

**David O. Brink; UCSD
PHIL 168; Winter 2008
Handout #3: Legal Interpretation**

RULES AND PRINCIPLES

In the "Model of Rules" Dworkin defends (near maximal) determinacy by claiming that attention to legal reasoning (e.g. Riggs v. Palmer and Henningsen v. Bloomfield Motors) shows that law consists of principles, as well as rules. He also distinguishes three kinds of discretion.

1. Judges have discretion iff their decisions are final [weak sense].
2. Judges have discretion iff their decisions are controversial and require judgment [weak sense].
3. Judges have discretion iff there are no relevant standards distinguishing correct and incorrect decisions [strong sense].

Dworkin's view seems to be that whereas the Realists (e.g. Gray) confuse (1) and (3), Hart confuses (2) and (3).

But Hart's semantic claims allow him to infer (3) from (2) in hard cases. There is no reason to assume that the meaning of principles will always be determinate when the meaning of rules is not. We must confront Hart's semantic assumptions if we are to resist his thesis about the indeterminacy of hard cases.

THE SEMANTICS OF INDETERMINACY

Hart's claims about open texture fit with a familiar semantic theory that combines a **descriptive theory of meaning**, according to which the meaning of a term or phrase is the set of descriptions or properties that speakers conventionally associate with it, with the claim that **meaning determines reference**, in the sense that the extension of the word or phrase is all and only those things that satisfy the associated description. For instance, the meaning of the term "bachelor" is given by the description "man who has never been married," which most people associate with the term, and the reference or extension of the word "bachelor" includes all and only those things that satisfy this description, that is, all and only men who have never been married. Notice that for a given word, there are

- (a) descriptions that almost everyone associates with the word,
- (b) descriptions that almost no one associates with the word, and
- (c) descriptions that some do associate with the word and that some don't.

Something that satisfies an (a)-description is determinately part of the extension of the term; something that satisfies only (b)-descriptions is determinately not part of the extension of the term; and about something that satisfies a (c)-description it is indeterminate whether it is part of the extension of the word. So a legal rule using this word determinately applies in the first case; it determinately does not apply in the second; and it is indeterminate whether it applies in the third. The first two kinds of case are easy cases, whereas the third is a hard case. In hard (and only hard) cases the law is indeterminate.

However, the traditional descriptive theory cannot explain how speakers refer despite associating erroneous descriptions with the referent of their terms or how speakers can use terms univocally despite significant differences in their beliefs about a (common) subject matter. Let's focus on disagreement. Suppose most people associate the description ABC with some term "K". But suppose that someone wants to challenge this understanding of K-things and associates "K" with XYZ (assume that different things are ABC and XYZ). The traditional theory implies that our heterodox thinker is either speaking nonsense or changing the subject. It would be like the "disagreement" between the person who says "The bank [savings institution] is a good place for your money" and the person who says "The bank [river embankment] is not a good place for your money". Both disagreement and continuity presuppose univocity or sameness of meaning or reference. But then meaning and reference cannot be a function of the variable descriptions that speakers associate with their terms.

1. Disagreement, continuity, and progress presuppose univocity.
2. Univocity presupposes that we can distinguish between (common) meaning and (different) beliefs about the extension of one's terms.
3. Distinguishing between meaning and belief requires that we not identify meaning with variable descriptions that speakers associate with their terms.

Consider a somewhat dated environmental protection regulation that requires special procedures for the handling of toxic substances. The correct interpretation of the statute depends upon what things are toxic, not on conventional beliefs (then or now) about toxins.

INTERPRETATION AND PURPOSE

The semantic content of the words in which a provision is expressed does not settle the provision's interpretation, especially if the "literal" interpretation of the provision would produce absurd results. For instance, we might need to appeal to extra-textual legislative purposes to explain why the "no vehicles in the park" ordinance should not be construed so as to include police cars or paramedic vehicles. The limits of textualism are nicely illustrated in a case that Scalia (a textualist) himself discusses. Scalia's brand of textualism insists that "a text ... should be construed reasonably, to contain all that it fairly means". He illustrates this brand of textualism by his dissent in Smith v. United States (1993).

