

Chapter Eleven

TEXTUAL INTERPRETATION

It is the task of the historian of culture to explain why there has been in the last four decades a heavy and largely victorious assault on the sensible belief that a text means what its author meant.

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SOUNDS, SHAPES, GESTURES, AND DASHES AND DOTS

My generation grew up with two things that have largely been spared to most of you. Radios, newspapers, TV, novels and movies all told us that the world would end in nuclear war. And probably as a result of movies depicting World War II, we all had an idea of the telegraph and Morse code. All of this played into a wonderful, if creepy, movie classic, ***On the Beach***. An accidental nuclear war has wiped out most of the world, and only Australia has survivors, but they have less than a year to live. A U.S. Navy ship decides to return to the west coast, partly because they want to die at home, and partly because the Australian base has been receiving gibberish in Morse code from a location in San Diego. What should we make of those seemingly random dashes and dots?

e₁. The base has been receiving gibberish on its telegraph from a source in San Diego.

How should we explain this? Is it a cry for help? A survivor simply desiring long distance companionship? Or is there some other explanation?

You're driving on the Interstate, come up quickly on a car ahead, change lanes and pass. As you pass, the driver's left hand comes up along the side of his head. Did he just give you an obscene hand gesture? Or was he simply scratching his ear? I get an e-mail telling me I have exceeded my mailbox quota and I need to send my password back so that the problem can be fixed. Is this the system administrator communicating with me? Or is it just a scam to hack into my computer? Just as though we must explain identical exams, the car outside Joe's bar, and morphological similarities in mammalian forelimbs, we often find ourselves in communicative contexts where we must explain gibberish Morse code, potential hand gestures, and mysterious e-mails. It should surprise none of you that I believe inference to the best explanation will be helpful to you in these latter situations.

INFERENCE TO THE BEST EXPLANATION AND TEXTUAL INTERPRETATION

Historians are concerned with texts, so are legal scholars, and indeed all of us rely on the spoken and printed word as evidence for all sorts of hypotheses. We might well turn to other interpretive disciplines like biblical hermeneutics and literary criticism for methodological insights. Rather than begin with a tricky legal statute, or a puzzling short story, however, it will be clearer, and more amusing, to illustrate the explanatory nature of textual interpretation with an example that does not require the background of an academic specialization. Stanley Fish provides a good one.

I have in mind a sign that is affixed in this unpunctuated form to the door of the Johns Hopkins University Club:

PRIVATE MEMBERS ONLY

I have had occasion to ask several classes what that sign means, and I have received a variety of answers, the least interesting of which is, "Only those who are secretly and not publicly members of this club may enter it." Other answers fall within a predictable narrow range: "Only the genitalia of members may enter" (this seems redundant), or "You may bring in your own genitalia," or (and this is the most popular reading perhaps because of its Disney-like anthropomorphism) "Only genitalia may enter." In every class, however, some Dr. Johnson-like positivist rises to say, "But you're just playing games; everybody knows that the sign really means, 'Only those persons who belong to this club may enter it.'" He is of course right.²

Interpreting the sign involves making an inference about what it means. We have a collection of data that is in need of explanation.

- e₁. The "text" is on a sign.
- e₂. The sign is on a door.
- e₃. The door is to the Johns Hopkins University Club.
- e₄. The "text" reads, "PRIVATE MEMBERS ONLY".

Such a characterization of the data implies that we have already done a certain amount of interpretation. We have explained the shapes PRIVATE MEMBERS ONLY as an attempt at linguistic communication; they did not accidentally appear when the building was being painted, nor are they modern art. Our explanatory question focuses on what these words are intended to communicate. We have a number of explanatory hypotheses:

- t₀. Only those persons who belong to this club may enter it.

- t₁. Only those who are secretly and not publicly members of this club may enter it.
- t₂. Only the genitalia of members may enter.
- t₃. You may bring in your own genitalia.
- t₄. Only genitalia may enter.
- t₅. The sign was intentionally designed with the double meaning by witty intellectuals.

As Fish's no-nonsense student insists, it is perfectly obvious what the best explanation of the words on the door is. Clearly t₀ is the simplest, most complete, least ad hoc, and most plausible account. Linguistic communication and interpretation is an inherently explanatory process. From casual conversations and fun signs on doors, to the interpretation of literary, constitutional and biblical texts, the role of the reader (or listener) is always the same. There are printed shapes and noises that need to be explained. Given the first order explanation that they are attempts at linguistic communication, the question now becomes what hypothesis best accounts for the meaning in the present context?

