Lexical indeterminacy, contextualism and rule-following in common law adjudication

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Abstract: In spite of claims to be giving effect to the intention of the legislature, English judges are expected to follow a literal rule of construction. However, in some cases, strict observation of this rule can lead to absurdity, while in others the literal meaning may appear indeterminate, as predicted by the semantic theory of contextualism, according to which 'what is said' is necessarily occasion-sensitive. It follows that the content of legal rules must be considered not as being objectively fixed, but as being established by consensus within the relevant community. Although philosophers of law tend to reject this version of rule-scepticism, certain aspects of legal judgments in well known cases shows that it corresponds well to the conventions of common law adjudication.

Intentional and literal meaning

Common law interpretation frequently involves an apparent tension between "what was said" in the written instrument, and what seems to have been intended. At first sight this distinction appears to correspond to that made in linguistic pragmatics between literal meaning and speaker's intentional meaning. In the semantic model associated with Grice (1969) the (acontextual) literal meaning is associated with the sentence or sentence-type, while the intentional meaning is associated pragmatically with the utterance as observed in a particular context. However, this distinction does not appear relevant to legal interpretation.

There are two principal reasons for the rejection of pragmatic interpretation. The first is the absence of shared knowledge of the discourse situation. Pragmatic understanding depends on an awareness on the part of the interlocutors of the relevant details of the context, and this in not available in the context of statute construction. Firstly, as it is tendentious to speak of the legislature or any other group having a collective intention, there cannot be said to be a clearly identifiable speaker. Clearly, some participants may not have considered the implications of the proposed legislation; while others may have voted for purely political reasons.¹

Further, the legal text is not addressed to any particular interlocutor, whose interpretation may be considered as privileged. Texts are to be interpreted in their ordinary, natural meaning, as they would be understood in the wider community, this sense (usually) being decided by a community of judges. The members of the relevant group will not always agree.

Finally, there is no well defined context. It is a defining characteristic of legal rules that they are made to be applied in new, hitherto unenvisaged situations. It has frequently been pointed out that where a situation has never previously been envisaged, and where no consideration has been given to the point, the legislature cannot be said to have expressed any particular intention. A construction involving intentional meaning will therefore depend on speculation, as was pointed out for example by Lord Watson in Salomon:

'Reintention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. (Salomon v Salomon & Co Ltd 1897, HL, per Lord Watson.)

The second reason for the inadequacy of pragmatic interpretation in legal adjudication is that intentional meaning is subjective, depending as it does on personal understanding. Further, it is necessarily context

¹ In an attempt to avoid this problem English judges often prefer to speak of the intention of the draftsman.
dependent, the same expression being understood in different ways on different occasions. Such a flexible approach to interpretation would allow the judges an unacceptable level of discretion. Indeed, if the content of the rule were allowed to vary according to circumstances, they would find themselves adjudicating on a case-by-case basis. They could no longer be said to be following a rule at all. In the context of legal adjudication, therefore, pragmatic interpretation tends to be rejected in favour of a fixed, literal meaning. Even where there is an evident conflict between the apparent intention and what was said, English judges prefer to base their decisions on the literal meaning of the text. Indeed, it has often been judicially stated that the aim of legal interpretation is not to discover and give effect to the (presumed) intention of the legislature, but rather to establish the 'correct' meaning of the words used. The intention is assumed to correspond directly to what is said. This was the conclusion proposed in Solomon:

In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately be ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. (Salomon v Salomon & Co Ltd 1897, HL, per Lord Watson.)

More recent judgments continue to express an explicit preference for literal over intentional meaning, for example in Black-Clawson:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking not what Parliament meant but the true meaning of what they said. (Black-Clawson International Ltd v Papierwerke Waldhof-Ascaffenburg AG 1975, CA, per Lord Reid.)

In order to resolve the case in favour of one party or the other judges are obliged to decide on a single, 'correct' meaning ('the true construction'). Further, this sense must be thought of as fixed and invariable, so that it can be applied consistently, not just in the particular case but also in new, unenvisaged situations. However, the reliance on so-called literal, rather than intentional meaning raises new problems.

**Literal meaning and indeterminacy**

Literal interpretation can frequently lead to absurdity. In Salomon, for example, there appeared to be a particularly flagrant contradiction between the supposed intention of the legislature and the statute to be interpreted, the Companies Act 1862. No one could seriously suppose that in approving the concept of limited responsibility Parliament intended to allow cobblers (here Salomon, 'a pauper') to set up convenient financial arrangements in order to avoid paying their debts. On a literal reading of the text, this would, however, be the inevitable result. Lord Watson nevertheless held that the judgment should be based on the text alone.

Another celebrated example of absurdity is observed in Whiteley v Chappell 1868-9. In this case, the defendant was accused of 'personification', defined in statute as the impersonation of 'any person entitled to vote' at an election. He had in fact impersonated someone who would have been entitled to vote but who had died shortly before the date of the election. Although he had cast a vote to which he was not entitled he was acquitted on the grounds that dead men are not entitled to vote.

In 1957, the House of Lords was obliged to recognise, contrary to good sense, that a foreign Prince was entitled to British nationality. According to a 1705 statute, passed during the reign of Queen Anne, British nationality was granted to Princess Sophia, Electress of Hanover, and also to her descendants, in perpetuity ('[to the end that] the said Princess ... and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be deemed natural born subjects of this Kingdom'). The judges could find no ambiguity in the text which would allow them to depart from the literal interpretation. Numerous members of European Royal families were therefore to
be considered as de facto subjects of Her British Majesty. Viscount Simonds referred to the 'absurdity' of the situation but nevertheless considered that it was not absurd enough to justify a departure from the literal rule:

> However absurd we today may think an interpretation which would lead to most of the Royal families of Europe being British subjects, I cannot say that in 1705 there was such manifest absurdity as to entitle one to reject it. (AG v Prince Ernest Augustus of Hanover 1957, HL, per Viscount Simonds.)

Quite apart from the risk of absurdity, a further problem associated with literal interpretation is that the ordinary or natural meaning is not always clear.