The statute at issue provided for an increased jail term if, "during and in relation to ... [a] drug trafficking crime," the defendant "uses ... a firearm". The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had "used a firearm during and in relation to a drug trafficking crime". ... I dissented [Scalia, A Matter of Interpretation, pp. 23-24].

Scalia dissented on the ground that the proper interpretation of the statute would understand the reference to the use of firearms to be restricted to their use as weapons, and not to include their use as barter. But this sensible interpretive claim cannot be defended by appeal to the meaning of the language of the enacted provision, independently of information about the general aims or goals the legislators were pursuing in enacting the provision. But this is just the sort of extra-

textual information that Scalia's textualism eschews. The purposes or intentions of the framers are also relevant.

WHICH PURPOSE?

But the common interpretive aid tells us very little until we know how to characterize the intentions of the framers. The interpreter can look only to the specific activities that the framers sought to regulate -- **specific intent** -- or she can look to the abstract values and principles that the framers had in mind -- **abstract intent** -- and then rely on her own views about the extension of these values and principles. These two conceptions of the intentions of the framers assign quite different roles to judges and other legal interpreters. Ascertaining specific intent appears to be primarily a **historical-cum-psychological** task, whereas articulating abstract intent appears to be a more philosophical and **value-laden** task.

Of these two, interpretation ought to focus on abstract, rather than specific, intent. Specific intentions are often indeterminate or conflicting, and even where they are clear and unequivocal, counterfactual evidence suggests that abstract intentions have priority. Suppose that I have the aim of subjecting the manufacture and disposal of toxic substances to stringent standards of care and that I recognize only x as toxic. As a result, my specific intention is that the manufacture and disposal of x but not y be regulated. If I were to come to believe that y as well as x is toxic, would I

(a) come to believe that y, as well as x, ought to be handled with due care

or

(b) cease to want to regulate the manufacture and disposal of toxic substances?

Here the answer seems clear: (a). My dominant aim is to regulate the manufacture and disposal of substances that are in fact toxic, not just those that I now believe to be toxic.

Or suppose that I have the abstract aim of prohibiting cruel and unusual punishment, that I do think drawing-and-quartering is cruel-and-unusual punishment, but that I do not think hanging is cruel and unusual punishment (for capital crimes). My specific intentions are to prohibit drawing-and-quartering but not to prohibit hanging. If I was to come to think that hanging is morally outrageous, would I

(a) come to believe that hanging is cruel and unusual punishment and ought to be prohibited

or

(b) cease to want to prohibit cruel and unusual punishment?

The answer again seems clear: (a). My dominant aim is to prohibit those forms of punishment that are in fact cruel and unusual, not just those that I now believe to be cruel and unusual.

This is like Dworkin's claim about constitutional adjudication that the task of judges and other legal interpreters is to identify the **best conception** of the framers' underlying **concept**, rather than reproduce their particular conceptions.

CORPORATE INTENTIONS AND CONSISTENCY IN PRINCIPLE

However, ascertaining the abstract intentions of individual framers is still in part a psychological inquiry and would not itself settle how to aggregate different and conflicting abstract intentions so as to yield the intention of the framers. Moreover, judges and other interpreters frequently identify the intention of the framers with a **plausible rationale** for the provision they are interpreting without any direct psychological evidence that this purpose was operative in the minds of framers.

We can avoid these problems and make sense of interpretive practice if we see the search for the intentions of the framers not as the conclusion of aggregating individual states of mind but rather as the construction of a **corporate state of mind**. From this perspective, ascription of intentions to the framers is a matter of positing values that provide a plausible and attractive rationale for the adoption of a law, in light of what else we know about the decisions and behavior of those legal institutions and law-making bodies. On this interpretation, interpretation requires a kind of consistency of principle that demands both backward-looking fit with previous legal materials and attractive forward-looking implications for the resolution of related controversies.