AUTHORIAL INTENTION

Virtually every one of the explanations we have alluded to so far share a common feature. The gibberish was perhaps a cry for help (or sad attempt to find companionship). The gesture might well have expressed his displeasure at your driving. The e-mail's author desired to help me (or to scam me). The sign was saying who (or what) could or could not come in through the door. The following picture is so natural that we hardly think about it, and that indeed is the magic of linguistic (or symbolic) communication. Authors desire to communicate. They use a medium -- spoken or written words, Morse code, hand gestures, or motion pictures -- as their means for communicating. In the ideal case, when we are unsure of what they were communicating we simply ask them -- what did you mean? If that proves impossible, as in all of the cases

above, we must infer what they meant. As Hirsh put it in this chapter's epigraph, "a text means what its author meant." How many of you have typed, or texted, "huh?" or just "???" when you were unsure what person on the other end was trying to say to you? Here is a beautifully simple model of communication.

e₁. There is a text.

e₂. The text has an author.

=====

t₀. The text means what its author intended it to mean.

A CASE WHERE INTERPRETATION REALLY MATTERED

Consider the case of Genevieve Welosky. She had been found guilty in criminal case of the "distillation of intoxicating beverages."³ She appealed her conviction to the Supreme Court in Massachusetts, arguing that she had been denied her right to be judged by a "jury of her peers," because the jury in her case was made up entirely of men. The court was asked to interpret a very old statute in Massachusetts that stated:

a person qualified to vote for a representative to the
General Court shall be liable to serve as a juror

The problem for the court was to interpret the meaning of the word "person" in this statute. If it was meant to include both men and women, then Ms. Welosky had a strong case. If, on the other hand, the term meant only men, then she would lose her case.

I suspect that this all sounds a little crazy to many of you. Of course, the word "person" includes both men and women. But that's how we understand language now. Here was the problem. That statute had been written well before the Nineteenth Amendment which gave women the right to vote.

At that time women could not “vote for a representative to the General Court,” and therefore could not serve on juries. Now, Welosky’s case was heard ten years after the Nineteenth Amendment, and at the time of her trial they could, and did, vote for court membership. The court saw its duty as interpreting the meaning of “person” at the time the statute was written. Recall the nice simple model of linguistic communication we constructed above.

- e₁. There is a text – persons who could vote, could serve on juries.
- e₂. The text has an author – the state legislature in Massachusetts.
- =====
- t₀. The text means what its author intended it to mean.

Okay, so what does the word “person” mean in this statute? The Massachusetts Supreme Court was clear.

It is clear beyond peradventure that the words of [the statute] when originally enacted could not by any possibility have included or been intended by the General Court to include women among those liable to jury duty. ... Manifestly, therefore, the intent of the Legislature must have been, in using the word “person” in statutes concerning jurors and jury lists, to confine its meaning to men.⁴

SOME PROBLEMS FOR THE SIMPLE MODEL

Legal scholars concerned with what is sometimes called **original intent** theories of meaning and interpretation have pointed out a number of huge concerns with “authorial” intent models of statutory and constitutional language. Here are just a few. Who is the author? The members of the Legislature who voted for the statutes? What about the Governor who had to sign it into law? Or the staff aids who helped individual

legislators with the drafting of the statute, or aiding others in understanding it?

Implicit in all of this is how misleading it is to say that is **an** author. The Legislature is a collective, composed of many voting members. What if some had one view of what the word "person" meant in the statute, but others had a very different understanding? What do we do about these kinds of disagreements?

Finally, and maybe most problematic, I'd venture to guess that virtually none of the authors of that statute had even thought about questions of gender at the time they drafted, and voted on it. They, like most of us, were prisoners of their times, and their unquestioned assumptions. We can imagine what it might have been had we been able to pose the question of the meaning of "person" in their statute. I can imagine a progressive member of the Legislature, the proud father of three daughters, answering in something like the following. "I look forward to the day that all persons, male or female, can vote and serve on juries. Of course, our statute includes women as 'persons.'" Unfortunately, I can also imagine others who might respond in the way that Justice Bradley did in a famous Supreme Court case about women's right to be lawyers.

[C]ivil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.⁵

CONCRETE AND ABSTRACT INTENTIONS

I've always been of two minds about the role of intention in legal and constitutional interpretation. I don't believe that words and phrases like, "person," "equal protection," "cruel

and unusual punishment," "due process," and the like have a **plain meaning**, so that we could go to a good dictionary to settle longstanding legal controversies. I also refuse to believe that the law is simply a kind of disguised political power game, and that who wins is a matter of rhetoric and ideology. So, I'm stuck with the fact that some kind of interpretation will always be necessary. I believe that what authors were trying to communicate with their language is relevant data for understanding what that language means. But at the same time, there remain these persistent problems for intent theories of legal interpretation. A way through this morass, not a magic bullet to be sure, but promising path, has been provided by the legal scholar Ronald Dworkin.