In cases of doubt, the judges follow the relevant precedents wherever possible. However, precedent is not always a sufficient guide, as the particular points raised in new cases may not have been discussed in prior cases.

Where the meaning of a statute has not been authoritatively decided, judges refer to the meanings clauses, which form an integral part of English statutes. However, these clauses do not usually supply detailed analyses. On the contrary, they tend give only prototypical definitions, in the sense of Rosch (1983), thus permitting the elimination of at most certain improbable, peripheral interpretations. Furthermore, they are often hedged with phrases to the effect that the judge may supply a different definition if he sees fit. Typical examples of such phrases are, 'unless the contrary intention appears' or 'except insofar as the context otherwise requires'. In cases of linguistic indeterminacy, meanings clauses are rarely useful as an aid to adjudication.

Where there are no relevant precedents and the meanings clause is of no help, judges are obliged to rely on their own personal intuition as competent speakers of the English language. In R v Ireland, the accused was said to have caused psychiatric illness by making silent telephone calls. As 'stalking' had not yet been defined in statute, he was charged under the Offences Against the Person Act 1861, s 20, the question to be decided being whether 'causing' psychiatric illness could be assimilated to 'inflicting' grievous bodily harm:

> The problem is one of construction. Although the words 'cause' and 'inflict' were not exactly synonymous, in the context of the Act of 1861, one could nowadays quite naturally speak of inflicting psychiatric injury (R v Ireland 1998 HL, per Lord Steyn)

Such an approach amounts to adjudication by introspection. The judge assumes that his intuition, possibly corroborated by that of his colleagues on the bench, will be accepted as valid for the relevant linguistic community. In Wagamama v City Centre Restaurants 1995 Laddie J, called upon to assess likelihood of confusion in a Trade Mark case, stated explicitly that in coming to his opinion, the judge should be guided by common usage:

> A judge brings to the assessment of marks his own, perhaps idiosyncratic, pronunciation and view or understanding of them. Although the issue of infringement is eventually one for the judge alone, in assessing the marks he must bear in mind the impact the goods make or are likely to make on the minds of persons who are likely to be customers for the goods or services under the marks (Wagamama v City Centre Restaurants 1995 per Laddie J).

In this case, the evidence of a telephone poll of likely customers was ruled admissible.

Where all else fails, judges occasionally cite dictionary definitions either as support for a particular interpretation or in cases of genuine doubt. They do this with reluctance, first because the use of a dictionary seems to imply the substitution of a technical definition for the preferred "natural" meaning, and secondly because dictionaries do not provide a single, "correct" solution, but rather a
variety of possible meanings as be observed in different contexts. Problems arise in cases of vagueness, where the sense is ambiguous, where the reference is imprecise, or where the meaning appears indeterminate.

Statutory meaning is said to be vague where a broad term is used, the details of the application being left to the discretion of the judge. Words like 'reasonable', 'fair' or 'safe', are often used in this way by statutory draftsmen. According to Bennion (1993: 1), this may also have been the intention of the draftsmen in using the expression 'a proper proportion', assumed to be ambiguous in Pepper v Hart 1993. Although vagueness has been shown to be an ineradicable property of law (Endicott 1990), it need not be thought of as a semantic problem, as such imprecision can always be remedied to the extent necessary by giving more accurate rules (see in particular Waismann 1951: 120).

The sense is said to be ambiguous where there are two possible interpretations, both of which are clear. In such cases the court has no alternative but to consider the context in order to resolve the ambiguity. Legal debate centres on the extent to which external evidence from the surrounding circumstances is admissible as an aid to construction. Examples may be given from contract law.

In Raffles v Wichelhaus 1864, the parties were at cross purposes because there were two ships both named "Peerless", both sailing from Bombay, one in October, one in December. The defendant was held to be entitled to refuse delivery in December, as he could show that he intended the October sailing. The contract was said obiter to be void for mistake. Knowledge of the context would have enabled the parties to supply the appropriate references and thus avoid the ambiguity.

The question of the admissibility of external evidence as an aid to (literal) construction was discussed explicitly in Prenn v Simmonds 1971. According to his contract, an employee had the right to purchase shares in his company at a fixed price, on condition that 'aggregate profits' were above a certain sum. He claimed that the contractual references to 'profits' were to the consolidated profits of the group, while the employer claimed that they referred on the contrary to the profits of the holding company. In the latter case, the amounts declared would depend on simple accounting decisions, at the discretion of the employer. Lord Wilberforce stated that in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used, but was not entitled to look at the pre-contractual negotiations. It was held that, even on a purely linguistic construction, the employee's interpretation was correct.

In other cases, the reference may be imprecise, the question being whether a particular usage can be derived by extension from a primary, or principal meaning. In Attorney-General's Reference (No 5 of 1980), the Court had to decide whether the articles defined in the Obscene Publications Act 1959, could be said to include video-cassettes, even though these were a relatively modern invention, and could not have been in the contemplation of Parliament at the time the Act was passed. The meanings clause of this Act gives the following definition: 'In this Act, "article" means any description of article (sic)containing or embodying matter to be read or looked at or both, any sound record or other record of a picture or pictures.' The material in question was described as being 'shown, played or projected'. According to the ejusdem que rule of construction, the words 'any other record' had to be restricted to articles of the same kind as in the preceding list of examples. It was pointed out that, contrary to film, video-cassettes do not contain pictures but only electrical impulses, which are not projected onto a screen. Further, video-cassettes cannot be said to be 'played' in the same way as sound recordings. Nevertheless, in the opinion of Lawton LJ, who referred in his judgment to 'ordinary parlance', the statutory words were 'sufficiently wide to cover what happens when pictures are produced by way of a video-cassette'.

