the purpose of the ordinance, in the sense relevant to deciding the case, is its complete purpose (given by the more specific designation), a ruling in her favor would be correct.

Though the example is fanciful, what it illustrates is not. On the contrary, the standard criticism of the landmark decisions reached in *Griswold v. Connecticut* (concerning laws restriction the sale of contraceptives) and *Roe v. Wade* (concerning laws restriction abortion) can be understood as involving reasoning of the same general sort. According to Justice William O. Douglass, writing for the majority in Griswold,

> [The guarantees in] The Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. ...Various guarantees create *zones of privacy*. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that *privacy*. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create *a zone of privacy* which government may not force him to surrender to his detriment. (*my emphasis*)

The standard criticism of this decision is that whereas it is true that several amendments to the Constitution were adopted to establish particular privacy rights, no general right of privacy covering contraception (or abortion) were thereby established. Putting this objection in the analytical framework outlined here, we acknowledge that the provisions mentioned by Douglass were adopted for the purpose of establishing strong, but rebuttable, legal presumptions against the passage of laws infringing the particular privacy rights

specified. We further acknowledge that the original assertive or stipulative contents of the relevant Constitutional clauses adopted for these purposes were not intended to settle, for all time, precisely which prospective laws would be constitutionally prohibited. Our earlier discussion of the First Amendment guarantee of freedom of speech, and of the press, emphasized legitimate future narrowings of the content expressed by language recognized to be overly expansive in certain ways. A similar point can be made to allow for a limited expansion of that content extending the guarantee to some forms of expression, which, though not strictly speech, share with speech the primary function of communicating ideas. Even recognizing all this, Douglass's decision cannot be reached. Although the contents of the constitutional guarantees he mentions may, legitimately, evolve over time to better serve their motivating purposes, and although each may correctly be said to have been aimed at securing privacy (of a certain sort), such a characterization of purpose is incomplete, and insufficiently specific. Once this defect is eliminated, and the purposes governing the constitutional provisions are fully, and specifically stated, the resulting set of privacy rights – though open-ended and subject to continuing change – does not encompass any general right to privacy that prohibits laws against contraception or abortion. In sum, the proper role of normative considerations in the interpretation of hard cases – including the most sweeping constitutional provisions – is highly circumscribed, and does not provide a blank check for rewriting our laws or Constitution.[24]

[24] Thanks to Andrei Marmor for his many valuable comments.

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