You have been elected as the student representative to the Faculty Personnel Committee. This is a huge tribute, but also a huge responsibility. Your vote will help to determine who is promoted, granted tenure, and in some sad cases, fired. You do me the great honor of scheduling a meeting with me and asking my advice about how these personnel decisions should be made. I ask you to give me the weekend to collect my thoughts, and we can discuss it the beginning of the week. Bright and early next Monday you show up at my office door, and it's time for me to put up or shut up. Suppose my advice goes as follows.

Personnel decisions should always be made in the best interest of the university and its students. Since we are primarily a teaching institution, being a first-rate classroom instructor is an absolute precondition for tenure or promotion. We also value scholarship, so being engaged in active and productive research is also required.

Here's the problem. My little speech is a text, and I am its author. According to Hirsch's simple model the words mean

what I meant. We both know that Professor Green is up for tenure. Being indiscrete and more than a tad unprofessional I have let my students know that I think Green should not be granted tenure. I believe he enjoys a great reputation as a teacher because he is showy and an easy grader. I don't believe the students learn much in his classes at all. I also think his research is a joke. He's published several articles, that's true, but mainly in clubby journals edited by like-minded colleagues. So, since you ask my advice about tenure, and you know my thoughts about the concrete case of Green, if you respect my advice, you should vote against Professor Green. Right?

Well, maybe not. My text didn't talk about Green at all. It appealed to abstract notions like "best interest of the interests of the institution and its students," "being a first-rate classroom instructor," and "being engaged in active and productive research." You've looked at Green's record. You think the teaching evaluations are very impressive, and he really has more publications than I do. You think it's definitely in the best interest of the institution to tenure one of its brightest young stars.

According to Dworkin, my words have both an **abstract intention** and a **concrete intention**.⁶ You might honor my advice to you by voting along the lines of my concrete intention regarding Green. But Dworkin argues, and I certainly agree, that you do more honor to my advice when you focus on the abstract considerations like best interest, first-rate teacher, and active and productive research. Of course, to do that honestly, it becomes your responsibility to assess Green against these abstract standards.

This is important because in many controversial legal cases it is abstract language that is at the center of the controversy. It is helpful because it articulates a principled argument for why it is legitimate for the Justices to ignore the

concrete beliefs of the framers of the Fourteenth Amendment (the 1866 Congress who also set up segregated public education in the District of Columbia) and make their own determination abstract requirements of Equal Protection (of the law) with respect to segregated public education.⁷ And it also mitigates the problem of who the authors were. We need not worry about their concrete thoughts about the issues of the day, but their (collective) intention that we respect their abstract concerns. Or, to return to our example, why their concrete attitudes toward voting and jury service are much less important than their abstract command that we must determine, in light of our present attitudes and understanding who “persons” are in that statute are. Not as some exercise in history, but in understanding a current law still on the books.

EVIDENCE FOR A STATUTORY INTERPRETATION

We have some obviously relevant data about the text in question.

- e₁. The text reads, “a person qualified to vote for a representative to the General Court shall be liable to serve as a juror.”
- e₂. The statute was passed before the Nineteenth Amendment when women could not vote.

e₁ and e₂ were used by Chief Justice Rugg as evidence for his interpretation:

- t₀. “The intent of the Legislature must have been, in using the word “person” in statutes concerning jurors and jury lists, to confine its meaning to men.”

I am unconvinced, however. I think we need to include some other relevant data.

- e₃. The authors of the statute had a great array of concrete attitudes toward women, voting, and jury service.
- e₄. The authors of the statute used the abstract language of "a person being qualified to vote."

When all of this is taken into account, I believe a much more plausible reading of the statute is clear. The only way to honor the abstract intention of the authors of the statute is to realize that we must interpret "a person being qualified to vote" as our history and shared sense of contemporary use of language dictates. When we do that, I think it is obvious that the following provides a better explanation of the words and what we know about the authors.

- t₁. The intent of the Legislature must have been, in using the abstract word "person" in statutes concerning jurors and jury lists, to include any one who had the legal right to vote at the time the interpretive question is raised – both men and women.

Since I do not believe that Chief Justice Rugg's account of the text and its authors provides the best explanation, I am forced to conclude that his evidence is very weak.

ENDNOTES

¹ E. D. Hirsch, Jr., *Validity in Interpretation* (New Haven: Yale University Press, 1967), p. 1.

² Stanley Fish, *Is There a Text in this Class?* (Cambridge, MA: Harvard University Press, 1980), pp. 274-5.

³ *Commonwealth v. Welosky*, 276 Mass. (1931).

⁴ *Ibid*, pp. 402-6.

⁵ *Bradwell v. The State*, 83 U.S. 16 Wall. 130 130 (1872)

⁶ Ronald Dworkin, *A Matter of Principle*, (Cambridge, MA: Harvard University Press, 1985), pp. 48-55.

⁷ *Brown v. Board of Education* 347 U.S. 483 (1954).