A more extreme example of imprecision regarding the variable extension of a word is found in Garner v Burr 1951, which concerned the meaning of the word 'vehicle'. Contrary to the Road Traffic Act 1930, which forbade the use of vehicles without rubber tyres on the public highway, a farmer strapped wheels to his chicken coop and towed it along the road behind his tractor. When prosecuted, he claimed, reasonably, that his chicken coop could not be said to be a vehicle, and that the absence of tyres
was therefore immaterial. The intention of Parliament was presumably to prevent damage to public roads, whether by the inappropriate use of an vehicle or otherwise. However, on appeal, Lord Goddard CJ preferred to prevent this mischief while respecting the text of the statute, by redefining the word 'vehicle' so as to include chicken coops and poultry sheds:

The regulations are designed for a variety of reasons, among them the protection of road surfaces; and, as this vehicle had ordinary iron tyres, not pneumatic tyres, it was liable to damage the roads. [The magistrates] have put what is in my opinion too narrow an interpretation on the word 'vehicle' for the purposes of this Act. It is true that, according to the dictionary definition, a 'vehicle' is primarily to be regarded as a means of conveyance provided with wheels or runners and used for the carriage of persons or goods. It is true that the [magistrates] do not find that anything was carried in the vehicle at the time; but I think that the Act is clearly aimed at anything which will run on wheels which is being drawn by a tractor or another motor vehicle. Accordingly, an offence was committed here. It follows that [the magistrates] ought to have found that this poultry shed was a vehicle within the meaning of s 1 of the Road Traffic Act of 1930. (Garner v Burr 1950, CA, per Goddard CJ.)

Where the literal meaning appears indeterminate, the question to be decided is no longer whether a particular understanding can be derived from a principal or prototypical meaning, but rather how the literal meaning itself is to be defined. As the judge is usually called upon to decide between two competing interpretations, the problem is often presented in legal judgments in terms of ambiguity. However, the analysis itself is more likely to illustrate the concept of polysemy. Examples are numerous.

Alexander v Railway Executive 1951 involved the interpretation of the word 'misdelivery' in a contractual exclusion clause. The ticket supplied to a stage conjurer who had deposited various theatrical effects in a left luggage office included a clause limiting responsibility for loss or damage inter alia in case of 'misdelivery'. The goods were claimed by and delivered to the conjuror's assistant, who subsequently disposed of them for his own purposes. The defendants relied on the dictionary meaning, which appeared to cover any delivery to the wrong person. However, Devlin J considered obiter that "'misdelivery' in its natural and ordinary meaning conveys to the ordinary man that there has been some mistake or inadvertence.' Either meaning could be intended, with no modification of contextual reference. The judge decided that, as the delivery to the conjuror's assistant was the result of a deliberate decision, the term did not apply in the present context. The conjuror was therefore entitled to compensation. Devlin J could not be said here to be pointing out an established fact of the matter, but appears to have made a personal decision concerning the application of the word in hitherto unenvisaged circumstances.

In Antonelli v Secretary of State for Trade and Industry 1997, the judge exercised his discretion concerning the interpretation of the word 'violence' in the context of the Estate Agents Act 1979. Under this Act the Director General of Fair Trading had the right to prevent anyone "convicted of [...] an offence involving fraud or other dishonesty or violence" from practising as an estate agent. Prior to the passing of the Act, Antonelli, an American citizen, had been found guilty in Detroit, USA, in 1973, of "burning real estate other than a dwelling house" contrary to the Michigan Criminal Law Act. The question to be decided in the English court was whether "burning real estate" should be considered as an offence "involving violence". At trial the judge relied on the dictionary definition of the word and decided in the affirmative. This decision was confirmed on appeal:

... the judge relied on the definition of violence cited to him from the Oxford Dictionary as: "The exercise of physical force so as to inflict injury or to cause damage to persons or property." He said: "Once it is agreed that violence can be directed against property, as well as against the person, I can see no reason for saying that setting fire to property is not an act of violence towards it." (Antonelli v Secretary of State for Trade and Industry 1997 per Beldam LJ)
Although it is possible to cause damage to property by acting violently, the idea of an act of violence towards property appears counter-intuitive. The property, even if damaged, is unlikely to be considered as a victim.

*R v Bournewood Community and Mental Health NHS Trust, ex parte L* 1999 depended on the meaning attributed to the word 'detention' in the context of the *Mental Health Act* 1983. This case concerned a patient [L], of 48 years of age, who was mentally deficient, incapable of speech and who understood very little. He had been resident at a psychiatric hospital for over 30 years. He was judged incapable of expressing his consent to or indeed his refusal of hospital treatment, but as he had made no attempt to leave the hospital premises, the authorities had not gone through the administrative formalities of compulsory detention. After disagreement with paid carers, the hospital was accused of false imprisonment.

In the High Court, Owen J consulted the dictionary to discover whether a person could be said to be 'detained' even though he was unaware that he would not be allowed to leave, and remained blissfully unaware that he would not be allowed to do so. The judge cited the first definition given in the *OED* as 'keeping in custody or confinement'. He took this to correspond to the ordinary or natural sense of the word, and held accordingly that, as [L]'s administrative status was that of a voluntary patient, he could not be said to be in custody or confinement and was therefore not 'detained'. However, on appeal, Lord Woolf MR cited authority for the proposition that, in law, it was possible to be 'imprisoned' without knowing it: 'So a man might, to my mind, be imprisoned by having the key of a door turned against him so that he is imprisoned in a room although he does not know that the key has been turned.'

Lord Woolf's judgment again raises the question of whether the judge should be considered as pointing out a pre-existing literal meaning of the word, of which the linguistic community may have been hitherto unaware, or deciding on his own initiative how the word should be interpreted in this new, previously unenvisaged context. Those who consider that a word cannot have a meaning unknown to the linguistic community must consider that the judgment depended on a decision rather than on empirical observation.

There was genuine disagreement concerning the sense of the word 'appropriates' in relation to the definition of theft in English law. According to the *Theft Act* 1968 s 1(1): 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. This text was taken from the *Larceny Act* 1916 s 1(1), which included the words 'without the consent of the owner' after the verb 'appropriates'. It was not at first clear whether or not the omission of these words was deliberate or the result of some mistake. Nor was it clear whether 'appropriates' should itself be understood as implying the absence of consent. The first question was authoritatively decided in *Lawrence v Metropolitan Police Commissioner* 1972. A Mr Occhi, an Italian tourist, arrived at Victoria station and attempted to take a taxi to Ladbroke Grove. He offered to pay in advance, and held out his open wallet to the taxi driver, inviting him to take the correct sum. The driver took £6, whereas the correct fare should have been around 10s 6d. In his defence, the driver, Lawrence, claimed that he could not be guilty of theft, as his client had consented to the taking of the notes. The question was certified for the Lords, where Viscount Dilhorne took the opportunity to clarify the law:

I see no ground for concluding that the omission of the words "without the consent of the owner" was inadvertent and not deliberate. Parliament has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence. (*Lawrence v Metropolitan Police Commissioner* 1972, HL per Viscount Dilhorne.)

Viscount Dilhorne was simply applying the literal rule of construction, which limits interpretation to the

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2 The hospital therefore lost the case in the Court of Appeal, and was found to be acting outside the law. This decision applied equally to all the other psychiatric hospitals in the country. The judgment was later reversed by the Lords, at least partly for reasons of policy.
text itself. However the question of the meaning of the word 'appropriates' remained open. This was examined in *R v Morris* 1984, another case of "theft with consent". The accused had switched labels on the products displayed on supermarket shelves, in order to pay less than the full price. In his defence, he claimed that he could not be guilty of theft, as he had paid the price requested at the check-out. In view of the competing interpretations, The problem was stated by Lord Lane in terms of ambiguity, although as a knowledge of the context was not sufficient to resolve the ambiguity, it might more properly be said that term was polysemic, that the meaning was indeterminate:

There are two schools of thought. The first contends that the word 'appropriate' has built into it a connotation that it is some action inconsistent with the owner's rights, something hostile to the interests of the owner or contrary to his wishes and intention or without his authority. The second contends that the word in this context means no more than to take possession of an article and that there is no requirement that the taking or appropriation should be in any way antagonistic to the rights of the owner (*R v Morris, CA 1984, per* Lane CJ).

The Court of Appeal considered that the true construction corresponded to the second of the two interpretations suggested, and accordingly confirmed the guilty verdict. However, in the Lords, in a concurring judgment, Lord Roskill appeared to redefine the verb 'appropriates', as involving an "adverse interference" with the rights of the owner." (*R v Morris* HL 1984, *per* Lord Roskill).

The correct interpretation of the word 'appropriates' was decided in *DPP v Gomez* 1993. The defendant, assistant manager in a shop, had persuaded his manager to agree to accept a cheque from an accomplice. He (the defendant) was aware that his accomplice was using a stolen cheque, but claimed in his defence that as the manager had authorised the transaction, there was still no 'appropriation'. The majority in the Lords confirmed that consent was no longer an ingredient of the offence. However, Lord Lowry, dissenting, referred to the dictionary meaning of the word 'appropriate':

The ordinary and natural meaning of 'appropriate' is to take for oneself, or to treat as one's own, property which belongs to someone else. The primary dictionary meaning is "take possession of, or take to oneself, especially without authority", and that is in my opinion the meaning which the word bears in s1(1). Reading sections 1-6 as a whole, the ordinary and natural meaning of 'appropriates' is confirmed. (*DPP v Gomez*, HL1993, *per* Lord Lowry, dissenting.)

Lord Lowry seems to have considered that the 'primary definition' must be accepted as the 'correct', legal meaning. He also appears to have ignored the word 'especially', which would seem to imply that appropriation may occur on occasion "with" authority. He makes no mention of alternative definitions. Yet his reading of the Criminal Law Revision Committee 1966, whose propositions were adopted substantially unchanged by Parliament, shows that his understanding corresponded to the intention of the legislature. The majority seems to have felt obliged to follow authority as decided by Viscount Dilhorne in 1972. As the question had already been decided, there was no legal justification for the introduction of external evidence in the form of a judicial committee report.3

Fundamental disagreement concerning the legal definition of meaning emerged in *Smith v United States* (USSC) 1993. This case concerned the meaning of the word 'used' in the context of a Federal statute imposing severe mandatory sentences on drug offenders if a firearm was used 'during and relation to' a drug trafficking offense. Having 'used' his machine-gun, not by shooting it, but by negotiating with an undercover agent with a view to exchanging it for two ounces of cocaine, Smith was sentenced to the mandatory 30-year period. In the Supreme Court, Justice O'Connor consulted *Webster's Dictionary* to confirm the ordinary, natural sense of the word 'use'.

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3 It seems, therefore, that the authoritative legal interpretation does not correspond to the intention of Parliament. The result is that it is possible in English law to be accused of theft for having (dishonestly) accepted a gift.
Surely petitioner's treatment of his MAC-10 can be described as 'use' within the everyday meaning of that term. *Webster's* defines 'to use' as 'to convert to one's service' or 'to employ'. [...] In petitioner's view, § 924(c)(1) should require proof not only that the defendant used the firearm, but also that he used it as a weapon. But the words "as a weapon" appear nowhere in the statute. Rather, § 924(c)(1)'s language sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense. (*Smith v United States* 1993, per Justice O'Connor, USSC)

Justice O'Connor thus considered that, given a suitable occasion, almost any usage could be considered ordinary and natural. On this view, even though one meaning may seem more natural than another, it does not follow that other possible meanings should be rejected. In particular, the sense of 'use for barter' could not be excluded. Thus, the relevant meaning, as legally defined, was assumed to be available across the range of possible discourse situations.

It is one thing to say that the ordinary meaning of 'uses a firearm' includes using a firearm as a weapon, since that is the intended purpose of a firearm and the example of 'use' that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also excludes any other use. Certainly that conclusion does not follow from the phrase 'uses a firearm' itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. That one example of 'use' is the first to come to mind when the phrase 'uses a firearm' is uttered does not preclude us from recognizing that there are other 'uses' that qualify as well. (*Smith v United States* 1993, Justice O'Connor, USSC)

On the authority of *Webster's Dictionary*, the majority therefore declared that Smith had indeed 'used' his machine gun when offering to swap it for a few ounces of cocaine, and that the mandatory minimum sentence should therefore be applied.4

Justice Scalia found himself in the minority in defending the contextual, rather than the literal, interpretation. He considered that in the context of the statute, the word 'use' would ordinarily be understood as involving shooting.

The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used. [...] Given our rule that ordinary meaning governs, and given the ordinary meaning of 'uses a firearm', it seems to me inconsequential that the words 'as a weapon' appear nowhere in the statute; they are reasonably implicit. (*Smith v United States* 1993, USSC, per Justice Scalia, dissenting.)

**Contextualism and occasion-sensitivity**

Hart (1961) showed that all substantive terms are subject to what he called a "penumbra of uncertainty". He gave the example (1961: 126) of a motor car as an uncontroversial, prototypical example of a 'vehicle', proposing 'bicycles, airplanes, roller skates' as less clear cases subsisting in the penumbra of the general term. Because of the what he called the open-textured quality of natural language, judges will always be required to exercise their discretion in interpreting rules prohibiting for example the use of vehicles in the park.

This approach may appear to account satisfactorily for cases where there are doubts concerning the extent to which a central term may be used to refer to related concepts, as in Attorney-General's

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4 Smith was sentenced to the minimum period of thirty years' imprisonment. It seems legitimate to suspect the majority of having based their decision not just on the meaning of the relevant statute, but also at least partly on the fact that the accused was known to be a dangerous drug-dealer. See also *Bailey v US* 516 U.S. 137 (1995) on 'use a firearm', *Muscarello v US* 524 U.S. 125 (1998) on 'carry a firearm', and the commentary in Cunningham and Fillmore, "Using common cense: a linguistic perspective on judicial interpretation of 'use a firearm'", 73 Washington. U. LQ. 1159 (1995)
Reference (No 5 of 1980) (where the court decided that the video-tape could legitimately be considered as sufficiently like a film to come within the terms of the Obscene Publications Act 1959). However, the theory of open texture does not solve the problems of construction encountered where the central terms themselves appear indeterminate. The senses given to words like 'violence' in Antonelli, 'misdelivery' in Alexander, 'detention' in Bournewood or 'appropriates' in Gomez do not seem to be derived from some more prototypical usage. In the case of 'vehicle' in Garner, it is difficult to include 'poultry shed' as part of the periphery associated with the term.

In his famous endnotes, Hart (1961) refers explicitly to Waismann's (1951) earlier, more radical definition of open texture, which appears more relevant to the problem of lexical indeterminacy as observed in legal interpretation. Waismann points out that all concepts are associated with an indefinite number of semantic features, some of which have not yet been noticed and perhaps never will be noticed by anyone. Descriptions are therefore inevitably incomplete. An indefinite number of features will remain implicit as part of the 'hidden background'. On this view, a doubt will always remain, even regarding prototypical usage.

Hart (1961: 126) supposed that '[t]here will indeed be plain cases, constantly recurring in similar contexts, to which general expressions are clearly applicable'. He assumed that the problems associated with open texture would be exceptional. However, if, following Waismann, the concepts themselves are defined according to the current state of knowledge in the relevant linguistic community, then meaning remains provisory, and cannot be fixed independently of context.

Given open texture in the sense of Waismann, whether a word or phrase is applicable in new circumstances becomes an empirical question, depending on background assumptions and hitherto unnoticed contextual features. In the words of Recanati (2004: 143): 'The applicability of a term to novel situations depends on its similarity to the source situations. The target situation must be similar to the source situations not only with respect to the "explicit" definition of the term, but also with respect to the hidden background. If the two situations diverge, it will be unclear whether the term will be applicable.'

Other semantic arguments have since been independently proposed to show the impossibility of an acontextual, literal meaning. In discussing the meaning of natural kind words, Putnam (1975) points out that what people mean by their words must be limited by their knowledge. For most speakers, in most circumstances, 'gold' refers to a metal which is shiny and yellow; and 'water' to a liquid which is wet, tasteless and colourless. Experts may use atomic weight or molecular structure as a criterion for determining whether a particular metal is gold, or a whether particular liquid is water, but ordinary people are usually unaware of such scientific details, and cannot be said to have had such a definition in mind.

Putnam's solution is to present the concept as a kind of 'stereotype', corresponding to shared, possibly imperfect knowledge in the linguistic community. The stereotype established by consensus will usually function unproblematically. However, problems appear where there is only a partial resemblance between the referent and the socially established stereotype, for example where the referent could just as easily be taken for an apple as for a lemon. In such a case, speakers no longer know what to say, and, the applicability of the term will appear again as an empirical question, depending on usage in the community.

Searle (1979) also showed that, even for the simplest sentences, meaning must depend to some extent on background assumptions, even where there are no contextual ambiguities. His argument can be summarised as follows (1979: 37). After references have been assigned, the sentence 'the cat is on the mat' may be assumed to have a literal meaning in which the mat is horizontal in relation to the cat. However, if the scene is placed in outer space, in a zero gravitational force, there is no longer any way of knowing which way is 'up'. Here, the mat may well be vertical in relation to the cat. Searle's conclusion is that all utterances must be interpreted in relation to some default context. In the absence of any plausible context, there can be no precise literal meaning. The meaning is therefore under-determined by the words and the (pragmatic) context must play a necessary role in establishing what is said. There can
no longer be said to be a literal meaning independent of context.

Travis (1989) has gone further, showing how the truth values of perfectly mundane sentences vary according to the purpose of the utterance, even where the words used have the same, unambiguous, referents. To take just one of his many examples, a sentence like 'the water's blue today' would be true for someone admiring the view of a lake in midsummer; yet the same sentence, spoken on the same day, and referring to the water in the very same lake, may well be evaluated differently by someone concerned with pollution levels. Note that the occasion-sensitive interpretation is not pragmatically implied in the sense of Grice (1975). However, in a more particular sense, the semantics of what is said may be used to convey certain pragmatic implicatures. On one reading, the mention of blue water may for example imply a suggestion to go bathing; while on the other, the implication may consist of a warning to keep well away from the beach.

In the example given, a purely literal interpretation would be rejected as self-contradictory, since it is well known that water is not in fact blue, but colourless. The understanding must therefore be occasion-sensitive. It must therefore be accepted that even the most mundane examples depend to some extent on the context. This is close to the approach taken by Justice Scalia in Smith.

In his extended discussion of the debate between the linguistic 'literalists' and 'contextualists', Recanati (2004: 146 et seg.) proposes a form of what he calls 'Meaning Eliminativism'. He rejects the notion of literal meaning, and speaks instead of the 'semantic potential' of expressions, allowing the content of 'what is said' to depend on certain aspects of the context. The sense in question is not fixed, but may be actualised in different ways according to context. This corresponds well to the approach of English judges, who habitually use common but paradoxically obscure phrases to the effect that a given expression is 'wide enough' to include a certain interpretation, or that a given interpretation should be considered to be 'within the meaning' of the relevant expression.

The importance of context in ascertaining not just the intentional meaning, but also the meaning of "what is said" is confirmed for example by Viscount Simonds, who speaks of the 'colour' of words as understood in context: "Words, and in particular general words, cannot be read in isolation, their colour and content are derived from their context." (Attorney-General v Prince Ernest Augustus of Hanover, HL 1957, per Viscount Simonds). Prince Ernest Augustus [1957] per Viscount Simonds. The notion of 'colour', as a grammatical concept, is also introduced in Bourne v Norwich Crematorium [1967] 1 All ER 576 per Stamp J) and Bromley LBC v GLC [1983] All ER 768 (per Lord Scarman).

More recently, Bennion (1993: 2), writing as an experienced parliamentary draftsman, points out that, according to the 'informed interpretation rule', 'the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result)'.

In the most recent judicial pronouncement on the subject at the time of writing, in Kirin-Amgen 2004, Lord Hoffmann seems to be proposing an occasion-sensitive approach to legal interpretation. He considered the meaning of 'what is said' to be:

... highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience. (Kirin-Amgen Inc v Hoechst Marion Roussel HL 2004, per Lord Hoffmann.)

In his judgment in this case, Lord Hoffmann went so far as to express doubt as to whether the literal approach to statute construction was ever strictly observed, allowing only that such principles 'used to be applied in legal interpretation (at any rate in theory)'.

If the legal construction of 'what is said' depends to some extent on the domain of discourse, then it seems necessary to accept that the so-called literal meaning, as well as the pragmatic intentional meaning, will vary according to circumstances. To the extent that this is so, it does not appear possible to avoid case-by-case adjudication. However, the rejection of a fixed literal meaning should not be taken as
a justification for pragmatic interpretation of speaker's intentional meaning in the sense of Grice (1975). On the contrary, if there is no fixed literal meaning, then there is nothing to which the machinery of pragmatic implicature can be applied in order to yield the desired intentional meaning. The absence of any pre-existing, objective meaning appears rather to confirm the analysis of Austin (1962), who considered that explicit performatives, and illocutionary acts generally, were fundamentally conventional, deriving their meaning not from their semantics, but from contextual use. However, if contextual use is itself constitutive of meaning, it will be necessary to accept, with Austin (1962: 4, n 2) that the law does not consist of factual propositions: 'Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of "the law" is a statement of fact.'

**Consensual interpretation and rule-following**

The fact that rules are expressed in words leads to the inevitable conclusion that where the application of terms in novel situations cannot be decided in advance, the rules expressed will also appear indeterminate. In his 'exegesis' of Wittgenstein, Kripke (1982) gave strong arguments for this conclusion.

Kripke (1982) takes Wittgenstein's remarks on rule-following as leading up to the private language argument (Wittgenstein 1953, § 258 to § 265). As he explicates it, the argument is based on the possibility of divergent understandings of rules. Kripke's basic, and now well known example is that of the arithmetic rule of addition, involving the function plus, which would conventionally give, for example $68 + 57 = 125$. A different, somewhat more complex rule, (called 'quaddition', involving the notional function quus), would give the same results up to $x, y < 57$, but thereafter 5. Kripke imagines a 'bizarre sceptic' who gives the answer 5 when asked to add 68 and 57. When questioned, this sceptic claims that he is following the rule (of 'quaddition') he has always followed, and that he is now simply going on in the same way. From his point of view, it is those who are now performing 'addition' (involving the function plus) who are now misinterpreting their own previous usage (Kripke 1982: 9).

By hypothesis, it cannot be known in advance which of the two rules was previously being followed, either by the sceptic or by the wider community, as the answers given, until the anomaly unexpectedly emerged, were identical. Nor can the rule be identified by introspection, as, again by hypothesis, that particular calculation has not been performed or envisaged previously. On this view, as the content of the rule as applied in novel circumstances cannot be known in advance, an individual, divorced from society, could not be said to know his own mind regarding the meanings he attaches to words.7

Note that the philosophical problem cannot be avoided by giving more precise rules of interpretation, as these will also be susceptible to reinterpretation. The sceptical argument thus leads to Wittgenstein's paradox (1953 § 201): 'This was our paradox: no course of action could be determined by a rule, because every course of action can be made to accord with the rule.' It follows, contrary to popular assumptions, that rules do not constrain behaviour. As applied to simple arithmetic, the thesis appears fantastic, as Kripke himself readily admits. However, the problem appears relevant to the problems of legal interpretation, and should not be ignored by jurists.

Kripke's proposed solution to Wittgenstein's paradox depends on the notion of consensus within the appropriate community. According to this solution, rules are not objectively fixed, independently of context, any more than words are attached to a fixed, literal meaning. The content of rules, like the

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5 Austin was no doubt thinking of his Oxford colleague, HLA Hart.

6 Wittgenstein himself (1953, §85) used an even simpler example to illustrate the same point. He imagines a pupil being asked to follow the teacher's example by continuing a mathematical series by adding 2 to each number. The pupil successfully continues the series up to 1,000, but then writes: 1000, 1004, 1008, 1012 ....' The pupil may have understood the rule as something like: 'Add 2 up to 1000, 4 up to 2000, 6 up to 3000 and so on'.

7 Hence Kripke's mention of an 'eerie feeling' when contemplating this situation. (Kripke 1982: 21).
meaning of words, depends on shared knowledge within the relevant community. This model corresponds well to contextualist definitions of meaning, depending on the current state of knowledge and the occasion of use.

However, Kripke's solution has repeatedly been rejected, often without argument, by philosophers of law. Marmor (1992: 189 n 46) denounces it as absurd: 'This is evidently absurd, not a philosophical conclusion which has to be taken seriously.' Smith (1992: 180) similarly rejects the proposed solution as implausible: 'But the sceptical solution regarding mathematical addition is not only implausible in an intuitive sense (in making mathematical functions more contingent or a matter of choice, than we think they are), it seems impossible on Kripke's own account. It is no solution at all.'

In the same way, Bix (1992: 210 n 10) rejects the consensual view of rule-following on the dubious grounds that: 'It is very hard to find a Wittgenstein scholar who is in substantial agreement with Kripke's reading.' He further claims (1992: 217) that: 'There are ample reasons to believe that we cannot simply apply directly Wittgenstein's ideas meant for easy cases, to hard cases.' He fails to see that Wittgenstein's consistent strategy is to take the simplest cases as the strongest possible argument for the point he is making, that is that even the simplest rules stand in need of interpretation. If the argument is valid for the rule "add two", then a fortiori it will remain valid for all rules. The converse is not true.

Schauer (1991: 66) claims that the problem of interpretation will dissolve if the instructions for example for the rule 'add 2' are given in writing, but fails to account for the fact that these instructions are also susceptible to re-interpretation. Contrary to Schauer's claim, it is by showing the pupil what to do in particular cases that the teacher hoped to dissolve the problem in cases of doubt over the interpretation of a given rule. Schauer himself admits (1991: 66) that his putative solution does not appear convincing: 'Before you, the reader, tear up this paper in disgust, I know that at first it appears that what I have said just misses the point entirely.'

Endicott (2000: 9) follows Hart in supposing that '[t]here is indeterminacy (if any) only in borderline cases', and simply denies (2000: 25) the possibility of a consensual solution: 'This seems to say that no action can follow a rule unless there is a community that says that it does. That sceptical view of the social nature of rules cannot be right.'

It is clearly possible to marshal stronger arguments against the consensual view of rule-following. Even if it is accepted that the content of rule cannot be defined on the individual level, it remains unclear how we are supposed to discover the meaning ascribed to the rule by the community. The difficulty is compounded if it is considered that a collectivity cannot be said to have any precise intention. Further, if, following the private language argument, it emerges that an individual has no way of verifying his own previous usage, then language itself will appear meaningless, and the debate therefore futile.\(^8\)

It should nevertheless be noted that the sceptical solution is not intended to show that rules do not exist or that linguistic communication is impossible. The aim is rather to show how difficult it is, given the impossibility of private language, to account for successful rule-following. Kripke's suggestion should thus be seen as an account of accepted practice, not as a denial of basic intuitions.\(^9\) It is interesting to note the extent to which the consensual approach corresponds to normal practice as observed in legal judgments relating to interpretation, the rule of precedent and the conventions of overruling.

That 'every action according to a rule is an interpretation' (Wittgenstein 1953, §202) may seem

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\(^8\) Wittgenstein himself may have rejected aspects of the proposed solution, insofar as it makes truth appear relative and fails to account for certainty. He says (1953 § 217), contrary to Kripke: 'If I have exhausted the justifications I have reached bedrock and my spade is turned', and speaks of a series as (1953 § 218): 'a visible section of rails invisibly laid to infinity.' He claims further (1953 § 202) that there is 'a way of grasping a rule which is not an interpretation.' As Kripke does not claim to represent Wittgenstein's own, considered view, his reading is often referred to as the 'Kripgenstein' problem.

\(^9\) Kripke himself points out (1982: 69) that his 'sceptical' solution is only so-called because it attempts to explain the existence of rules without refuting the sceptical argument. This corresponds to Wittgenstein's own approach (1953 §235): 'This merely shews what goes to make up what we call 'obeying a rule' in everyday life.'
tendentious, yet the fact that legal rules stand permanently in need of interpretation is uncontested. This is true even in those 'easy' cases where only one interpretation appears plausible. Even Hart, who considered arguments for rule-scepticism as 'incoherent' (1961: 136), was forced to admit (1961: 126) that the plain cases, 'where the general terms seem to need no interpretation', are simply the most familiar ones, constantly recurring in similar contexts. The fact that a particular context is familiar does not imply that it has no role to play in interpretation. Rules of interpretation have been developed within the common law, and to some extent consolidated in the Interpretation Act 1978, but these 'metarules' of interpretation, like the written instructions suggested by Schauer, remain themselves susceptible to changing interpretations.

The claim that the rule is what the (appropriate) community says it is corresponds closely to the common law rule of stare decisis. Just as it may not be clear in advance whether a term is applicable in a novel situation, it may be unclear whether a precedent is binding (cf Recanati 2004: 143, above). To distinguish a case involves making new semantic distinctions on the basis of hitherto unnoticed, background features. It is equivalent to interpreting the rule in a new way, by bringing out a new element of the situation. It amounts to a claim that the rule we were following, now adapted to allow for exceptional circumstances, is more complex than we thought it was. It is no longer the same rule.

The question of whether a new interpretation is equivalent to a change in the law is discussed expressly in Perrin v Morgan 1943. The court considered the rule of construction regarding the interpretation of the word 'money' in an English will, which had apparently been regarded by the courts as binding since 1725. Viscount Simon proposed to abandon the rule altogether:

I protest against the idea that, in interpreting the language of a will, there can be some fixed meaning of the word 'money', which the courts must adopt as being the 'legal' meaning as opposed to the 'popular' meaning. [...] It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation (Perrin v Morgan 1943, per Viscount Simon).

Lord Thankerton, however, considered that the question to be decided was 'whether the rule, as applied by the courts in the decisions referred to, is a wrong rule altogether, or is a sound rule, which has been wrongly applied.' He was not prepared to abolish a rule of such long standing, but nevertheless considered that it should be applied differently:

I have always understood the rule as one which yielded to a sufficient context. With this understanding I do not see why the rule, properly applied, should fail to work justice. The blot, if any, is not the rule, but its misapplication (Perrin v Morgan 1943, per Lord Thankerton).

To modify the application of a rule is to change its content in order to obtain a different result, whilst appearing to preserve the rule itself. Even while making his distinction, in order to avoid being bound, the judge claims, like Kripke's bizarre sceptic, to be going on as before. A similar point was discussed in Kleinwort Benson v Lincoln City Council 1998, concerning the right to recover money paid under a mistake of law.

What is in issue at the heart of this case is the continued existence of a long standing rule of law, which has been maintained in existence for nearly two centuries in what has been seen to be the public interest. It is therefore incumbent on your Lordships to consider whether it is indeed in the public interest that the rule should be maintained, or alternatively that it should be abrogated altogether or reformulated." (Kleinwort Benson v Lincoln City Council, HL 1998, per Lord Goff

The difference between modifying a rule and simply overruling it appears here as a matter of degree. In certain circumstances, English judges find themselves obliged to depart from the rule of stare
decisis to the extent of overruling a line of earlier decisions. This power is used only rarely, and usually marks a significant turning point in the development of the law. However, even (or perhaps especially) in these particularly important cases, the judges avoid stating openly that they are changing the law. Instead, by convention, they declare themselves to be correcting earlier mistakes and misapprehensions. Again, even when establishing new rules, they still claim to be following the law as they have always understood it.

In *Kleinwort Benson*, Lord Browne-Wilkinson referred to the words of Lord Reid, who had notoriously described the 'declaratory theory', according to which the common law is supposed to have remained fixed and and unchanged since time immemorial, as a 'fairy-tale':

The theoretical position has been that judges do not make or change law: they discover and declare the law, which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said, a fairy tale in which no-one any longer believes (*Kleinwort Benson v Lincoln City Council*, HL 1998, *per* Lord Browne-Wilkinson).

An extreme example is found in *R v R* 1992, which overruled the longstanding rule concerning marital rape. The law on this subject was originally defined by Hale (1736: 629), where he states: 'But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.' Lord Lane nevertheless felt entitled to take account of the social developments, which had already given rise to a considerable number of exceptions to the rule. He adopted what he called a 'radical' solution in declaring in effect that Hale's rule of constructive consent had never been the law:

> This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it. *R v R*, CA 1992, *per* Lord Lane)

As long as Hale's rule was considered by the legal community to be a rule of law, it was applied as such in the courts. No individual judge, acting on his own account, was at liberty to decide otherwise. However, when a new consensus is established, it becomes possible to declare, without legislative intervention, that the law had never been as previously thought. It had been wrongly applied as the result of a misapprehension. This is exactly as predicted by Kripke. The judicial convention regarding overruling appears as a perfect illustration of his consensual solution to the rule-following problem.

**Conclusion**

In the account of rule-following under discussion, the content of a rule, like the meaning of words, depends not on individual knowledge or intuition, but on consensus within the appropriate community. The same is true of the law, which is also established by consensus within the legal community. Individual judges can still dissent, just as they can disagree about whether the rule is just, but they accept the decision of the community as to what the rule actually is, after authoritative decision. It is implicit in Hart's 'rule of recognition' (1961: 100) that members of the general public are also prepared to follow the primary rules of obligation. If it were not so, the legal system would fail. The fact that the law evolves over time, to take account of emerging social needs and values, shows that it is not fixed independently of the participants, but is indeed responsive to the changing consensus.

Judgments on questions of interpretation have been seen to make frequent reference to common usage in the wider community. In (*Wagamama v City Centre Restaurants* 1995, Laddie J stated that it was right to bear in mind the views of likely customers. Lawton LJ, referred in *Attorney-General's Reference (No 5 of 1980)* to 'ordinary parlance'. In *R v Ireland* 1998, Lord Steyn justified his personal linguistic intuition by referring not to his personal idiolect, but to how 'one could nowadays speak'.
As a philosophical theory, however, the consensual solution to the rule-following paradox faces formidable obstacles. A model in which individuals are not expected to know their own minds is unlikely to provide a satisfactory account of knowledge and certainty. Clearly, to make the validity of mathematical results depend on the agreement of the community at large would be wrong. Serious objections may also be made to the appeal to consensus as final arbiter regarding ethical questions. Nevertheless, in other fields, agreement does depend on social, rather than objective facts. Grammatical usage is indeed discovered by the observation of practice, rather than being imposed by external authority. Within a particular linguistic community, words and phrases do mean what that community thinks they mean. To that extent, the consensual approach seems intuitively acceptable. Thus, even though it may be inadequate as a theory of truth, the social solution may still be considered plausible as an explanation of meaning, and more particularly as an account of the practice of rule-following.

Legal adjudication is also a collegial activity, depending fundamentally on meaning and interpretation. Yet it also makes claims to certainty, whilst not ignoring ethical questions. It must therefore remain unclear whether the social view of rule-following is appropriate as a theory of law. In the first review of Kripke (1982) to appear in a law journal, Bjarup (1988: 49) hesitates to come to a clear conclusion:

If the community all started saying that $57 + 68 = 5$, to use Kripke's example, then this 'brute empirical fact' does not make me wrong when I insist that the correct answer is 125. What is the case with legal decisions is more difficult to answer.

In view of the indeterminacy of linguistic meaning, this question must be considered relevant to any account of common law adjudication.

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10 The extent to which it is sensible to debate theories of truth independently of meaning remains a challenge to philosophers.

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